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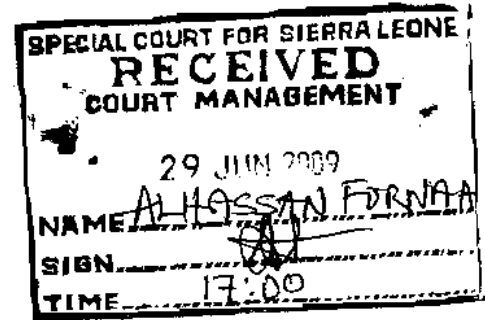
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**SPECIAL COURT FOR SIERRA LEONE
APPEALS CHAMBER**

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

Acting Registrar: Binta Mansaray

Date filed: 29 June 2009



THE PROSECUTOR

against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-A

PUBLIC

GBAO - REPLY TO PROSECUTION RESPONSE TO GBAO APPELLANT BRIEF

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I. Introduction

1. The RUF Judgement was rendered by Trial Chamber I on 2 March 2009.¹ On 8 April 2009 the Trial Chamber issued its Sentencing Judgement.² Both the Prosecution and the Defence appealed the Judgement in accordance with Rule 111.³ The Gbao Defence and Prosecution filed their Appeal briefs on 1 June 2009.⁴ Both the Gbao Defence and Prosecution filed their Response on 24 June 2009.⁵

2. The Gbao Defence will not reply to every ground of appeal opposed by the Prosecution. This includes grounds 8(e), 8(f), 8(g), 8(p), 9 and 19.

II. Preliminary Comments

A. [REDACTED] Statement

3. Annexe IV of the Gbao Defence Appellant Brief is a redacted statement [REDACTED]. In the interests of justice, this statement should be unredacted for the Chamber's complete consideration.

B. *Frequent Reference to General, not Specific, Evidence*

4. Within their Response the Prosecution frequently encouraged the Appeals Chamber to view what they variously refer to as 'the evidence', the 'Trial Chamber's findings', the 'circumstances', 'the totality of the evidence', the particular 'crime' alleged and Gbao's behaviour 'as a whole' in order to draw correct conclusions or reasonable inferences and to counter Defence allegations that certain factual findings were missing from the Trial Chamber Judgement.⁶

¹ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1234, Judgement (TC), 2 March 2009 ("Trial Judgement").

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

³ Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 27 May 2008 ("Rules of Procedure and Evidence").

⁴ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-279, Confidential Appeal Brief for Augustine Gbao, 1 June 2009 ("Gbao Appellant Brief"); also see *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1253, Confidential Notice of Appeal for Augustine Gbao, 28 April 2009; also see *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1278, Confidential Prosecution Appeal Brief, 1 June 2009 ("Prosecution Appellant Brief"); also see *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1252, Prosecution's Notice of Appeal, 28 April 2009.

⁵ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1290, Confidential Prosecution Response Brief, 24 June 2009 ("Prosecution Response"); also see *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-1291, Confidential Gbao-Response to Prosecution Appellant Brief, 24 June 2009 ("Gbao Response").

⁶ Prosecution Response, para. 5.79 in response to Gbao's Sub-Ground 8(o): '[i]n assessing whether the Trial Chamber's inference as to Gbao's specific intent to cause terror was reasonable, the Trial Chamber's findings must be viewed as a whole... [i]t was open to the Trial Chamber to find from the evidence and circumstances as a

5. Reliance on general evidential support can be appropriate under certain circumstances. However, the frequency with which the Prosecution defer to this default position in defence of the Trial Chamber's failure to make factual findings is troubling and, we submit, an insufficient response in order to justify Gbao's ultimate convictions. Additionally, we submit if the Prosecution were equipped with direct evidence implicating the Accused in support of the Trial Chamber's conclusions they would no doubt have cited it within their Response: they have repeatedly returned to the transcripts to cite testimonial evidence (not relied upon by the Trial Chamber) in order to substantiate claims made throughout this appeal process. Generic claims citing evidence 'as a whole' are a poor substitute to specific findings and merely highlight the evidential deficiencies within the Trial Chamber's Judgement in this case. To place reliance on such claims necessarily imports the risk of making arbitrary findings which would offend justice.

6. We suggest that it would be unfair for the Appeals Chamber to proceed in the manner proposed by the Prosecution without cited factual findings directly relevant and applicable to the Ground in issue. We submit it would equally be wrong for the Appeals Chamber to adopt the 'totality' of the evidence where part of that evidence related to events taking place on a later occasion to the crime alleged.⁷

7. Nebulous reference to 'totality' or circumstances 'as a whole' without specific findings of law and fact is offensive as it can circumvent the Prosecution's duty to prove its case and effectively reverses the evidential burden. If routinely permitted this would serve to

whole that Gbao had the intent for the crime of terror..."; para. 5.86, in response sub-ground 8(r): "...the Trial Chamber was entitled to infer intent from the totality of the evidence. The conclusion that Gbao shared the intent for Counts 7-9 in Kailahun District was not an unreasonable one"; para. 7.11, in response to Gbao's Ground 12: "[t]he Prosecution recalls that the Trial Chamber specifically said that it had 'considered the body of evidence in relation to the various districts of Sierra Leone' to make its legal findings on sexual violence as acts of terrorism. Based on the evidence as a whole, the Trial Chamber correctly concluded..."; para. 7.218, in response to Gbao's Count 16: "[t]hese submissions are legally wrong since they rely on one single moment within the course of crimes, instead of looking at the crime as a whole and at Gbao's later and prior behaviour...[i]t was his behaviour as a whole, together with his position...which actually amounted to tacit approval...of the crimes"; para. 5.68, in response to sub-ground 8(i): "this paragraph of the Trial Judgement builds on earlier findings of the Trial Chamber"; para. 5.79, where it stated that "[i]n cases of very large crimes, elements of crimes can be inferred from the evidence and circumstances as a whole"; para. 5.24, in response to sub-ground 8(d) where it stated that while the Trial Chamber should have provided "more detailed reasoning" in relation to connecting crimes committed by non-JCE members to JCE members "[i]t is clear from the reasoning provided, viewed in the context of the findings as a whole"; para 5.80, where it stated that "[i]t was open to the Trial Chamber to find from the evidence and circumstances as a whole that Gbao had the intent for the crime of terror".

⁷ See eg. para 7.67 of the Prosecution Response, where it stated that "[t]hese (Gbao's) submissions are legally wrong since they rely on one single moment within the course of crimes, instead of looking at the crime as a whole and at Gbao's later and prior behaviour".

place the Appellant in the invidious position of having to disprove a ‘totality’ of unspecified facts of indeterminate relevance. Placing such an impossible burden on the Appellant would gravely infringe his right to a fair trial.

III. Ground 2: Expert Evidence

8. The Gbao Defence appeal under Ground 2 can be found in paragraphs 5 - 14 of its Appellant’s Brief.

9. In paragraphs 4.89 – 4.96 of its Response, the Prosecution contended, *inter alia*, that “there is no principle that an expert witness cannot give an opinion on matters that ‘go to the acts or conduct of the accused’”.⁸ They disagreed with our argument that the paragraphs cited by the Gbao Defence contained findings as to an ultimate issue in the case. They stated that “the Prosecution does not understand how the Gbao defence can even suggest that these paragraphs relate to the acts and conduct of Gbao”.⁹

A. Reply to Prosecution’s Response

10. In contrast to the Prosecution position, the Trial Chamber found that expert evidence was acceptable to the degree that it “does not make conclusions on the acts and conduct of the Accused”.¹⁰ We supported and referenced this legal finding. If the Prosecution did not support the Trial Chamber’s assessment, they should have argued that this constituted an error of law in their Response.

11. The Majority was required to demonstrate that Gbao possessed the requisite intent under Form I JCE for Counts 7-9 in Kailahun District. It did not specifically address Gbao’s intent through specific factual findings. If it sought to infer Gbao’s intent from the facts, the expert findings were used, along with other factual findings in the Trial Chamber Judgement, to establish that Gbao did in fact possess this requisite intent.¹¹ These are the findings we have cited. Using expert evidence to establish this intent is not permissible, as it clearly goes to the acts and conduct of the Accused.

⁸ Prosecution Response, para. 4.93.

⁹ *Id.* at para. 4.96.

¹⁰ Trial Judgement, para. 538.

¹¹ *Id.* at para. 2172.

III. Grounds 6 & 7: Witness Credibility

12. The Gbao Defence appeal under Grounds 6 and 7 can be found in paragraphs 20 - 26 of its Appellant's Brief.

13. In paragraphs 4.34 - 4.41 of its Response, the Prosecution argued *inter alia* that the Trial Chamber is best placed to make determinations of credibility, and that it can accept all or some of a witnesses' testimony.

A. Reply to Prosecution's Response

14. We agree that the Trial Chamber in this case is entitled to discretion in assessing witness credibility, but such discretion should not become a panacea endowing it with immunity from challenge on appeal.

15. The Gbao Defence has not gratuitously argued that all Prosecution witnesses lack credibility. Instead, it noted that the testimony of four witnesses - TF1-108, TF1-366, TF1-113 and TF1-314 - was so thoroughly discredited and their lies and misrepresentations so grave and continuous throughout their testimony that their entire evidence should be disregarded.

16. As stated in our brief TF1-113 and TF1-314 admitted to lying under oath.¹² TF1-108 falsely implicated the three Accused in the rape and killing of his wife (dramatically crying in the witness box when recounting this false story, thereby aggravating the material nature of his lie).¹³ Why TF1-108 was not later sanctioned by the Trial Chamber for perverting the course of justice is unknown. TF1-366 lied repeatedly.¹⁴

17. We submit that one material lie alone ought to lead to dismissal of a witnesses' testimony, or at least provoke the strictest judicial scrutiny regarding the rest of her/his evidence. After all, all witnesses presented themselves to the Tribunal, swore on the Bible or Koran and took oaths to tell the truth. By subsequently betraying that duty to the Special

¹² Transcript, TF1-113, 6 March 2006, pp. 105-06; also see *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1220, Confidential Gbao-Corrected Final Brief, 31 July 2008 (unredacted and corrected) ("Gbao Final Brief") paras. 428-508, which discusses the myriad of complications with the testimony of TF1-113 and TF1-314.

¹³ See Gbao Final Brief, paras. 284-345.

¹⁴ See *Id.* at paras. 899, 902, 1062, 1064, 1148, 1286, 1450-55, 1461-65 for a discussion of TF1-366, who lied about material matters on 23 separate occasions.

Court (particularly if done chronically throughout their testimony) we suggest these witnesses no longer deserved the Trial Chamber's unquestioned consideration.

18. The casual acceptance by the Trial Chamber of certain witness testimony had the dramatic consequence of a 25 year sentence that will likely lead to Gbao dying in prison. Reliance upon certain testimony such as those witnesses listed above tarnished the legitimacy of the Trial Chamber's avowed intent to provide a fair and impartial trial.

IV. Ground 8: Joint Criminal Enterprise

19. Ground 8 contained nineteen sub-grounds objecting to the Majority's findings that Gbao should be held responsible as a member of the Joint Criminal Enterprise ('JCE'). In its Response, the Prosecution suggested that the Trial Chamber did not err in any manner in finding that Gbao was a JCE member in all areas.

20. We submit that in practical terms the Gbao Judgement comprises a group of findings that, when viewed cumulatively, expand JCE beyond its equitable means. His conviction was largely based upon the judicial creation that he was the RUF Ideologist and that he trained all RUF recruits. Beyond this, the Majority findings stretch the notion of criminal intent well past the limits of propriety.

21. Additionally, convicting Gbao of Form III liability when the crimes were all alleged to have been Form I exemplifies the JCE doctrine's misuse and over-reaching. A common challenge to the use of JCE in international criminal tribunals is that it is not a fundamentally appropriate mode of liability. The concern among many is that its overexpansion can lead to an inequitable result. We suggest that the Majority did just that in its JCE findings against Gbao.

22. We submit that the Appeals Chamber should reverse these findings in order to ensure that the JCE doctrine can be preserved and promoted for future international criminal tribunals. In addition to the errors of law and fact in our Appeal, the findings in this case betray the fundamental underpinnings of JCE as a proper and necessary doctrine in international criminal cases and should be reversed.

V. Sub-Ground 8(a): Denial of a Fair Trial for Lack of Notice

23. The Gbao Defence appeal under sub-ground 8(a) can be found in paragraphs 32 - 41 of its Appellant's Brief.

24. In paragraphs 2.13 – 2.16 of its Response, the Prosecution argued that the Trial Chamber's finding that Gbao was the RUF Ideologist did not deprive him of a fair trial. They stated "it was not the Prosecution's theory that Gbao's function as RUF ideologist *in itself* constituted his substantial contribution to the JCE and hence this was not a material fact to be pleaded in the Indictment".¹⁵ Instead it "was one aspect of the evidence that the Trial Chamber was entitled to take into account as part of its findings".¹⁶

A. Reply to the Prosecution's Response

25. The Prosecution appeared keen to minimise the findings of the Majority in its Judgement against Gbao in regard to his contribution as the RUF Ideologist. However, it is unmistakably true, we submit, that the *foundation* of the Majority's Judgement in assessing Gbao's role in the JCE was as the Ideologist of the RUF. They relied upon this finding in attributing individual criminal responsibility to Gbao as a JCE member for almost every count in the Judgement.¹⁷

26. Gbao's role as OSC was not, in contrast, considered to be one of the major contributions he made to the JCE. In paragraph 270 of the Sentencing Judgement, the Trial Chamber stated:

"Gbao's personal role within the overall enterprise was neither at the policymaking level, nor was it at the 'fighting end' where the majority of the actual atrocities were actually committed. Indeed...Gbao 'has not been found to have ever fired a single shot and never to have ordered the firing of a single shot'. Gbao's... *major contributions to the JCE can be characterised by his role as an ideology instructor and his planning and direct involvement in the enslavement of civilians on RUF government farms within Kailahun District*".¹⁸

¹⁵ Prosecution Response, para. 2.15.

¹⁶ *Id.* at para. 2.15.

¹⁷ See Trial Judgement, paras. 2009-49, 2057 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court's findings on Gbao's participation and significant contribution in Kono), 2168, 2170, 2171; see generally Trial Judgement, Dissenting Opinion of Justice Pierre G. Boutet, Trial Judgement, pp. 688-96 ("Justice Boutet Dissenting Opinion to Trial Judgement"), where he stated in paragraph 1 "[i]n the opinion of the majority, Gbao's significant contribution to the joint criminal enterprise is founded on his role as an RUF ideology instructor and his commitment to spreading and implementing that ideology".

¹⁸ Sentencing Judgement, para. 270.

27. The Gbao Defence has objected to the Majority's findings of forced farming in Kailahun District under Count 13 in Grounds 8(s) and 11 in the Appeal Brief.

28. The Majority found that the role of RUF ideology was by itself an important element to the JCE. It stated "without the ideology there would have been no JCE and that the revolution, of which the JCE was a key element, is a product of the ideology. In effect, the revolution was the ideology in action".¹⁹ Whilst paragraph 270 above indicates the Majority of the Trial Chamber's reliance on Gbao's role as RUF Ideologist as a major contribution to the JCE it is demonstrably significant that they made no mention of Gbao's role as Overall Security Commander in that context.

29. Whilst stating that Gbao's role as RUF Ideologist was not 'in itself' a condition precedent to the Prosecution's theory, we further submit it was *never* the Prosecution position in regards to Gbao's contribution to the JCE. It was not argued in the Indictment, the Prosecution's Pre-Trial brief, their Final Brief, or elicited through the Prosecution or Defence testimony *during the entire case*. We also aver that it was never the Prosecution's case that Gbao trained all RUF during the Indictment period or that the RUF ideology was inherently criminal. The Prosecution is unable to cite any evidence, whether accepted by the Trial Chamber or not, that supports this point. Given the Prosecution's current stand we find this a remarkable state of affairs.

30. In arguing that the Trial Chamber relied upon the RUF Ideologist finding as 'one aspect of the evidence that the Trial Chamber was entitled to take into account' we submit the Prosecution failed to acknowledge both a critical Defence argument and a fundamental difficulty with the Trial Chamber findings: that there *was no evidence* that supported Gbao's role as the RUF Ideologist. We strongly concur with Justice Boutet that "[o]ver the course of this four year trial, it was never the Prosecution's case that the revolutionary ideology of the RUF advocated the commission of crimes in order to achieve the goal of taking power and control over Sierra Leone, nor did the Prosecution argue that Gbao played a vital role in putting this criminal ideology into practice".²⁰

¹⁹ Trial Judgement, para. 2032.

²⁰ Justice Boutet Dissenting Opinion to Trial Judgement, para 5.

31. It is notable that the term “Ideologist” was heard for the first time in relation to Gbao or otherwise during the oral pronouncement of the Judgement on 25 February 2009.²¹ This illustrates, albeit anecdotally, the novel nature of the Majority’s Judgement as against Gbao.

32. Finally, if the Prosecution is now arguing that it was not part of their original theory that Gbao functioned as the RUF Ideologist, and that this was not a material fact necessary to be pleaded in the Indictment, then it is curious as to why the Prosecution nevertheless sought further convictions based in part upon this theory in its Appellant Brief.²²

VI. Sub-Ground 8(b): Gbao did not Train All RUF Recruits During Junta Period

33. The Gbao Defence appeal under sub-ground 8(b) can be found in paragraphs 42 - 48 of its Appellant’s Brief.

34. In paragraphs 5.57 and 5.58 of its Response, the Prosecution rejected the Defence position that the Majority’s JCE convictions were based upon Gbao’s role as RUF Ideologist.²³ It also stated that “whether all new recruits were in fact trained in the ideology is not determinative of Gbao’s responsibility pursuant to this JCE mode of liability”.²⁴

A. Reply to Prosecution’s Response

35. The Gbao Defence incorporates the arguments made in paragraphs 25 – 32 above. We submit that the Majority’s findings related to JCE clearly *were* founded upon Gbao’s role as the RUF Ideologist. Paragraph 270 of the Sentencing Judgement makes this clear. This is implicitly reinforced by the Prosecution’s rejoinder in Response to sub-ground 8(b), where they largely based their responses to Gbao’s contribution through the prism of his role as Ideologist.

36. We further submit that it is accurate to say that the Majority’s JCE theory as it relates to Gbao rests on their finding that Gbao trained every RUF recruit in ideology. This is made clear by review of the Majority’s findings. During the Junta period, Gbao was not otherwise

²¹ Transcripts of the oral delivery of RUF Judgement, 25 February 2009, p.10.

²² Prosecution Appellant Brief, paras. 2.168, 2.169, 3.52. Paragraph 2.168 stated that Gbao’s role as ideology instructor was found to have dictated the spirit in which the crimes alleged in the Indictment were committed. The Prosecution also relied upon these same arguments from its Appellant’s Brief in its Response; *also see* Prosecution Response, paras. 5.58 and 5.71, which rely upon paragraph 2.168 of its Appellant Brief.

²³ Prosecution Response, para. 5.57.

²⁴ *Id.* at para. 5.57.

personally found to have been involved in any crimes committed, save for those findings related to forced farming in Kailahun District and on the killing of the 64 alleged Kamajors in Kailahun Town (where he was investigating the 64 to assess whether they were in fact Kamajors). There are no factual findings that Gbao played any role in relation to the crimes in Bo, Kenema and Kono; indeed, his name is never even mentioned. In Kailahun District, there are no findings which specifically related to Gbao in relation to Counts 7-9.

37. We suggest that the Majority created such basis for conviction because it was the only way to link Gbao to crimes outside of farming and the 64 killings, where his role was minimal in any event. Without the findings on Gbao’s role as RUF Ideologist, we submit that it would not have been possible to conclude that Gbao significantly contributed to the JCE. The other findings, we submit, would not suffice to substantiate such a broad and wide-ranging conviction.

38. We also suggest that the finding that Gbao “trained all RUF recruits” during the Junta period would be the only way to link his acts to the later commission of crimes. This did not happen.

VI. Sub-Ground 8(c): Gbao was not Part of the Plurality nor a Senior RUF

39. The Gbao Defence appeal under sub-ground 8(c) can be found in paragraphs 49 - 62 of its Appellant’s Brief.

40. In paragraphs 5.59 – 5.63 of its Response, the Prosecution contended that, *inter alia*, while Gbao was not part of the Supreme Council, such membership was not the only basis of participation in the JCE.²⁵ Instead, they argued that Gbao’s position as a Vanguard gave him leadership status and that the Trial Chamber did not explicitly restrict the scope of the plurality to senior AFRC and RUF.²⁶

41. Additionally, they argued that just because the Trial Chamber’s reasoning was less developed as pertaining to Gbao’s involvement that did not in itself constitute an error.²⁷ The Prosecution then stated that Gbao’s presence in Kailahun District did not militate directly

²⁵ *Id.* at para. 5.59.
²⁶ *Id.*
²⁷ *Id.* at para. 5.60.

against membership in the JCE.²⁸ Finally, they suggested that it was not necessary for the Trial Chamber to find specific joint action between Gbao and the AFRC, since interaction between RUF and AFRC leadership was sufficient to show action in concert.

A. Reply to the Prosecution's Response

42. The Gbao Defence has not solely relied upon Gbao's absence from membership on the AFRC Supreme Council in order to demonstrate that he was not part of the JCE. However, we have suggested this is one of many indicators that he was not part of the plurality, since many senior RUF members *were* members of the AFRC Supreme Council. When considered alongside the eight other explicit findings²⁹ demonstrating the reasoning behind the establishment of the plurality of senior persons that constituted the JCE, the Majority's error in finding Gbao part of that plurality became clear. Additionally, the Gbao Defence presented fifteen other findings to demonstrate that, while he may have had *de jure* status as OSC, Gbao's actual role was not senior throughout the conflict; and especially not so during the Junta period.³⁰

43. Contrary to the Prosecution's position, the Trial Chamber Judgement explicitly restricted the scope of the JCE to senior RUF and AFRC members. It stated that "there is insufficient evidence to conclude that between 25 May 1997 and 14 February 1998, mid-and low-level RUF and AFRC commanders as well as rank-and-file fighters were themselves part of an agreement together with the more senior leaders of both movements" to participate in the JCE.³¹

44. Furthermore, while there need not be endless findings demonstrating joint action between the AFRC and Gbao, a failure to present one single action is surely an indicator that Gbao did not act jointly with the AFRC. As we argued in our Appellant Brief: "the Court did not find the existence of a single conversation between Gbao and any AFRC, whether in person or by radio. Similarly the Majority made no legitimate finding to demonstrate that Gbao worked cooperatively with the AFRC in Kailahun District, and not a single example of Gbao acting in concert with the AFRC, whether during the Junta period or otherwise".³²

²⁸ *Id.* at para. 5.61.

²⁹ Gbao Appellant Brief, para. 51.

³⁰ *Id.* at para. 56.

³¹ Trial Judgement, para. 1992.

³² Gbao Appellant Brief, para. 54.

45. Finally, the Prosecution's reasoning in response to the Defence argument that there were no findings on joint action between Gbao and the AFRC is circular. They claimed that rather than to find specific action between Gbao and the AFRC, it was necessary only to show interaction between leaders of the AFRC and RUF.³³ However, the JCE was between senior leaders of the AFRC and RUF. Thus, if Gbao was a senior leader, and it was necessary to find joint action between senior leaders, then based upon the Prosecution's own reasoning it would be necessary to find joint action between Gbao and the AFRC.

46. At any rate, the argument that there were no apparent findings in the case showing any interaction, much less criminal action, between Gbao and any AFRC member (much less one of their senior members) between 25 May 1997 and February 1998 persuasively demonstrates, we submit, that Gbao was not part of the JCE with the AFRC.

47. The Prosecution did not respond to the Defence argument that TF1-371, an AFRC Supreme Council member, did not even know Gbao was a member of the RUF, much less a senior member. It is hard to imagine how Gbao can safely be seen to have acted in concert with TF1-371, one of eight RUF listed as Supreme Council members,³⁴ when TF1-371 did not even know whether Gbao was a *member* of the RUF.

VII. Sub-Ground 8(d): Non-JCE Members 'Used' by JCE Members

48. The Gbao Defence appeal under sub-ground 8(d) can be found in paragraphs 63 - 75 of its Appellant's Brief.

49. In paragraphs 5.20 - 5.27 of its Response, the Prosecution argued that, *inter alia*, the Trial Chamber did not err by failing to make findings on whether crimes committed by non-JCE members throughout Sierra Leone were 'used' by JCE members to further their common criminal purpose, stating that the Appeals Chamber "must be conducted on the basis of the Trial Judgement as a whole".³⁵ They then recited the law on how acts of non-JCE members can be imputed to JCE members, so long as they were found to have been 'used' by a JCE member in an effort to further the common criminal purpose.

³³ Prosecution Response, para. 5.63.

³⁴ Trial Judgement, para. 755.

³⁵ Prosecution Response, para. 5.20.

50. The Prosecution appeared to support the Trial Chamber's arguments in relation to the link that must be demonstrated between non-JCE members and JCE members. However, they acknowledged that "more detailed reasoning could have been provided by the Trial Chamber".³⁶

51. While the Prosecution responded to the link between non-JCE members and JCE members in Kono District,³⁷ it did not appear that they responded to the lack of a link between non-JCE members and JCE members in Bo, Kenema and Kailahun Districts. Their specific arguments appear to relate only to Kono District.³⁸

A. Reply to the Prosecution's Response

52. The Gbao Defence contended that "the Majority in the Trial Chamber erred in fact by failing to apply the proper legal standard in detailing, through factual findings, the methods by which the alleged members of the JCE 'used' lower-ranking, non-members of the JCE to commit crimes in furtherance of the joint criminal enterprise".³⁹

53. We dispute the Prosecution's contention that connecting crimes to the JCE members may properly be done based upon the evidence as a whole. There must be specific findings. As an example, the Appeals Chamber in the *Krajisnik* Case overruled several of the Trial Chamber's findings related to JCE in view of its failure to link the principal perpetrators of crimes with one of the JCE members.⁴⁰

54. Annexe I to the Gbao Defence Brief considered both specific and general findings by the Trial Chamber that fail to show a link between non-JCE members and JCE members. We submit that the crimes listed were errors of fact by the Trial Chamber. Besides particular findings in Kono, the Prosecution did not respond.

55. As stated in our brief, failing to make findings connecting a JCE member to a non-JCE member jeopardises "the safe and equitable evolution of JCE and international criminal justice in general. Leaving aside whether the crimes found to have been committed were

³⁶ *Id.* at para. 5.24.

³⁷ *Id.* at paras. 5.23, 5.26.

³⁸ *Id.* at para. 5.26.

³⁹ Gbao Appellant Brief, para. 63.

⁴⁰ *Prosecutor v. Krajisnik*, Case No. IT-00-39-A, Judgement (AC), 17 March 2009, paras. 237, 249, 283-284.

actually committed, if the Appeal Chamber overlooks the need to link the crime perpetrated by non-JCE members and the JCE members, Gbao faces the inevitable but unpardonable risk of being held responsible for any crime committed by any RUF/AFRC during the Junta period. In essence, this punishes him for RUF membership".⁴¹

VIII. Sub-ground 8(i): Significant Contribution to the JCE

56. The Gbao Defence appeal under sub-ground 8(i) can be found in paragraphs 103 - 143 of its Appellant's Brief.

57. In paragraphs 5.64 – 5.71 of its Response, the Prosecution disputed certain arguments made by the Gbao Defence in its Appellant's Brief. Firstly, it referenced Justice Boutet's dissenting opinion, who argued that the RUF ideology prohibited criminal behaviour, but that the RUF members did not tend to follow this ideology.⁴² It appeared to utilise this aspect of Justice Boutet's dissent to support the nexus between the ideology and the crimes committed.

58. The Prosecution also supported the Trial Chamber's finding that Gbao was important in imparting the ideology of the RUF and argued that it was reasonable for the Trial Chamber to find, even in the absence of testimonial evidence, that Gbao was trained at Camp Naama.⁴³

59. The Prosecution also argued that, if the Appeals Chamber were to dismiss the findings against Gbao in relation to his role as RUF Ideologist, his rank, status, functions in Kailahun and his supervisory role over the IDU, MPs, IO, and G5 still allowed him to exert influence and remain informed, even if the RUF security/administrative units were less effectual during the Junta period. It also rejected the Gbao Defence representation that Gbao was only a captain during the Junta period, as the witness relied upon (DAG-048) required corroboration.⁴⁴

60. In response to the Gbao Defence argument that only general findings existed to demonstrate that farming in Kailahun District furthered the interests of the JCE, the Prosecution argued that it was reasonable to infer Gbao's responsibility under JCE from such

⁴¹ Gbao Appellant Brief, para. 72.

⁴² Prosecution Response, para. 5.65.

⁴³ *Id.* at para. 5.66.

⁴⁴ *Id.* at para. 5.68.

findings. They finally submitted that the Trial Chamber finding regarding the beating of TF1-113 was done in furtherance of the JCE.⁴⁵

A. Reply to Prosecution Response

61. In his Dissent, Justice Boutet was referring to arguments supporting the notion that Gbao believed in the RUF ideology that prohibited criminal behaviour; the Majority in the Trial Chamber found that Gbao was the RUF Ideologist training all RUF recruits in an inherently criminal ideology and, had the ideology not existed, that the JCE would never have occurred.⁴⁶ It is unclear why the Prosecution referred to Justice Boutet in this section, as these are both wholly different arguments.

62. The Prosecution contended that Gbao could remain informed in the capacity of his supervisory role as OSC, even if RUF security units were not as effectual during the Junta period. However, the Majority in the Trial Chamber explicitly found the opposite. It stated “the Chamber has heard no credible evidence that would tend to indicate that Gbao actually received reports regarding unlawful killings” in Bo, Kenema and Kono.⁴⁷

63. Regarding Gbao’s supervisory role as OSC, his powers were indisputably limited.⁴⁸ While we submitted that the security units were ineffectual during the Junta period, Gbao additionally had no effective control over them.⁴⁹ Even if Gbao had the power to recommend certain punishments following an investigation into wrongdoing, the power to initiate the original investigation itself was never in his hands.⁵⁰ Even where Gbao did make recommendations for punishment after an investigation had concluded, he had no power to implement it. Such power lay with the High Command alone.⁵¹

64. The Gbao Defence acknowledges that DAG-048 was found to lack credibility, and that therefore the Appeals Chamber may wish not to accept his uncorroborated testimony. However, if that be the case, neither the Trial Chamber nor the Prosecution made any findings

⁴⁵ *Id.* at para. 5.70.

⁴⁶ Trial Judgement, para. 2032.

⁴⁷ *Id.* at paras. 2041, 2057 (applying *mutatis mutandis* the Court’s findings on Gbao’s participation and significant contribution in Kenema) and 2105 (applying *mutatis mutandis* the Court’s findings on Gbao’s participation and significant contribution in Kono).

⁴⁸ *Id.* at para. 2034.

⁴⁹ *Id.*

⁵⁰ *Id.* at paras. 684, 702.

⁵¹ *Id.* at para. 686.

or assertions relating to Gbao's rank during the Junta period. Thus, the finding that Gbao's rank contributed to the ultimate finding that he significantly contributed to the JCE, without noting what his actual rank was (we maintain it was of mid-level) should not have been used.

IX. Sub-Ground 8(j): Use of Incorrect *Mens Rea* Standard

65. The Gbao Defence appeal under sub-ground 8(j) can be found in paragraphs 144 - 149 of its Appellant's Brief.

66. In paragraphs 5.72 – 5.75, the Prosecution argued *inter alia* that an Accused's significant contribution need not extend to every location within the Trial Chamber's Judgement for him to be found guilty under JCE.

67. It additionally argued that it is possible for a Trial Chamber to find Form I and III liability within the same JCE.⁵²

A. Reply to the Prosecution's Response

68. We suggest that were the Appeals Chamber to uphold the Majority's findings against Gbao such a decision would represent a vast expansion of JCE liability. We submit that findings such as these *extend JCE beyond its logical limits*. JCE is an amorphous concept and is vulnerable to being extended beyond the point of propriety. We assert that the Majority in the Trial Chamber did just that and thereby set a dangerous precedent that, if not restricted, will be open to abuse in the future.

69. In the present case all the crimes under Counts 1-14 were found to be within the common purpose, so a first form of JCE. Gbao was found responsible under the *mens rea* standard for JCE Form III in Bo, Kencma and Kono. All other JCE members were found responsible under JCE Form I. This was impossible to find. When individuals are said to be part of the same JCE they need to be found to have committed the same crimes under the same JCE form. Crimes either fall inside the common purpose (form 1) or outside it (form 3); they cannot be both inside the common purpose for some JCE members and outside it for others.

⁵² Prosecution Response, para. 5.74.

70. For this reason, Form I and III cannot exist within the same JCE for the same crime. It is illogical to claim that Bockarie, Gullit and other JCE members came to an agreement to commit the crimes under Counts 1-14 to take or maintain control over Sierra Leone while Gbao did not. This finding showed that they were not part of the same JCE as they did not share the same intent.

71. Additionally, the JCE found by the Trial Chamber included senior RUF and AFRC intentionally committing crimes (in Counts 1-14) to maintain or take power over the country. Accordingly, it found an agreement existed between these senior RUF and AFRC JCE members to commit the crimes charged in the Indictment and, while acting in concert, they intentionally committed them to further their common goal. If Gbao did not intend, or agree, to commit a crime, *he cannot be found to be acting in concert* with other senior RUF or AFRC.

72. We submit that the Prosecution have promoted what some in international criminal law fear – the potential for the overexpansion of JCE. As a legal principle, JCE can be utilised equitably and in the interests of justice. However, due to its malleability, it can be extended beyond its original equitable purpose and, we submit, beyond bounds of fairness to the Accused. This was done by the Majority and is now being promoted by the Prosecution.

X. Sub-Ground 8(k): Gbao did not Share the Intent of other JCE Members

73. The Gbao Defence appeal under sub-ground 8(k) can be found in paragraphs 150 - 156 of its Appellant's Brief. In paragraph 5.76, the Prosecution stated that it relied upon its submission in relation to sub-ground 8(j). The Gbao Defence relies upon its reply in paragraphs 65-72 above.

XI. Sub-Ground 8(l): No Findings on Foreseeability

74. The Gbao Defence appeal under sub-ground 8(l) can be found in paragraphs 157 - 159 of its Appellant's Brief.

75. In paragraph 5.77, the Prosecution supported the Trial Chamber's reasoning.

A. Reply to Prosecution's Response

76. It must be emphasised that this is an argument in the alternative, presented only for consideration by the Chamber only if it reverses Trial Chamber findings and places crimes

outside the common purpose of the JCE. The Trial Chamber found that Counts 1-14 were all 'within' the JCE.⁵³

XII. Sub-Ground 8(m): Gbao had No Knowledge of Crimes in Bo, Kenema or Kono

77. The Gbao Defence appeal under sub-ground 8(m) can be found in paragraphs 160 - 170 of its Appellant's Brief.

78. The Prosecution reiterated its arguments made in response to sub-grounds 8(b), 8(c), 8(i), 8(j), 8(k), and 8(l).

A. Reply to Prosecution's Response

79. It is not entirely clear why the Prosecution relied upon the various sub-grounds listed above, as none of them appear to specifically address the Majority's findings that Gbao somehow knew about the crimes being committed in Bo, Kenema and Kono. Other arguments are made in our Appellant Brief.

XIII. Sub-Ground 8(o): Gbao did not Share the Intent as JCE Member Under Count 1 in Kailahun District

80. The Gbao Defence appeal under sub-ground 8(o) can be found in paragraphs 172 - 180 of its Appellant's Brief.

81. In paragraph 5.79 – 5.82, the Prosecution argued that, since Gbao was found to be a JCE member, he necessarily shared the intent of the JCE members. It again referenced Gbao's role as RUF Ideologist⁵⁴ and stated that intent can be inferred from the circumstances.

A. Reply to Prosecution's Response

82. The Prosecution presented a slightly confusing argument in support of the Trial Chamber's finding that Gbao possessed the requisite intent under Count 1. It argued that, because Gbao was part of the JCE, he necessarily shared the intent of the JCE. This construction is misconstrued as Gbao must first be found to have the requisite intent to commit acts of terror in Kailahun District before he can properly be found to be part of the JCE.

⁵³ Trial Judgement, paras. 1982, 1985.

⁵⁴ Prosecution Response, para. 5.81.

83. The Gbao Defence argued in the alternative in its Appellant's Brief⁵⁵ that, based upon the circumstances, it was improper to infer that Gbao shared the intent with other JCE members to commit the crimes under Count 1. The Trial Chamber found "the Prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located".⁵⁶ Accordingly, one may not properly infer intent based upon the evidence where the Trial Chamber found that there was no evidence to infer from.

84. Other arguments are made in support of this sub-ground of appeal in our Appellant Brief.

XV. Sub-Ground 8(q): Gbao did not Share the Intent under Counts 3-5 in Kailahun District

85. The Gbao Defence Appeal under sub-ground 8(q) can be found in paragraphs 187 – 197 of its Appellant's Brief.

86. In paragraphs 5.84 – 5.85 of its Response, the Prosecution *inter alia* again relied upon an argument related to the Trial Chamber's finding of Gbao's role as the RUF Ideologist.⁵⁷ They also argued that Gbao was the most senior RUF present (after Bockarie had issued the order and left town) and, while he could not have stopped Bockarie, there was no evidence that he wanted to do so.⁵⁸

A. Reply to Prosecution Response

87. Gbao was not shown to be the most senior present in Kailahun Town after Bockarie left town. The Prosecution provided no Trial Chamber's finding to substantiate this assertion. Moreover, the Trial Chamber found "[a]ll RUF members within an area fell under the authority of the local Area Commander".⁵⁹ During the Junta period, Dennis Lansana held that

⁵⁵ It was an argument in the alternative because no findings were made in reference to Gbao's intent under Count 1.

⁵⁶ Trial Judgement, para. 2047.

⁵⁷ Prosecution Response, para. 5.84, which stated that "[t]he Prosecution relies upon its argument at paragraph 5.81 above..." Paragraph 5.81 referenced a finding related to Gbao's role as RUF Ideologist.

⁵⁸ *Id.* at para. 5.85.

⁵⁹ Trial Judgement, para. 664.

position in Kailahun District.⁶⁰ Additionally, Gbao was not found to have effective control in the area,⁶¹ including during the time of the killing.

XVI. Sub-Ground 8(r): Gbao did not Share the Intent under Counts 7-9 in Kailahun District

88. The Gbao Defence appeal under sub-ground 8(r) can be found in paragraphs 198 - 212 of its Appellant's Brief.

89. In paragraphs 5.86 – 5.90 of its Response, the Prosecution argued, *inter alia*, that DIS-080, a Defence witness, could be used to substantiate the claim that forced marriage took place in Kailahun District.⁶² They also argued that there is no reason why the Trial Chamber should be precluded from relying on evidence of events that took place outside the Junta period, as the JCE was found to have continued until April 1998.⁶³ They finally contended that the Gbao Defence had failed to set out precisely where the Trial Chamber made findings on the basis of uncorroborated evidence.⁶⁴ They also referenced their arguments in response to Ground 2 regarding expert evidence.

A. Defence Reply to Prosecution Response

90. The Defence reiterates its reply under Ground 2 above.

91. DIS-080 did not support the Prosecution's case regarding the question of forced marriage. He was asked during his testimony by the Prosecution: "some of the civilian women who were captured and brought back for their own protection, as you testified, were forced to marry some of the freedom fighters; how do you respond? A. I did not see that".⁶⁵

92. The Prosecution is mistaken in asserting that findings regarding events outside the Junta period can be used to establish crimes within the Junta period, as Gbao was found to be a member of the JCE in Kailahun District only between 25 May 1997 and 19 February

⁶⁰ *Id.* at para. 765. The Chamber described the role of the Area Commander in paragraph 664: "Prior to 1998, the RUF forces were organised into brigades of fighters for particular geographical areas who reported to the battleground commander. The Area Commanders were also responsible for passing orders to battalion commanders".

⁶¹ *See Id.* at para. 2034.

⁶² Prosecution Response, para. 5.88.

⁶³ *Id.* at para. 5.89.

⁶⁴ *Id.* at para. 5.90.

⁶⁵ Transcript, DIS-080, 8 October 2007, p.11.

1998.⁶⁶ Even if it did consider findings relied upon outside the Junta period under Counts 7-9 in Kailahun District, there would only be one piece of testimonial evidence that would establish Gbao's intent within the JCE.⁶⁷

93. We suggest that if the Appeal Chamber reviews these four arguments in relation to sub-ground 8(r), it will unmistakably see the errors in the Judgement. Notably, every finding falls by the logic of the Trial Chamber's own reasoning.

XVII. Sub-Ground 8(s): Gbao did not Share the Intent under Count 13 in Kailahun District

94. The Gbao Defence Appeal under sub-ground 8(s) can be found in paragraphs 213 – 237 of its Appellant's Brief.

95. In paragraphs 5.91 – 5.94 of its Response, the Prosecution responded, *inter alia*, that the Gbao Defence was incorrect in asserting that referring to crimes after the Junta period until April 1998 was impermissible. They also disputed our contention that farming did not further the goals of the Junta government.⁶⁸ In reference to forced mining in Giema, they responded that it was not necessary to show that the act of forced mining was done in support of the Junta. All that was necessary to show was the crime of enslavement.⁶⁹

A. Reply to Prosecution Response

96. Gbao's convictions were entered on the basis of crimes committed between 25 May 1997 to 19 February 1998.⁷⁰ We therefore reiterate our argument in paragraph 216 of the Gbao Appellant Brief that testimony outside this period cannot be used to support the arguments suggesting Gbao's involvement in the JCE. Therefore, only TF1-108, TF1-330 and TF1-366 should properly be used in relation to crimes that took place during the Junta period.

97. The Prosecution was otherwise incorrect in claiming that it was permissible to rely upon findings outside the Junta period in support of its argument that the enslavement was done in furtherance of a JCE. Clearly, crimes cannot be found to have been committed in

⁶⁶ Trial Judgement, para. 2172.

⁶⁷ There was only one witness – Dennis Koker – that the Gbao Defence objected under Counts 7-9 that was used to establish that he possessed the requisite intent under the JCE. See Gbao Appellant Brief, para. 206.

⁶⁸ Prosecution Response, para. 5.92.

⁶⁹ *Id.* at para. 5.94.

⁷⁰ *Id.* at para. 2172.

furtherance of the JCE when that JCE has already terminated. Even if the JCE extended to April 1998, it is not clear that the crimes the Trial Chamber relied upon to substantiate Gbao's JCE conviction were committed between 19 February 1998 and April 1998.⁷¹

98. There are no specific findings that the farming products were used to support the Junta government during the Junta period. If farming were of "critical importance" to the Junta government,⁷² one might expect examples of how the produce was used to support the Junta government. None were known to be provided in relation to Kailahun District.

99. In reply to the Prosecution's argument regarding forced mining, even if it were true that forced mining occurred in Giema, it must still be demonstrated that such activities were in furtherance of the JCE. If the Trial Chamber had found Gbao individually criminally responsible under a different mode of liability, it would not have been necessary to show that the mining was done in furtherance of the JCE. However, Gbao was sentenced to 20 years imprisonment under Count 13 by virtue of his JCE involvement. It must therefore be shown that the mining was done in furtherance of the JCE; otherwise the claim as against Gbao should be dismissed.

100. The following arguments were not addressed by the Prosecution in their Response:

- i. That Gbao was not involved with military training, forced or not, at the RUF training camps during the Junta period;⁷³
- ii. Regarding the findings related to Gbao's farm;⁷⁴
- iii. That fact that witnesses referring to forced mining in Kailahun District testified to events that took place outside the JCE period.⁷⁵

XIX. Ground 10: Counts 7-9 were not Established in Kailahun District

101. The Gbao Defence Appeal under Ground 10 can be found in paragraphs 240 – 252 of its Appellant's Brief. The Prosecution Responded in paragraphs 7.51, 7.55, 7.56, 7.57 and 7.61. The Gbao Defence continues to rely upon its appeal arguments.

⁷¹ *For eg.* It was found in paragraph 1424 that there was a farm near Pendembu that civilians were forced to work between 1999-2001, clearly after April 1998.

⁷² As stated by the Prosecution in paragraph 5.92 of its Brief.

⁷³ Gbao Appellant Brief, para. 215.

⁷⁴ *Id.* at para. 219.

⁷⁵ *Id.* at paras. 232- 236.

XX. Ground 11: Count 13 was not Established in Kailahun District

102. The Gbao Defence Appeal under Ground 11 can be found in paragraphs 253- 280 of its Appellant's Brief.

103. In paragraphs 7.148 – 7.166 of the Prosecution's Response, the Prosecution argued, *inter alia*, that the Trial Chamber had discretion to find that workers were not remunerated for their work.⁷⁶ In reference to the Gbao Defence table of factual misrepresentations and other errors of fact, the Prosecution claimed to be unable to respond owing to page limitations. They then argued generally that the Trial Chamber properly had discretion to make its findings in the manner in which it made them.⁷⁷

104. The Prosecution referenced Gbao's role as OSC in seeking to establish that he played a major role in forced farming.⁷⁸ In relation to the allegations of Gbao's personal farm, they relied upon two additional witnesses to support their claim that Gbao had a private farm where individuals were forced to work.⁷⁹ The Prosecution additionally argued that Gbao's role as OSC demonstrated his involvement in forced mining. They also referenced mining activities outside Kailahun District in order to support mining allegations in Kailahun District.⁸⁰ The Prosecution argued that even if Gbao was not at the mining site, "this does not logically mean that he was not planning mining activities from the background through his G5 commanders".⁸¹ The Prosecution finally argued that Patrick Bangura was a G5 commander.⁸²

A. Gbao Reply to Prosecution Response

105. The Gbao Defence argument was not solely that the Trial Chamber erred in finding that workers were not remunerated for their work; it was also that the Trial Chamber *accepted* that civilians were paid 'in kind' for their efforts. For example, the Trial Chamber found both that "[p]arents agree to gather food as their contribution for the free education"⁸³ and "in return for their work and produce...civilians received free medical treatment at RUF hospitals".⁸⁴ The Court additionally found that "[t]he RUF attempted to establish good

⁷⁶ Prosecution's Response, para. 7.151.

⁷⁷ *Id.* at para. 7.152.

⁷⁸ *Id.* at paras. 7.154 – 7.160.

⁷⁹ *Id.* at para. 7.162.

⁸⁰ *Id.* at para. 7.164.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Trial Judgement, para. 1384.

⁸⁴ *Id.* at para. 1421 (emphasis added).

relationships *with the civilian population* in order to maintain Kailahun as a defensive stronghold...⁸⁵ Nonetheless, it relied upon reports from NGOs, TF1-108, TF1-330 and TF1-366 to oppose findings that workers were paid for their efforts.⁸⁶ We suggested that this decision was an abuse of its discretion.

106. In reply to the Prosecution's argument regarding Annexe III, we submit that these findings are not merely examples of proper discretionary findings: they are wholly erroneous or misrepresentations of the testimony used to convict Gbao under Count 13. For example, a witness relied upon to substantiate forced farming in Kailahun District actually discussed Kono District.⁸⁷ On another occasion a witness was relied upon in order to implicate Gbao despite not being corroborated as to evidence concerning Gbao's acts and conduct contrary to the Trial Chamber's earlier requirement that such corroboration was required.⁸⁸ Elsewhere, evidence was cited that simply did not appear in the transcript.⁸⁹ We submit that these were not proper discretionary findings. Where the Trial Chamber asserted that a particular piece of evidence stated "x", while in fact it stated "y", we submit it should be disregarded.

107. In reply to the Prosecution's comment that the Gbao Defence did not reference Gbao's role as OSC in relation to farming and mining activities in Kailahun District, that was because Gbao had no effective control over the G5 in Kailahun District.⁹⁰ This is thoroughly detailed in the Response to Ground Two of the Prosecution's Appeal.⁹¹

108. The Prosecution stated that the RUF "were supervising civilians in camps at mining sites".⁹² This testimony related to Kono District (the citation comes from the section in the Trial Judgement on Kono).⁹³ In reference to the Prosecution's suggestion that Gbao was planning forced mining "from the background", we assert this was entirely a speculative

⁸⁵ *Id.* at para. 1384 (emphasis added).

⁸⁶ Gbao Appellant Brief, para. 259.

⁸⁷ See *eg.* Trial Judgement, fn 2637, citing to TF1-367, 23 June 2006, pp.46-47. See Gbao Appellant Brief, Annex III, p.2.

⁸⁸ See *eg.* Trial Judgement, fn 2676, citing to TF1-108, 7 March 2006, p.113. He testified that Gbao's bodyguard was guarding the civilians working on Gbao's farm. TF1-108 required corroboration for any testimony related to Gbao's acts and conduct. See Gbao Appellant Brief, Annex III, p.12.

⁸⁹ See *eg.* Trial Judgement, fn 2700, citing to TF1-108, 10 March 2006, pp.32-33, and to DIS-157, 25 January 2008, pp.31-32. See Gbao Appellant Brief, Annex III, p.12.

⁹⁰ Trial Judgement, para. 2034. See generally paras. 2034, 2041, 2153, 2155, 2178, 2181, 2217, 2219, 2237, 2298, 2299, which stated that Gbao did not have effective control.

⁹¹ See Gbao Response, paras. 70-95.

⁹² Prosecution Response, para. 7.164.

⁹³ Trial Judgement, para. 1237, which discussed forced mining in Kunduma, Kono District.

comment and not taken from the Trial Judgement. We are concerned that the Prosecution persists in speculating about Gbao's ambiguous (and seemingly limitless) power as OSC. Finally, there appears to be no evidence that Patrick Bangura was a G5 commander from TF1-330 or other witnesses.

109. The Prosecution claimed not to understand what the Gbao Defence meant by the Trial Chamber making a 'compressed' finding.⁹⁴ In short, the Trial Chamber aggregated testimony that alleged Sesay, Gbao and Bockarie had farms in Kailahun District. The citations to the transcript were largely references to Sesay and Bockarie's farms. Only TF1-108 and TF1-330 mentioned that Gbao had a personal farm. TF1-330 did not testify that civilians were forced to work on this farm; he testified only that Gbao had a farm. The only witness to allege that Gbao had a personal farm on which forced labour was used was TF1-108, a witness requiring corroboration as to any testimony going to Gbao's acts and conduct. Paragraphs 272 of the Gbao Appellant Brief detailed this error.

XXI. Ground 12: Counts 7-9 in Kailahun District do not Constitute Acts of Terror

110. The Gbao Defence Appeal under Ground 12 can be found in paragraphs 281 – 288 of its Appellant's Brief. The Prosecution's Response is located in paragraphs 7.10 – 7.13 of its Response.

111. We re-emphasise the Trial Chamber's finding that "the Prosecution has failed to adduce evidence of acts of terrorism in the parts of Kailahun District that were controlled by the RUF and where Gbao was located".⁹⁵ Otherwise, we largely rely upon the arguments in the Gbao Appellant Brief.

XXII. Ground 14: Alleged Abuse of Process by the Prosecution

112. The Gbao Defence appeal under Ground 14 can be found in paragraphs 290 – 311 of its Appellant's Brief. The Prosecution responded to them in paragraphs 4.54 - 4.58 and 4.76 - 4.87 of its Response.

⁹⁴ Prosecution Response, para. 7.161.

⁹⁵ Trial Judgement, para. 2047.

113. The Prosecution argued *inter alia* that the cases presented by the Defence in its appeal do not contradict the Trial Chamber's reasoning.⁹⁶ They further stated that [REDACTED] statement does not contradict the gravamen of the Trial Chamber's ruling against Gbao.⁹⁷

A. Defence Reply to Prosecution's Response

114. The Gbao Defence largely relies upon the arguments within its Appellant's Brief. The Defence repeats that prejudice to an Accused is not a necessary precondition to a finding of abuse of process, as the "mischief to be prevented is not only to the individual abuses of an Accused's right to a fair trial, but equally to abuses of the judicial process itself".⁹⁸

115. In response to the Prosecution's argument that [REDACTED] statement did not challenge the gravamen of the conviction against Gbao, we disagree. While appreciating that it does constitute evidence, the statement clearly demonstrates that Gbao did not share Kallon's *mens rea* before Kallon independently arrived at the Makump DDR Camp. Similarly, [REDACTED] statement that after Kallon and Jaganathan left the camp, Gbao attempted to tell anonymous RUF fighters to return the weapons to the UN Peacekeepers. This showed he may not have possessed a criminal *mens rea* after the events at the Makump DDR camp. Further, according to the statement, it appeared that Gbao may not have possessed the requisite *mens rea* while Kallon and his men were taking Jaganathan to the vehicle. It is not clear, as the Prosecution has redacted the statement, but it appears that Gbao and Maroa agreed to meet together (with others) to discuss how "to resolve the situation".⁹⁹ This potentially demonstrates that Gbao did not possess the requisite *mens rea* while Kallon was arresting Jaganathan. If this is true, it is hard to understand how this cannot contradict the gravamen of the complaint against Gbao and show an abuse of process.

116. Additionally, the Prosecution makes no mention of their clear attempt to implicate Gbao in [REDACTED] abduction. In fact, they continue to implicate Gbao in the facilitation of Maroa's abduction in their Appeal Brief¹⁰⁰ and Response.¹⁰¹ Such an event did not happen, as [REDACTED] statement makes clear.

⁹⁶ Prosecution Response, para. 4.81.

⁹⁷ *Id.* at para. 4.84.

⁹⁸ Gbao Appellant Brief, para. 303.

⁹⁹ [REDACTED].

¹⁰⁰ Prosecution Appellant Brief, para. 4.111.

¹⁰¹ Prosecution Response, para. 7.220.

XXIII. Ground 16: Gbao did not Possess Requisite *Mens Rea* or *Actus Reus* under Count 15

117. The Gbao Defence appeal under Ground 16 can be found in paragraphs 313 – 354 of its Appellant’s Brief.

118. In paragraphs 7.213 – 7.229, the Prosecution responded to the Defence argument. They argued, *inter alia*, that Gbao was opposed to disarmament because the RUF was unwilling to disarm until certain aspects of the Lomé Peace Accord were fulfilled.¹⁰² They later argued contrarily that Gbao was a senior figure in Makeni, partly because he was “heavily involved in the disarmament of RUF fighters”.¹⁰³ They further argued that TF1-174 testified (although this was not accepted by the Trial Chamber) that Gbao took children from the ICC to fight on behalf of the RUF.¹⁰⁴ Finally it argued that TF1-071 stated that Gbao threatened to execute any RUF disarming secretly. This was all presented to demonstrate Gbao’s reluctance to disarm.

119. The Prosecution further challenged the Defence contention that Gbao’s conviction was a case of *ex post facto* aiding and abetting, largely due to Gbao’s behaviour before and after the actual event where Kallon assaulted and abducted Jaganathan.¹⁰⁵ Finally, it argued that it was immaterial that Gbao was talking (rather than fighting) with the UN Peacekeepers; that no physical assaults took place until Kallon and his men arrived; that Kallon and Gbao were not in contact with each other; and that Gbao did not attack the peacekeepers himself.¹⁰⁶ The Prosecution also noted that Gbao was a member of the High Command¹⁰⁷ and that he was not scared of Kallon.¹⁰⁸

A. Reply to Prosecution Response

120. The Gbao Defence relies largely upon the arguments within our Appellant’s Brief. We submit that the moment Gbao stood by while Kallon and his men arrested Jaganathan would have been the relevant moment to assess his individual criminal responsibility: prior to that he had committed no crime, and had even attempted to stop Kallon from committing crimes

¹⁰² *Id.* at para. 7.215.

¹⁰³ *Id.* at para. 7.224.

¹⁰⁴ *Id.* at para. 7.216.

¹⁰⁵ *Id.* at para. 7.218.

¹⁰⁶ *Id.* at para. 7.226.

¹⁰⁷ *Id.* at para. 7.227.

¹⁰⁸ *Id.*

himself. Following this he is absent from the Trial Chamber's findings, except for the finding that he escorted Maroa to the RUF Teko Barracks.

121. The Prosecution continued to rely upon Trial Chamber factual findings (not legal findings) that Gbao escorted a bloodied and disarmed Maroa back to Teko Barracks.¹⁰⁹ This was used to support their claim that Gbao facilitated the abduction of Major Maroa and continued to hold a criminal *mens rea* after the events at the Makump DDR camp. We suggest that this assertion can in fact be utilised to support the Gbao Defence argument that the Prosecution is continuing to abuse the processes of the Court. While it is true that Ganase Jaganathan testified that Gbao arrived at Teko Barracks with Maroa (and the Trial Chamber made a finding on it) this was challenged by the statement ██████████ gave to the Prosecution which was subsequently suppressed. ██████████ did not state that Gbao escorted him to the camp.¹¹⁰ In fact, he stated that Gbao tried to stop anonymous RUF fighters from beating and disarming the UN peacekeepers.

122. The Prosecution claim that Gbao was opposed to disarmament because certain conditions of the Lomé Peace Accord had not been fulfilled cannot be properly used, we suggest, to demonstrate that he opposed disarmament. Disarmament was conditional upon the terms of negotiations contained in the Accord, which the RUF had the right to demand. Also, testimonial evidence from TF1-174 (not accepted by the Trial Chamber)¹¹¹ did not show Gbao was opposed to disarmament and, at any rate, lacks credibility for reasons thoroughly explained in the Gbao Final Brief¹¹² and Appellate Response.¹¹³ TF1-174 could not have been telling the truth when discussing Gbao's role in relation to events surrounding UNAMSIL because he lied in relation to Gbao's actions. Finally, TF1-071's testimony that Gbao threatened execution to anyone who disarmed secretly was tarnished by his shameless lying concerning Gbao's activities related to UNAMSIL.¹¹⁴

123. The Prosecution also challenged the argument that Gbao was scared when Kallon ordered the arrest of Jaganathan. We suggest that the testimony that Gbao "just froze" and

¹⁰⁹ *Id.* at para. 7.220.

¹¹¹ The Prosecution arbitrarily noted that he was a reliable and credible witness. See Prosecution Response, para. 7.216. It is notable that there is no attribution to this position taken by the Prosecution.

¹¹² See Gbao Final Brief, paras. 1437-1448.

¹¹³ See Gbao Response, paras. 105-113.

¹¹⁴ See *Id.* at paras. 179-181; Also see Gbao Appellant Brief, para. 316.

stood “statue-like” indicated that he was scared.¹¹⁵ This testimony came from Jaganathan Ganase himself.

124. Contrary to Prosecution insistence, Gbao was not part of the High Command. This position is buttressed by the Trial Chamber findings.¹¹⁶ The Prosecution should also recall TF1-071’s sophisticated and complex description of the RUF hierarchy, in the form of a very large diagram specifically noting the leadership in all areas of Sierra Leone. Gbao’s name was notably absent.¹¹⁷

125. Finally, the Prosecution appeared frustrated with the Defence focus on the holding of the AK-47 leading to the Trial Chamber’s findings of individual criminal responsibility. However, we submit that this was the only factual finding used to demonstrate Gbao’s *mens rea* at the camp. Whether he was opposed to disarmament, orchestrating the conflict by his presence (which we have fully disputed in our Appellant Brief) or otherwise, none of these findings demonstrated that he supported the commission of crimes against UNAMSIL Peacekeepers. We submit that it was this single finding only and that underscores its relevance.

XXIV. Ground 18: Errors Related to Sentencing

126. The Gbao Defence appeal under Ground 18 can be found in paragraphs 356 – 488 of its Appellant’s Brief. In paragraphs 9.47 – 9.60 the Prosecution presented its Response.

127. The Gbao Defence relies largely upon the arguments in its Appellant’s Brief. In response to the attribution of an aggravating factor against Gbao, his conviction on the basis of tacit approval of Kallon’s crimes at the Makump DDR camp (the foundation of the Trial Chamber’s conviction that Gbao aided and abetted the crimes) required a finding as to his position of leadership.

128. Concerning the issue of Gbao potentially serving a sentence in a foreign country, the Trial Chamber agreed with our submission that this should be taken into account, but

¹¹⁵ Transcript, Jaganathan, 20 June 2006, p. 25-26; *also see* Gbao Appellant Brief, para. 348.

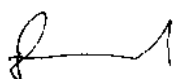
¹¹⁶ Trial Judgement, para. 657, which described what constituted the RUF High Command. Kallon at the time of the UNAMSIL conflict was a member of the High Command, as he was Battleground commander. *See* Trial Judgement, para. 2285.

¹¹⁷ *See* Exhibit 20.

appeared to find it did not have the authority to do so.¹¹⁸ We submit that it did possess that authority. Finally, the Prosecution objected to the Gbao Defence reference to the 13 year average sentence for JCE at the ICTY, claiming it was not a complete study and based on only some cases.¹¹⁹ It appears that the Prosecution are incorrect.¹²⁰ Additionally, the academic article clearly has no binding value on the Special Court (or any court, for that matter). We offer the academic study simply for the Appeals Chamber consideration

129. We maintain our original objection to the disproportionate sentence. While we believe all of Gbao's convictions should be reversed, should the Appeals Chamber nevertheless find otherwise, we adopt and support the statement from Justice Boutet in his Dissent: "my learned colleagues have overstated the culpable criminal conduct of Augustine Gbao".¹²¹

Filed in Freetown, 29 June 2009



John Carmegh



Scott Martin

¹¹⁸ Gbao Appellant Brief, paras. 401-404.

¹¹⁹ See Prosecution Response, para. 9.58.

¹²⁰ The article referenced appeared to consider the sentences of all Accused up until August 2008. Barbara Hola, Alette Smeulers, and Catrien Bijleveld, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice", *Leiden Journal of International Law*, 22 (2009) p. 83, fn 27, 28.

¹²¹ *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-T-1251, Sentencing Judgment (TC), 8 April 2009, Separate and Dissenting Opinion of Justice Pierre G. Boutet, para. 3. This statement was in relation to the Sentence imposed regarding the UNAMSIL conflict.

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RUF EXHIBITS

Exhibit 20.

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