Obscuring Joint Criminal Enterprise Liability: The Conviction of Augustine Gbao by the Special Court of Sierra Leone

By
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INTRODUCTION

Joint criminal enterprise, or JCE, is an important concept in international criminal law. The development of JCE has been controversial from the beginning, and many scholars have called for limited and cautious application of a principle that could lead to "guilt by association."[1] Indeed, one scholar argues that the JCE doctrine has the potential "to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened."[2] This note does not argue for or against the JCE principle as a concept when it is correctly applied by judges. However, it does discuss how the recent application of joint criminal enterprise by the Special Court for Sierra Leone ("SCSL"), in its conviction of Augustine Gbao, demonstrates the consequences of taking JCE liability too far—beyond the edges of the law.

This note begins by briefly discussing the current doctrine for joint criminal enterprise liability. It then examines the doctrine's application by the SCSL, and argues that the Court's recent decision to bifurcate the requirement of a common

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1. *See* Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005), Mark Osiel, *The Banality of Good: Aligning Incentives Against, Mass Atrocity*, 105 COLUM. L. REV. 1751, 1796 – 1803 (2005); Harmen van der Wilt, *Joint Criminal Enterprise: Possibilities and Limitations,*5 J. INT'L CRIM. JUST. 91 (2006). Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise,* 5 J. INT'L CRIM. JUST. 69 (2006).

2. Danner and Martinez, *supra* note 1 at 132. They argue, "Over-expansive doctrines, unbridled prosecutorial discretion, and unpersuasive judicial decision making may still doom international criminal adjudication." *Id.* at 143.

plan into two elements, a non-criminal objective and a criminal means, facilitated a misapplication of the law by the Appeals Chamber and the subsequent wrongful conviction of Gbao. The bifurcation decision supported an overly broad and elastic JCE pleading. Based on this broad pleading, the SCSL convicted Gbao for crimes he did not intend to commit. This judicial mistake, in turn, has had disastrous effects for the accused and threatens the legitimacy of international criminal law.[3]

JOINT CRIMINAL ENTERPRISE

Before these criticisms can be explored with regards to the SCSL, it is important to understand the basics of JCE liability. A "joint criminal enterprise" is not an element of a crime. Rather, joint criminal enterprise is a mode of liability whereby members are attributed with criminal culpability for crimes committed in furtherance of a common purpose, or crimes that are a foreseeable result of undertaking a common purpose.[4] There are three different forms of JCE: the "basic" form ("JCE I"), the "systemic" form ("JCE II"), and the "extended" form ("JCE III").[5] All forms of JCE share a common *actus reus*, consisting of the following elements:

A plurality of persons acting in concert;[6]

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3. This article focuses on the decision and rationale of the Judges in Trial Chamber I and the Appeals Chamber at the SCSL. It is important to note, however, that part of the onus of this incorrect decision rests with the Prosecution. The Prosecution has an obligation to serve as an instrument of justice and only prosecute on the basis of already established law. The Prosecution acknowledged that the Trial Chamber's reasoning may not be based on current law, yet moved ahead in its arguments for conviction regardless. Prosecutor v. Sesay, Kallon, and Gbao, Case no. SCSL-04-15-A (Appeals Chamber), Judgment, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, ¶ 19, (Oct. 26, 2009) (hereinafter "*RUF* Appeal Judgment, Fisher Dissent") (internal citations omitted) ("this dearth of jurisprudential support was acknowledged by the Prosecution which admitted at the Appeal Hearing that there 'may be no authority' in international criminal law in which the means rea element for JCE is characterized or applied as the Trial Chamber applied it to Gbao.").

4. The ICTY Appeals Chamber first recognized JCE as a mode of liability under customary international law in Prosecutor v. Tadić, Case No. IT-94-1-A (Appeals Chamber), Judgment, ¶¶ 189-229 (July 15, 1999) (hereinafter "*Tadić* Appeal Judgment"). *See also* Prosecutor v. Brđanin, Case No. IT-99-36-A (Appeals Chamber), Decision on Interlocutory Appeal, ¶ 5 (Mar. 19, 2004). Joint criminal enterprise is considered a form of "committing," included in Article 6.1 of the SCSL Statute. Prosecutor v. Sesay, Kallon, and Gbao, Case no. SCSL-04-15-T (Trial Chamber), Judgment, ¶ 252, (March 2, 2009) (hereinafter "*RUF* Trial Chamber Judgment"). *See also* Prosecutor v. Krajišnik, Case No. IT-00-39-T, Appeals Judgment, ¶ 11 (Mar. 17, 2008) (Shahabuddeen, J., separate opinion).

5. *Tadić* Appeal Judgment, ¶ 190; Prosecutor v. Vasiljević, Case No. Case No. IT-98-32-A (Appeals Chamber), Judgment, ¶ 95 (Feb. 25, 2004) (hereinafter "*Vasiljević* Appeal Judgment"); Prosecutor v. Stakić, Case No. IT-97-24-A (Appeals Chamber), Judgment, ¶ 62 (March 22, 2006); Prosecutor v. Milan Milutinović, Nikola Sainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction-Joint Criminal Enterprise, ¶¶ 20, 443 (May 21, 2009).

6. *Tadić* Appeal Judgment, ¶ 227; Prosecutor v. Krajišnik, Case No. IT-00-39-T (Trial

The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;[7] and

The Accused "significantly" contributied to the common plan, design, or purpose.[8]

The three forms of JCE differ according to the *mens rea* of the Accused. JCE I liability attaches when an Accused intended to participate in a JCE and intended the commission of a crime or crimes to further the JCE's common plan.[9] The Accused can be held liable for a crime even if he was not directly involved in its physical perpetration, as long as his contribution to its commission was "significant."[10] JCE II requires that the Accused had personal knowledge of a system of ill-treatment and intended to further that system.[11] The Trial Chamber hearing the case against members of the Revolutionary United Front ("RUF") rejected this form of JCE as a possible mode of liability in the RUF case because it was not properly pleaded.[12]

JCE III is a constructive form of liability.[13] Once it has been established that an Accused was a member of a JCE, he can be held liable for unintended but foreseeable crimes that were committed in furtherance of the JCE's common plan.[14] For both JCE I and JCE III, the Accused and all members of the JCE must intend to participate in the same common criminal plan. This means that all members of the JCE must share the same intent. JCE III extends liability for crimes committed outside the common criminal plan that were committed in furtherance of the common plan and were a natural and foreseeable consequence of that plan.[15] This point is key to understanding the fallacy of the SCSL's

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Chamber), Judgment, ¶ 884 (Sept. 27, 2009).

7. *Tadić* Appeal Judgment, ¶ 227.

8. *Id.*; Prosecutor v. Brđanin, Case No. IT-99-36-A (Appeals Chamber), Judgment, ¶ 430 (Apr. 3, 2007) (hereinafter "*Brđanin* Appeal Judgment"), citing Prosecutor v. Kvočka, Radić, Žigić and Prcać, Case No. IT-98-30/1-A (Appeals Chamber), Judgment, ¶¶ 97-98 (Feb. 28, 2005).

9. *Brđanin* Appeal Judgment, ¶ 365, 430-431. See also *Vasiljević* Appeal Judgment, ¶ 101.

10. The *Tadić* appeal judgment explains JCE I as involving cases where: "where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design . . . they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proved to have, effected the killing are as follows: (i) The accused must voluntarily participate in one aspect of the common design (for instance … providing material assistance to or facilitate the activities of his co-perpetration), and (ii) The accused, even if not personally effecting the killing, must nevertheless intend the result." *Tadić* Appeal Judgment, ¶ 196.

11. *Id.*, ¶ 228.

12. *RUF* Trial Chamber Judgment, ¶ 385.

13. David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 87 (2006) ("Liability is 'constructive' because the actus reus and mens rea that establish liability fall outside the ordinary legal definition of the crime.").

14. *Brđanin* Appeals Judgment, ¶ 410-413.

15. According to the *Tadić* Appeal Judgment, JCE III arises in cases "involving a common

reasoning in convicting Gbao. As explained below, in that case the SCSL used the less stringent definition of *mens rea* found in JCE III to convict Gbao of crimes under a JCE I theory of liability.

Joint criminal enterprise is a theory of liability that has been widely applied by international criminal tribunals and roundly criticized by scholars, defense attorneys, and other practitioners. These critics argue that JCE, without careful and limited application by judges and prosecutors, can violate the fair trial rights of defendants[16] or allow prosecutors to get around *mens rea* requirements for serious specific intent crimes such as genocide.[17] Proponents of JCE argue that it is necessary to allow prosecution of those most responsible for international atrocity crimes: persons often far removed from the actual commission of the crime, but responsible for them nevertheless.[18] However, JCE cannot serve its intended purpose if judges at the highest level of international criminal court apply it incorrectly. Below, this article describes the misapplication of JCE law at the SCSL. It then argues that this misapplication threatens the legitimacy of international criminal law and confirms scholars' warnings of the consequences of not limiting or reigning in the use of JCE.

THE SCSL: MISCONSTRUING JCE

The Special Court for Sierra Leone was established in 2002.[19] Distinct from the *ad hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR"), the SCSL is a hybrid tribunal, which incorporates aspects of Sierra Leonean law into its statute and is located in Sierra Leone.[20] The SCSL operates on a "shoe-string budget" and is mandated to "prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[21] As such, the SCSL has only conducted four trials: three trials for the leaders of the three armed groups operating during the Sierra Leone civil war, the Civil Defence Forces ("CDF"), the Revolutionary United Front

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design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose." *Tadić* Appeal Judgment, ¶ 204.

16. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 293 (Oxford, 2005); Osiel, *supra* note 1 at 1803.

17. Mettraux, *supra* note 16 at 265; Osiel, *supra* note 1 at 1796.

18. *See, e.g.,* Mettraux, *supra* note 16 at 292; Osiel, *supra* note 1 at 1786-1790.

19. Statute of the Special Court for Sierra Leone, Jan. 16, 2002, U.N. Doc. S/RES/1315, available at http://specialcourt.org/documents/index1.html. ("SCSL Statute").

20. *Id.* However, the SCSL has never applied any Sierra Leonean law in any of its decisions or judgments, and the trial of Charles Taylor is being held in The Hague due to security concerns. Prosecutor v. Taylor, Case No. SCSL-03-01-PT, Order Changing Venue of Proceedings, (June19, 2006).

21. SCSL Statute, art. 1.

("RUF"), and the Armed Forces Revolutionary Council ("AFRC"); and one trial for the former president of Liberia, Charles Taylor. In spite of the limited budget and timeframe of the tribunal, the Prosecutor issued broad indictments in the RUF, AFRC, and Taylor cases for multiple crimes committed throughout the entire territory of Sierra Leone over a span of six years, and grouped all of them under the theory that these Accused participated a single, unified joint criminal enterprise.[22]

The JCE pleading was broad and vague, and became controversial in the first rebel-group trial,[23] the AFRC case.[24] The SCSL AFRC Appeals Judgment determined that a JCE's common purpose could be comprised of a non-criminal objective and a "contemplated" criminal means. As will be demonstrated below, the erroneous decision in the RUF case stems in part from this bifurcation of the common criminal purpose into an objective and a "contemplated" means.

In the AFRC Trial Chamber Judgment, the Trial Chamber held that joint criminal enterprise had not been properly pleaded by the Prosecution, and as such, no JCE liability attached to any of the three Accused.[25] The court reasoned that the Prosecution had not adequately specified the nature or purpose of the JCE in its indictment, and therefore, the Accused did not have sufficient notice of the case against them.[26] Specifically, the Trial Chamber held that the alleged common purpose, "'to take actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond

22. Indictments for the two rebel groups and Taylor all alleged that the accused participated in a common plan to "take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas." Prosecutor v. Taylor, Case No. SCSL-03-01-I-01, Original Indictment, ¶ 23 (Mar. 7, 2003); Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-PT, Indictment, ¶ 33 (Feb. 5, 2004) (common purpose to "take any actions to gain and exercise political power and control over the territory of Sierra Leone"); Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-PT, Corrected Amended Consolidated Indictment, ¶ 36 (Aug. 2, 2006) (common purpose to "take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas"). This use of prosecutorial discretion to allege these kinds of broad, over-arching JCE allegations that scholars warned against as dangerous for the integrity of this mode of liability. Osiel, *supra* note 1 at 1799-1802, Danner and Martinez *supra* note 1 at 135-46. For another critique of the pleadings at the SCSL, see Cecily Rose, *Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-based Crimes*, 7 J. INT'L CRIM. JUST. 353 (2009).

23. As distinct from the trial of the CDF forces.

24. *See* Rose *supra* note 22.

25. Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-T (Trial Chamber), Judgment, ¶ 85 (June 20, 2007) (hereinafter "*AFRC* Trial Judgment"). The Trial Chamber did find all three accused guilty for eleven counts, just under different theories of liability. *Id.*, ¶¶ 2113, 2114, 2117, 2118, 2121, 2122.

26. *Id.*, ¶¶ 71, 81. Demonstrating the often-disjointed jurisprudence at the SCSL, this holding directly contradicted a holding by Trial Chamber I, serving as the AFRC Pre-Trial Chamber, that the indictment had properly pleaded JCE liability. Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, ¶¶ 51-52 (Apr. 1, 2004).

mining areas," is not a criminal purpose recognized by the Statute. According to the Court, the common purpose pleaded in the indictment did not contain a crime under the Special Court's jurisdiction."[27]

Importantly, and key to the application of JCE in the RUF trial, the AFRC Trial Chamber took issue with the Prosecution's pleading JCE I and JCE III in the alternative.[28] The Court rejected the logic of this approach, reasoning: "if the charged crimes are allegedly within the common purpose, they can logically no longer be a reasonably foreseeable consequence of the same purpose and vice versa."[29] The Trial Chamber concluded that it was inherently problematic to plead that criminal acts were a naturally foreseeable consequence of a joint criminal enterprise to take political control of a country.[30] Such a pleading asked the Trial Chamber to find the existence of two JCEs—one that included all of the crimes in the indictment as criminal means towards a common purpose, and/or one that included only some crimes as part of the JCE, and other crimes as merely consequences of that JCE—without having specified this in the indictment.

The Appeals Chamber, overturned the Trial Chamber, holding that as long as the Accused contemplated crimes within the statute as the means to achieve a non-criminal objective, JCE liability could apply.[31] The Appeals Chamber held that "[t]he objective and the means to achieve the objective constitute the common design or plan."[32] The Appeals Chamber thus concluded, "the requirement that the common plan, design, or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective."[33]

The Appeals Chamber also rejected the Trial Chamber's conclusion that JCE I and JCE III should not have been pleaded in the alternative.[34] The Appeals Chamber reasoned that pleading basic and extended forms of JCE in the alternative "is now a well-established practice in the international criminal

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27. *AFRC* Trial Judgment, ¶ 67. The Court relied in part on an SCSL Appeals Chamber decision affirming, "[t]here is no rule against rebellion in international law." AFRC Trial Judgment, ¶ 67, *citing* Prosecutor v. Kallon and Kamara, Case No. SCSL-2004-15-AR72(E)/ SCSL-2004-16-AR72(E), Decisions on Challenge to Jurisdiction: Lome Accord Amnesty, ¶ 20.

28. The Prosecution pleaded that "the crimes in this Indictment . . . were either *actions within* the joint criminal enterprise or were a *reasonably foreseeable consequence* of the joint criminal enterprise." (emphasis in the original) *AFRC* Trial Chamber Judgment, ¶ 71, *citing* Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-PT, Indictment, ¶ 34 (Feb. 5, 2004),

29. *AFRC* Trial Judgment, ¶ 71.

30. *Id.*, ¶ 72.

31. Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-A (Appeals Chamber), Judgment, ¶ 76 (Feb. 22, 2008) (hereinafter "AFRC Appeals Judgment"),.

32. *Id.*, ¶ 76.

33. *Id.*, ¶ 80.

34. *Id.*, ¶ 85.

tribunals."[35] However, the Appeals Chamber did not take note of the fact that the Trial Chamber was not holding that the practice *itself* was incorrect, but instead was limiting its conclusions to the specifics of the AFRC pleading, and reasoning that pleading JCE III *in this form* would risk criminalizing acts of rebellion.[36] The Appeals Chamber failed to address the serious error the Trial Chamber warned against: that it is logically impossible that members of a JCE can simultaneously intend and not intend a crime.

In short, the SCSL Appeals Chamber held that the common purpose required for joint criminal enterprise liability could be bifurcated into a non-criminal objective which the Accused contemplated achieving through criminal means. The Appeals Chamber allowed the Prosecution to plead an overly broad formulation of JCE common purpose by permitting them to lump the non-criminal objective of rebellion together with vague and unspecified "criminal means" into a common purpose. By permitting equivocal pleadings, this holding also facilitated the RUF Trial Chamber to apply faulty logic in its conviction of Augustine Gbao. This recent and unsound jurisprudence could have been avoided had the Appeals Chamber upheld the AFRC Trial Chamber's Judgment and required more specific JCE pleadings from the SCSL Prosecution.

THE RUF CASE: JCE MISAPPLIED

In the RUF case, the Prosecution alleged that the three Accused, leaders of the rebel group that started Sierra Leone's civil war, were guilty of crimes committed throughout the entire country as part of a joint criminal enterprise. By a majority, the Trial Chamber convicted all three Accused of war crimes and crimes against humanity stemming from their participation in a single JCE with the common criminal purpose to take power and control of Sierra Leone through commission the crimes alleged by the Prosecution in counts 1 – 14 of the indictment.[37] Applying the bifurcation rationale propounded by the Appeals Chamber in the AFRC case, the Trial Chamber reasoned that the Accuseds' objective of taking control of Sierra Leone

in and of itself is not criminal and therefore does not amount to a common purpose within the meaning of the law of joint criminal enterprise. . . . However, where the taking of power and control over State territory is *intended* to be implemented through the commission of crimes within the statute, this

35. *Id.*, ¶ 85; *citing* Prosecutor v. Karemera, Case No. ICTR-97-24, International Criminal Tribunal for Rwanda, Amended Indictment, ¶ 7 (Feb. 23, 2005); Prosecutor v. Mpambara, Case No. ICTR-01-65, International Criminal Tribunal for Rwanda, Amended Indictment, ¶ 6 (Mar. 7, 2005); Prosecutor v. Brđanin, Case No. IT-99-36, Sixth Amended Indictment, ¶ 27 (Dec. 9, 2003); Prosecutor v. Milošević, Case No. IT-02-54, Amended Indictment (Bosnia), ¶ 6, 8; Prosecutor v. Krajišnik and Plavšić, Case No. IT-00-39 & 40, Amended Consolidated Indictment, ¶ 5 (Mar. 7, 2002).

36. *AFRC* Appeals Judgment, ¶ 85; *c.f. AFRC* Trial Judgment, ¶¶ 71-72.

37. *AFRC* Appeal Judgment, ¶ 305, *RUF* Trial Chamber Judgment, ¶¶ 1979-1985.

may amount to a common criminal purpose.[38]

The bifurcation involves a single common purpose that includes two elements: one, taking control of the entire territory of Sierra Leone, and two, the intent to take power through the commission of crimes in counts 1 – 14 of the indictment. There was one JCE, with a broad and comprehensive common purpose. The Trial Chamber convicted Gbao on JCE liability by a majority, with Justice Boutet dissenting.[39] The majority convicted Gbao on the basis of JCE I for crimes committed throughout the territory of Sierra Leone,[40] even though it specifically found that he did not intend the crimes committed in three districts in Sierra Leone.[41] It reasoned that, because Gbao intended some crimes in Kailahun district, he was a member of the JCE, and therefore was guilty under JCE I for all of the crimes committed within the common purpose.[42] It also reasoned, later in the judgment, that Gbao did not intend crimes committed in Bo, Kenema, or Kono districts, but that he willingly took the risk that these crimes would be committed by other members of the JCE in furtherance of its common purpose.[43]

In order to be convicted on the basis of JCE I, an Accused must have intended the crimes that comprise the common criminal purpose. In the RUF case, that common purpose included all of the crimes Gbao was accused of,

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38. *RUF* Trial Chamber Judgment, ¶ 1979 (emphasis added). Whereas the Appeals Chamber in the AFRC trial had originally used the word "contemplate," to describe the means of the JCE's common purpose, the Trial Chamber further compounded the problematic bifurcation of the common purpose by using the word "intended." Although some might argue that this holding simply means the JCE members agreed that particular crimes would be used to achieve the objective, the use of terms such as "contemplate" and "intend" to describe the common purpose potentially blurs the distinction between the actus reus and the mens rea required for establishing joint criminal enterprise liability.

39. *Id.*, ¶ 1990; Prosecutor v. Sesay, Kallon, and Gbao, Case no. SCSL-04-15-T (Trial Chamber), Judgment, Dissenting Opinion of Justice Pierre G. Boutet, ¶ 252, (March 2, 2009) (hereinafter "*RUF* Trial Chamber Judgment, Boutet Dissent"). Boutet took a narrow position, arguing that Gbao's actions did not constitute a "significant" contribution, and opined that there was reasonable doubt as to whether Gbao had intended to participate in the JCE in the first place. *RUF* Trial Chamber Judgment, Boutet Dissent, ¶¶ 5-15. Accordingly, Boutet found that Gbao did not participate in the JCE or significantly contribute to the JCE. *RUF* Trial Chamber Judgment, Boutet Dissent, ¶ 23.

40. *RUF* Appeals Judgment ¶ 305 ("The Majority found that Gbao was a participant in the JCE"); *RUF* Trial Chamber Judgment, ¶ 1990.

41. *RUF* Trial Chamber Judgment, ¶¶ 2040 ("Gbao did not share the intent of the principal perpetrators to committed the crimes committed against civilians under Counts 3 to 5 (unlawful killings), and Count 14 (pillage) in Bo District in furtherance of the joint criminal enterprise"), 2048 (Regarding Bo district, the Trial Chamber found that "Gbao willingly took the risk that the crimes charged and proved … *which he did not intend as a means of achieving the common purpose*, might be committed by other members of the joint criminal enterprise or persons under their control") (emphasis added); 2060 (repeating its finding for Kenema District); 2109 (repeating its finding for Kono District) .

42. *RUF* Appeal Judgment, Fisher Dissent, ¶ 22, *citing* Trial Transcript, 3 September 2009, at 194 (lines 13 – 29), 195 (lines 1-2).

43. *RUF* Trial Chamber Judgment, ¶¶ 2048, 2060, 2109.

meaning that the Trial Chamber necessarily needed to find that he intended to commit all of those crimes, in all districts of Sierra Leone. However, through a misapplication of the law of JCE, the Trial Chamber simultaneously found that Gbao intended to commit all of the crimes in counts 1 – 14 of the indictment, but that he did not intend for other members of the JCE to commit crimes in three districts of Sierra Leone. In short, the Trial Chamber found that Gbao did not share the intent for certain crimes in the JCE, an important element of the JCE I *mens rea*, but wrongly convicted him for those crimes anyway. The Appeals Chamber, by a majority, upheld this finding.[44]

On Appeal, Gbao argued that the Trial Chamber erred in fact by finding him individually criminally responsible for crimes in Bo, Kenema, and Kono by applying the *mens rea* standard for JCE III to crimes that were already found to be part of the JCE under JCE I in all locations in Sierra Leone.[45] This is essentially the scenario that the AFRC Trial Chamber had tried to avoid in the AFRC Judgment.[46] Gbao also argued that, because the Trial Chamber found that he did not have intent for the crimes committed in Bo, Kenema, and Kono, he was therefore not guilty under JCE of those crimes.[47] These arguments were dismissed out of hand by the Appeals Chamber majority, who opted to discuss the issue only because it was "opportune for the Chamber to adumbrate on the developing concept of Joint Criminal Enterprise liability in International Humanitarian Law."[48]

In his concurring opinion, Justice Ayoola emphasized the fact that there existed only one JCE, "a single systematic campaign manifesting throughout Sierra Leone."[49] The Trial Chamber found that the JCE was broad and comprehensive.[50] This is important because it means that the Trial Chamber did not find a number of distinct JCEs, nor did it find that there existed a JCE in which some crimes were intended as part of the common purpose and others were foreseeable consequences. Under current standards of international criminal law on the basic form of JCE, an Accused must intend all of the crimes committed within the common criminal purpose. Accordingly, to be held liable,

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44. *RUF* Appeal Judgment, ¶¶ 492 – 495.

45. Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-A, Public Noice of Appeal for Augustine Gbao, ¶¶ 52 – 54 (Apr. 28, 2009).

46. *See supra*, notes 28-33 and surrounding text.

47. *Id.*, ¶¶ 55 – 56.

48. *RUF* Appeal Judgment, ¶ 481. The use of the word "adumbrate" is particularly appropriate, since the concept of JCE that the Appeals Chamber articulates is indeed only a vague outline and definitely serves to obscure the true nature of the law.

49. Prosecutor v. Sesay, Kallon, and Gbao, Case no. SCSL-04-15-A (Appeals Chamber), Judgment, Separate Opinion of Justice Emmanuel Ayoola in respect of Gbao's Sub-Ground 8(j) and 8(K), ¶¶ 9, 11, (Oct. 26, 2009).

50. The Trial Chamber did not adopt the Prosecution's alternative pleading that some crimes were part of the JCE (Counts 1, 2, 12, 13 and 14) and other crimes were a foreseeable consequence of it (Counts 3 – 11), which might have allowed for a correct differentiation between JCE I and JCE III crimes. *RUF* Trial Chamber Judgment, ¶¶ 387, 389.

Gbao must have intended to commit all of the crimes in that single JCE.

However, the Trial Chamber found Gbao *did not* intend to commit the crimes in the JCE, but convicted him on JCE I anyway, using the JCE III definition of *mens rea*. Because of the constructive nature of JCE III, an accused cannot be convicted of crimes *within* the JCE that he did not intend but that were foreseeable–this mode only attaches for crimes that are *outside* the common purpose. Because of the way the JCE was pleaded, and because the Trial Chamber found that the common criminal purpose included all of the crimes in Counts 1 - 14, by law Gbao could only be found liable for those crimes based on JCE I. Based on the bifurcation of common purpose at the SCSL, by intending the common criminal purpose (to take control over Sierra Leone), Gbao by definition intended the means contemplated to achieve that common purpose (all of the crimes alleged in Counts 1 – 14 that were committed throughout the territory of Sierra Leone). Therefore, the discussion of Gbao's *mens rea* should have been limited to JCE I. Contravening this principle, the Trial Chamber found specifically that Gbao did not intend the crimes in Bo, Kenema, and Kono, but convicted him on the ground that these crimes were foreseeable and that he took the risk that they would be committed in furtherance of the common criminal purpose.[51] In reaching this conclusion, the Trial Chamber majority and the Appeals Chamber majority created a legal impossibility.[52]

In convicting Gbao, the Trial Chamber and the Appeals Chamber majorities collapsed the distinction between JCE I and JCE III.[53] The two Chambers found that Gbao did not share the intent with the rest of the JCE members for crimes falling under the JCE I. It was erroneous to adjudge him guilty. In a dissent joined by President Winter, Justice Fisher explained that the Appeals Chamber upheld and adopted the Trial Chamber's circular rationale by reasoning that, because the Trial Chamber found that Gbao was a member of the JCE, and therefore intended the common criminal purpose, he was guilty for all crimes committed by members of the JCE that he *either* intended, or that were naturally foreseeable.[54] This finding has no basis in customary international law and is therefore invalid. Indeed, as Justice Fisher warns, "this reasoning is not only circular, but dangerous."[55]

CONSEQUENCES: DISTORTING INTERNATIONAL CRIMINAL LAW

The reasoning exhibited by the tribunals, discussed above, is truly

51. For the crimes in Bo, Kenema, and Kono, Gbao was found guilty of 63 criminal acts and the ongoing crimes of sexual slavery and forced marriage. *RUF* Appeal Judgment, Fisher Dissent, ¶ 16.

52. *Id.*, ¶¶ 16, 25.

53. *Id.*, ¶ 19.

54. *AFRC* Appeals Judgment, ¶ 492 (emphasis added); *RUF* Appeal Judgment, Fisher Dissent, ¶ 17.

55. *RUF* Appeal Judgment, Fisher Dissent, ¶ 18.

dangerous. Many negative consequences arise from this jurisprudence. First, according to Justice Fisher, it extends JCE liability to the point where it "blatantly violates the principle of *nullum crimen sine lege* because it imposes criminal responsibility without legal support in customary international law applicable at the time of the offence."[56] Secondly, it sets a precedent for the trial of Charles Taylor, who, the Prosecution alleges, participated in a joint criminal enterprise, along with the RUF, to take control of Sierra Leone by criminal means.[57] If the SCSL applies this flawed logic in Taylor's case, another wrongful conviction could result. Moreover, it exemplifies the type of overly broad application of JCE that scholars have warned against, and undermines the legitimacy of international criminal law.[58] International criminal law endeavors to provide the world justice and accountability for horrible crimes. However, these goals are directly undermined if tribunals unjustly and incorrectly apply the laws they are supposed to be upholding. If this type of reasoning is propounded in other cases and adopted by other chambers, it will threaten the very foundations of international criminal law because it's inherent errors run against the right to fair and just trials. Finally, and most seriously, Gbao was convicted and sentenced to twenty-five years in prison based on a faulty decision, and this is a miscarriage of justice.

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56. *RU*F Appeal Judgment, Fisher Dissent, ¶ 19. Fisher notes that "the Majority makes no effort to reason why it considers that this extension of JCE liability was part of the law to which Gbao was subject at the time these offences were committed and it fails to cite a single case in which this extension of liability is recognized as part of customary international law. This dearth of jurisprudential support was acknowledged by the Prosecution which admitted at the Appeal Hearing that there 'may be no authority' in international criminal law in which the mens rea element for JCE is characterized or applied as the Trial Chamber applied it to Gbao." *Id*., *citing* Transcript, Appeal Hearing, (Dr. Christopher Staker), 3 September 2009, pp. 196, 197.

57. However, when faced with interpreting the Prosecution's JCE allegations in that case, which are nearly identical to those in the RUF case, Trial Chamber II held, and the Appeals Chamber confirmed, that Taylor is in fact accused of participating in a joint criminal enterprise with the common purpose to terrorize the civilian population of Sierra Leone. Prosecutor v. Taylor, Case No. SCSL-03-01-T- 751 (Trial Chamber), Decision on Public Urgent Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment (J. Lussick, dissenting) (Feb. 27, 2009); Prosecutor v. Taylor, Case No. SCSL-03-01-T- 775 (Appeals Chamber), Decision on "Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment", ¶ 15 (May 1, 1009).

58. *See supra* note 1 and surrounding text.