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## I.Lawyer (A blog on International Justice)

Wednesday, 27 June 2012

### Charles Taylor, JCE and Letting Sleeping Dogs Lie

By Wayne Jordash



*(Photo: Evert-Jan Daniels AP)*

Charles Taylor was convicted on all 11 counts of an indictment that charged the Accused with five counts of crimes against humanity; in particular: murder, rape, sexual slavery, other inhumane acts, and enslavement. In addition to the crimes against humanity, he was also convicted on five counts of violating Article 3 Common to the Geneva Conventions and Additional Protocol II, punishable under Article 3 of the Statute, for acts of terrorism, violence to life, health and physical or mental well-being of persons, in particular murder, outrages upon personal dignity, violence to life, health and physical or mental well-being of persons, in particular cruel treatment, and pillage. The remaining count, on which Taylor was also found guilty, was that of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, a serious violation of international humanitarian law punishable under Article 4 of the Statute.

Although the Prosecution had alleged liability on the basis of 'joint criminal enterprise' (JCE) for all of the crimes in the indictment, the Trial Chamber found no such liability. Most of Mr. Taylor's convictions were rendered on the basis of aiding and abetting crimes, under Article 6(1) of the Statute. He was found guilty under this mode of liability for the majority of conduct that fell within Counts 1 – 11. He was also found guilty for the remaining conduct, under the same counts, on the basis of planning the commission of specified crimes following attacks in three districts of Sierra Leone between December 1998 and February 1999.

The Trial Chamber passed a sentence of 50 years. As reported in this blog on 30 May 2012 this sentence was worryingly incongruous with finding Taylor responsible for the majority of the crimes as a secondary participant. It involved explicitly removing the distinction between the more direct modes of participation (such as perpetrating a crime, committing crimes as a member of a joint criminal enterprise ("JCE") or ordering a crime) and Mr. Taylor's convictions for aiding and abetting. This being so, why didn't the Trial Chamber convict Taylor on one of these more direct bases?

## Some non-starters: superior responsibility, planning, & ordering

An analysis of the Judgment and the facts of the case show that, for the vast majority of the crimes, the evidence could not begin to sustain other more direct modes, such as ordering (e.g., 6979 of the Judgment) or planning (e.g., 6977). Whilst it is true that Mr. Taylor was convicted for planning *certain* crimes following attacks in three Districts of Sierra Leone between December 1998 and February 1999 (e.g., 6977), the analysis, to put it mildly, is less than convincing and is one of the weakest parts of the Judgment (e.g., 3099 – 3130).

Whether this is correct or not, it is clear from the voluminous 2500 page judgment, setting out, it seems, every last piece of evidence, that Mr. Taylor's role, geographically and organizationally, was simply too remote to amount to proof of intentionally designing the acts that constituted the crimes, a prerequisite for a finding of planning for the remainder of the crimes.

Similarly, this remoteness, as well as the nature of Mr. Taylor's relationship with the rebels, removed any real prospect of a conviction pursuant to superior responsibility or ordering. As noted by the Trial Chamber, the "substantial influence" that Mr. Taylor had over the RUF, and to a lesser extent the AFRC, was not the same as effective control (e.g., 6985 – 6992). In reality, since the case commenced, no one but the Prosecution considered superior responsibility or ordering to be a fair summation or an accurate reflection or manifestation of Mr. Taylor's relationship with the ground commanders or the direct perpetrators of the crimes.

## Why aiding & abetting, rather than JCE?

And so, buried in an overloaded indictment reflecting international criminal law's fixation with notions of evil masterminds or monsters, rather than contributions to crimes by ordinary men, was the real case against Taylor: aiding and abetting or participation through a JCE. JCE is prevalent in other cases before the SCSL, which are closely related to the *Taylor* case. Given that Mr. Taylor was found in those cases to have been part of the joint criminal enterprise, with the same alleged aim of gaining power and control in Sierra Leone, the Trial Chamber's rejection of JCE in *Taylor* begs obvious questions.

In a judgment of 7000 paragraphs, the Chamber ruled out applying JCE in a paltry fourteen paragraphs (6893 – 6906). In a further, similarly scant analysis, it sought to explain why aiding and abetting was the more appropriate mode of liability (6907 – 6958).



(Photo: AP Pool/P. Dejong)

The Chamber noted that “[w]hile the relationship [between the Accused and the rebels] was a mutually beneficial one, the Trial Chamber... [was]... of the view that it was the expression of “converging and synergistic interests”, rather than a common plan to terrorize the civilian population of Sierra Leone (6901). According to the Trial Chamber the support provided by Mr. Taylor, rather than being provided pursuant “to a common plan to terrorize the civilian population of Sierra Leone [...] indicates that there was a *quid pro quo* in the relations between the RUF and the Accused. The trading of diamonds for arms is the clearest example, and a number of statements attributed to the Accused indicate the interest he had in providing weapons or facilitating the provision of weapons to the RUF in exchange for diamonds”. The Trial Chamber found that “the Accused and the RUF were military allies and trading partners, but it is an insufficient basis to find beyond a reasonable doubt that the Accused was part of any JCE” (6905).

### **But still no answers...**

The Trial Chamber’s justification provides no meaningful answers to the critical issues. Of the fourteen paragraphs of analysis, only four addressed the substance of the issue: whether Mr. Taylor’s contributions evinced a shared intention to pursue the common purpose within the indictment period (6900, 6901, 6904 and 6905) (or, as per the SCSL’s novel interpretation of JCE, demonstrated that Taylor foresaw the crimes having intended to pursue the objective of seizing power). Even putting that aside, the analysis is weak at best, for two key reasons.

First, the reasoning misses the point entirely. The purpose of a JCE must either itself *be* a crime or *necessarily entail* a crime, and most criminal enterprises, prosecuted at the international criminal tribunals under the rubric of JCE, are of the latter type. That is to say, they have as their *final* objective a non-criminal objective. For example, at the ICTY, the JCEs are commonly pled as a variant of a political campaign designed to achieve a Serbian State – in particular, a joint enterprise to commit a specified crime in order to achieve that end.

The Trial Chamber found that the operational strategy of the RUF/AFRC was to “deliberately use terror against the Sierra Leonean population as a primary *modus operandi*” (6796), or put another way, “the crimes committed by the AFRC/RUF were inextricably linked to how the RUF and AFRC achieved their political and military objectives” (6799). That Mr. Taylor pursued a course of conduct designed ultimately to enable him to obtain diamonds would appear to be of little consequence when, in order to achieve that aim, the rebels, according to the Trial Chamber, had to use terror to take and hold power in Sierra Leone and Taylor’s acts were so intended.

In light of the “inextricably linked” acts of terror, Taylor and the other JCE members’ had “converging and synergistic interests” that included terror as an objective – even if only because terror was the way in which other objectives would be achieved.

If Taylor knowingly supported acts of terror, whatever his ultimate aim, this – if combined with his substantial contribution – was sufficient to underpin convictions pursuant to JCE.

This leads us to the second reason for the shortcomings in the Trial Chamber's analysis – that, on the basis of the factual findings that the Trial Chamber made (provided, of course, that they are legitimate), it *did* find that Taylor knowingly supported the JCE, and substantially contributed thereto. The composite findings that were used to underpin the convictions for aiding and abetting the majority of the crimes, and planning the remainder, are indistinguishable from those that would have justified a conviction for JCE.

In particular, Taylor was not found to have merely assisted in the commission of the crimes through the provision of weapons and arms, as might be commonly presumed by his aiding and abetting convictions. On the contrary, according to the Trial Chamber's findings, Taylor's involvement, whilst falling short of defining him as a superior with effective control or management of the organization, was as involved and sustained as any traditional JCE member and sufficient to enable an inference of a shared criminal intent. As well as Taylor's convictions for planning the January 6<sup>th</sup> 1999 attack on the capital Freetown, the most heinous mass criminal event in the history of the Sierra Leone conflict (e.g., 3099 – 3618), Taylor was found to have substantially and materially intervened in, and sustained, the operations of the RUF and AFRC in a multitude of ways.

He was found to have been, if not a decisive participant, an extremely instrumental one, providing all manner of support, facilitation, direction, advice, protection and expertise, from the beginning to the end of the 61 month indictment. This included: supplying personnel to assist with combat activities, including fighters (e.g., 4093, 4495, 4583, 4616 – 4622), providing expertise and equipment (e.g., radio technology 3665, 3804, 3834, 3885), satellite phones (e.g., 3731, 3806), operational training, e.g., 3665, 4108), other such assistance, such as a safe house (e.g., 3916-7, 4246), military and political instructions/advice, which was often followed by the RUF leadership (e.g., 3606 – 3610, 4108, 4151, 6781, 6783), as well as a dizzying array of frequent and substantial supplies (or facilitation) of arms and ammunition throughout the indictment period that "was critical in enabling the operational strategy of the RUF and AFRC during the Indictment period" (e.g., 5838 – 5845).

Moreover, the Trial Chamber found that Taylor would have known of these crimes in the six most populous districts of Sierra Leone from early on in the indictment period (30 November 1996 to 18 January 2002), at least by August 1997 (e.g., 6885 – 6892), yet continued to provide this substantial support until the end of the war in 2002.

In light of the Prosecution's stated JCE case – that the "Accused's participation in the JCE through the provision of vital instruction, direction, guidance, material, manpower, communications capability, strategic command and other support, contributed significantly to the commission of the Indictment crimes, the survival of the other JCE participants and prolonged the conflict" (6895) – the Trial Chamber's justification is difficult, if not impossible, to reconcile or understand from any straightforward legal and factual standpoint. The obvious question is: how is it possible to have been so critical or instrumental in the continued operations of the RUF/AFRC, over the whole of the indictment period, with full knowledge of the

inextricable link of those operations with heinous crimes, not to be judged to have shared the criminal intent?

In sum, the reasons given for applying aiding and abetting, rather than JCE, are weak, at best. However, it is suggested that other motivations were in play during the deliberations, which reveal the mere expedience on which this central aspect of the *Taylor* judgment was based.

### The real reason for the rejection of JCE

It is an open secret that the JCE mode of liability, if generously interpreted by a Trial Chamber, is flexible enough to find guilt in the most testing of circumstances. For the reasons noted below, this critique is especially apposite in relation to the conception of JCE that the SCSL's jurisprudence has propounded, albeit anomalously. The problems posed by this jurisprudential anomaly are the real reasons for the application, in *Taylor*, of aiding and abetting rather than JCE.



(Photo: AP)

The problem for the Trial Chamber was that, if it was going to apply the SCSL's interpretation of JCE – the view of the majority in the Appeal Chamber in *Sesay et al.* – it would have been duty bound to apply a theory of JCE that, whilst reflecting elements of a crime of aggression, has been widely and rightly discredited as not part of customary law and a violation of the principle of legality and culpability. As Justice Fisher, who is now President of the SCSL and was also a member of the Appeals Chamber in the RUF case, noted at the time that the Majority upheld Gbao's convictions:

“by holding that Gbao can be liable for crimes within the Common Criminal Purpose that he did not intend and that were only reasonably foreseeable to him... [the Majority] blatantly violates the principle *nullum crimen sine lege* because it imposes criminal responsibility without legal support in customary international law applicable at the time of the commission of the offence”.

The majority decision, she went on to observe, had “abandoned the safeguards laid down by other tribunals as reflective of customary international law.” The Gbao convictions illustrate the consequences of abandoning these safeguards: without any basis in customary international law, a man “stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and

which were not a reasonably foreseeable consequence of the crimes he did intend.” (45 of the dissent in the *RUF* Appeal Judgment).

Justice Fisher was right. The majority in the Appeals Chamber upheld the majority view in the Trial Chamber that an Accused may be found responsible pursuant to a JCE for possessing an intent to pursue a non-criminal objective with the foreseeability that crimes might be committed during the implementation of that endeavor. And such responsibility, it was held, exists even in the absence of any proof that it was actually foreseen *by the Accused* that such crimes might be committed (e.g. *RUF* Trial Judgment, Para. 1979; see also, *Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone* – *Journal of International Criminal Justice*, (May 2010) and *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone* – *Leiden Journal of International Law*, 23 (2010) for further commentary by Wayne Jordash, Scott Martin and Penelope Van Tuyl).

Had the Taylor Trial Chamber assessed Taylor’s criminal responsibility through the majority’s novel interpretation of JCE, it would have been bound to attribute crimes to Taylor that he, or other JCE members, had intended, but also make explicit findings attributing crimes that were only foreseeable – to the notional ‘reasonable person’ – from an intention to pursue the taking of power and control over Sierra Leone. In other words, the Trial Chamber would have been duty bound to also violate the principle of *nullum crimen sine lege* with deleterious consequences for the perceived robustness and ultimately the legacy of the Taylor Judgment.

Rather than grapple with the discredited majority theory, it is plain, as argued above, from a reading of the judgment that the SCSL Trial Chamber decided to duck the JCE question. This was a wise decision but not one based on the findings made. Accordingly, it is very difficult to see any justification for the choice not to convict Taylor pursuant to the SCSL’s mode of JCE liability, other than the Trial Chamber’s prudent decision to avoid international critique of the SCSL’s interpretation of JCE and avoid tainting the Taylor convictions in a way similar to those of ‘lesser’ convicted persons such as Gbao.

### **The Chamber’s approach – prudent but fair?**

This approach, whilst prudent, does raise serious questions. The problem arises upon consideration of the long sentence received by Mr. Taylor – equivalent to that of a primary participant. Having realized that the SCSL’s version of JCE, used to convict the *RUF* Accused, was so fundamentally flawed and recognized to be so, the Trial Chamber faced a dilemma: convict using the discredited version of JCE or accept that Taylor’s role must be described and sentenced as significantly less than the Accused in the SCSL’s earlier cases.

The Trial Chamber’s solution was enticingly simple: to convict for aiding and abetting, and sentence as if for JCE. Simple it may have been, but unjust in equal measure. The Trial Chamber justified this special treatment for Mr. Taylor by holding that while “aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation...” Mr.

Taylor's leadership role "puts him in a class of his own." As noted by Professor Mark Drumbl, in a compelling guest post on *Opinio Juris* on 11 June 2012, the Trial Chamber fetishized Taylor's head of state status. This enabled the sentence to be increased.

## **Conclusion**

The fact that the Trial Chamber sought to avoid JCE is more than understandable, given the SCSL's mishandling of this form of liability in previous cases, and the desire to insulate the Taylor judgment from the adoption of a flawed version of JCE and the inevitable critique. However, understandable is not the same as legally sound. To refuse to convict explicitly on a discredited version of JCE, but then to sentence as if those findings had been made, is neither good law nor a reason to celebrate, however infamous the Accused in question.

The question now remains, what happens next? The parties must file their notice of appeal on the 19 July 2012. Will the SCSL Prosecution resist the temptation to put this issue before the majority in the Appeal Chamber for them to once-again resurrect and apply their version of JCE? Had the Prosecution taken steps to avoid this in the Gbao case, perhaps, he would not now be imprisoned for the remainder of his natural life for crimes, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. Despite the obvious problems with the Taylor Trial Chamber's approach in rejecting JCE, one can only hope that the Prosecution takes the more prudent approach and let's sleeping dogs lie. This, in the circumstances, must be the wiser course, rather than providing the majority in the Appeal's Chamber with another opportunity to perpetuate its misguided and dangerous view of JCE in a case as significant as Mr. Taylor's.

### War Crimes Court Momentum : Lawmaker Joins Liberia's Prosecution on Quest



*Grand Bassa County Representative  
Jeh Byron Browne*

Monrovia - Grand Bassa County Representative Jeh Byron Browne has tabled a bill before the House of Representatives calling for the establishment of war crimes court in Liberia.

On Tuesday, Representative Browne said a war crimes court would help maintain peace and promote genuine reconciliation in Liberia. The Bassa lawmaker is seeking for the court to prosecute those who played key roles in Liberia's 14-year civil war.

"Like former President Taylor who was sentenced to 50 years in prison, after he was found guilty of aiding and abetting the civil war in Sierra Leone, there are those who aided and abided Liberia's civil war," Browne said.

"We cannot afford to see people who masquerading as reconcilers, after they have equally aided and abetted the war in this country that left hundreds of thousands of lives and millions properties destroyed."

Browne said President Ellen Johnson Sirleaf and former Independent National Patriotic Front of Liberia (INPFL) rebel leader Prince Johnson ought to appear before a war crimes court to clear their names.

"If former rebel leader Prince Johnson committed atrocities and or President Sirleaf did give US\$10,000 to facilitate Charles Taylor's rebel movement as we hear, these issues must be properly disposed of before reconciliation", said Browne. Browne's call for a war crimes court comes on the back of similar requests from other civil society members and political figures.

Last week the Executive Director of the Center for the Protection of Human Rights, T. Dempster Browne, tabled a similar bill before the legislature calling for the war crimes court establishment. Mulbah Morlu of the opposition Congress for Democratic Change has also made similar demands.