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SCSL-03-01-T  
(14400 - 14408)

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**SPECIAL COURT FOR SIERRA LEONE**

**Trial Chamber II**

**Before:** Justice Julia Sebutinde, Presiding  
Justice Richard Lussick  
Justice Teresa Doherty  
Justice El Hadji Malick Sow, Alternate

**Registrar:** Mr. Herman von Hebel

**Date:** 14 January 2008

**Case No.:** SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE	
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**THE PROSECUTOR**

-v-

**CHARLES GHANKAY TAYLOR**

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PUBLIC

**DEFENCE REPLY TO PROSECUTION RESPONSE TO URGENT DEFENCE MOTION  
REGARDING A FATAL DEFECT IN THE PROSECUTION'S SECOND AMENDED  
INDICTMENT RELATING TO THE PLEADING OF JCE**

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## I. INTRODUCTION

1. The Defence brings forth this Reply to the *Prosecution Response to Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE* filed on 7 January 2008.<sup>1</sup>
2. The Prosecution's Response avers two grounds upon which the Motion<sup>2</sup> should be dismissed: first, dismissal is said to be warranted because the Prosecution has given the Defence adequate notice of the alleged common plan, design, or purpose to commit crimes within the jurisdiction of the Court; second, the Motion is said to define "purpose" too narrowly and it impermissibly limits JCE<sup>3</sup> liability to the existence of a criminal purpose to the exclusion of liability based on the existence of a criminal plan or design.<sup>4</sup>
3. By way of this Reply, the Defence reiterates the fundamental nature of the Motion, further buttresses its jurisprudential basis and soundness, and explicates why the Prosecution's Response is devoid of merit.

## II. PRELIMINARY OBSERVATION – TIMELINESS OF THE MOTION

4. The Prosecution's Response rightly notes that the Defence does concede the untimely nature of the Motion vis-à-vis the temporal requirements of Rule 72(A) of the Rules of Procedure and Evidence ("the Rules").<sup>5</sup> However, the Prosecution's Response also acknowledges that application of the waiver principle to the Motion would be inapposite if the Court's Judgement in the AFRC case supports the proposition that certain issues, such as the pleading of JCE, may be raised (certainly considered by the Court) at any time during the proceedings.<sup>6</sup> Assuming that such support may permissibly be derived from the AFRC Judgement, the Trial Chamber may consider the Motion and the Prosecution avowedly would

<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-380, *Prosecution Response to Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 7 January 2008 ("Prosecution's Response").

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-378, *Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 14 December 2008 ("the Motion").

<sup>3</sup> "Joint Criminal Enterprise."

<sup>4</sup> Prosecution's Response, para. 7.

<sup>5</sup> Prosecution's Response, para. 3; Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 19 November 2007; See, also, <http://www.sc-sl.org/rulesofprocedureandevidence.pdf>.

<sup>6</sup> Prosecution's Response, para. 6; See, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, SCSL-04-16-T, Judgement, 20 June 2007 ("AFRC Judgement"), paras. 24–25.

not oppose such a review, especially at this early stage of the proceedings.<sup>7</sup> In the Defence's view, this is a significant concession by the Prosecution that represents a tacit acknowledgement of the legal significance and practical implications of the issues which are raised by the Motion. The Defence, therefore, again urges the Trial Chamber to receive the Motion and to consider its merits, especially at this early stage of the presentation of the evidence.

### III. LEGAL ARGUMENT

#### A. Adequacy of Notice Given to the Defence

5. The Prosecution maintains that it has provided the Defence with adequate notice of the alleged common plan, design, or purpose to commit crimes within the jurisdiction of the Court and therefore, the Motion ought to be dismissed.<sup>8</sup>
6. The adequacy of the notice is said to derive from the various iterations of the allegations in the Prosecution's initial Case Summary, its Pre-Trial Brief, its Opening Statement, the Second Amended Indictment, the Amended Case Summary, and the fulfilment of the Prosecution's disclosure obligations.<sup>9</sup>
7. The Defence does not dispute that the Prosecution has attempted to advance a JCE theory of liability through these various submissions and materials; where the dispute lies is in the legal sufficiency and propriety of the articulated mode of JCE liability, in the specific context of the criminality (rather, the lack thereof) of the alleged "common purpose." Attempting now to rely almost exclusively on paragraph 42 of the Amended Case Summary to sustain an otherwise confusing and frequently changing "common purpose" does little to apprise the Accused of the true nature and cause that he must defend in a case which has already commenced.
8. Paragraph 42 of the Amended Case Summary states:

Between about 1988 and about 18 January 2002, the Accused and others agreed upon and participated in a common plan, design or purpose to carry out a criminal campaign of terror, as charged in the Second Amended Indictment, in order to

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<sup>7</sup> Prosecution's Response, para. 6.

<sup>8</sup> Prosecution's Response, para. 7.

<sup>9</sup> Prosecution's Response, para. 8.

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pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.<sup>10</sup>

9. Ignoring for a moment the fact that the reference to 1988 in paragraph 42 of the Amended Case Summary implicates a timeframe that pre-dates the indictment period, the Prosecution is now relying on that paragraph in asserting that the common plan, design or purpose that was shared by the Accused and other participants in the JCE was “to inflict a campaign of terror on the citizens of Sierra Leone.”<sup>11</sup> *Acts of terrorism* are said to be a violation of Article Three Common to the Geneva Conventions (punishable under Article 3(d) of the Court’s Statute<sup>12</sup>) and also recognised under public international law.<sup>13</sup>
10. But one need only compare this more recently advanced “common purpose” with what was previously expressed by the Prosecution as the “common purpose” of the JCE in its Pre-Trial Brief and 4 June 2007 Opening Statement to appreciate why the record is in such a state of confusion on this score and how, therefore, notice is wholly lacking in adequacy.
11. In a section of its 4 April 2007 Pre-Trial Brief entitled *The Emergence of the Common Plan, Design or Purpose (Common Plan)*, the Prosecution alleges that the Accused “participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order to exploit the natural resources of the country.”<sup>14</sup> The Prosecution went on to add that “Implementation of this *common plan* [emphasis added] included overthrowing the government of Sierra Leone...”<sup>15</sup> Further amplification of the Accused’s criminal responsibility under Article 6(1) of the Statute is given in Paragraph 143 of the Pre-Trial Brief, where it is stated that “A common plan to control a country by any means necessary, including criminal means, in order to exploit the natural resources of that country may be considered to *amount to*[emphasis in the original] the commission of crimes within the jurisdiction of the Court.”

<sup>10</sup> Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-T-327, *Prosecution Notification of Filing of Amended Case Summary* (hereinafter “Notification”), with “Case Summary Accompanying the Second Amended Indictment,” as Annex, 3 August 2007 (hereinafter “Amended Case Summary”).

<sup>11</sup> Prosecution’s Response, para. 10.

<sup>12</sup> *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002; See, also, <http://www.sc-sl.org/statute.html>.

<sup>13</sup> Prosecution’s Response, para. 10.

<sup>14</sup> Prosecutor v. Taylor, SCSL-03-01-PT-218, *Rule 73bis Pre-Trial Conference Materials Pre-Trial Brief*, 4 April 2007, para. 6.

<sup>15</sup> *Ibid.*

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12. As has been argued by the Defence in the Motion, the failure to plead a crime within the jurisdiction of the Court as the common purpose of the JCE is the crux of the matter and the legal deficiency which remains uncured. Indeed, it goes without saying that the alleged “common plan” in the Prosecution’s Pre-Trial Brief (i.e., to take and maintain political and physical control over a country in order to exploit its natural resources) is not a crime that is within the jurisdiction of this Court. And there is, of course, significance in this for purposes of what an Accused is being placed on notice of that he has to defend against, especially when within a week after the filing of its Second Amended Indictment on 29 May 2007<sup>16</sup>, the Prosecution in its Opening Statement on 4 June 2007, repeatedly avers a “common purpose” that is different from the “Acts of Terrorism” which are now being advanced. Consider, for example, the following excerpts from the Prosecution’s Opening Statement<sup>17</sup>:

...The accused is responsible for the development and execution of a plan that caused the death and destruction in Sierra Leone. That plan, formulated by the accused and others, was to take political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation (page 30, lines 9-15)...

From its inception, the accused and the other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal means involved the campaign of terror waged against the civilian population of Sierra Leone that I have described. The crimes identified in the indictment also were involved in the criminal plan and were the natural and foreseeable consequences of it (page 32, lines 17-24)...

A plan was there formulated by the accused and others to take over political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to permit – to facilitate this exploitation (page 41, lines 12-16)...

As we've indicated many times, access to Sierra Leone's abundant resources was a primary objective, but Sierra Leone would also be a source of manpower (page 41, lines 26-28)...

<sup>16</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-263, *Prosecution's Second Amended Indictment*, 29 May 2007 (hereinafter, “Second Amended Indictment”).

<sup>17</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 4 June 2007.

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13. It is clear from the foregoing excerpts that in its Opening Statement – a key phase of a case as far as giving notice to an Accused of the nature and cause of the charges against him are concerned<sup>18</sup> – the Prosecution was advanced a different “common purpose” that what it is now suggesting: a purpose or objective which has already been shown to be outside the jurisdiction *ratione materiae* of the Statute.
14. The Defence submits that the Prosecution has not given the Accused adequate notice of the nature and cause of the charges against him, to the extent that it keeps modifying and advancing different theories as the “common purpose” of the alleged JCE in which the Accused is said to have participated.

**(B) Distinctions between “Common Purpose,” “Common Plan,” “Common Design,” and “Means” and “Ends”**

15. A second ground upon which the Prosecution argues that the Motion should be dismissed is an alleged misplaced focus by the Defence on “criminal *purpose* to the exclusion of liability based on the existence of a criminal plan or design, and [too narrow a definition] of “purpose,” all within the context of JCE liability.<sup>19</sup> The Prosecution further makes a labouring effort to question the legal propriety and import of distinctions between “means” and “ends” within the context of JCE liability and the “common purpose” of the alleged participants.<sup>20</sup>
16. It is submitted that the Prosecution has placed inordinate and legally irrelevant emphasis on the Defence’s preferential use of the phrase “common purpose” instead of “common plan” or “common design,” considering that the Defence’s use of that phrase derives from language which was merely aimed at mirroring language that appears in the first of four types of facts that must be present in an indictment charging JCE, as per this Chamber’s Judgement in the AFRC case, as well as language that is used in a core paragraph that sustains the Chamber’s decision on the subject.<sup>21</sup>

<sup>18</sup> Information given in an Opening Statement of the prosecution may, in some instances, cure a defective indictment. See, e.g., *Prosecutor v. Kordic and Cerkez*, Case No. IT-65-14/2-A, *Judgement*, 17 December 2004, para. 169 and *Prosecutor v. Natelic and Martinovic*, Case No. IT-98-34-A, *Judgement*, 3 May 2006, para. 27.

<sup>19</sup> Prosecution’s Response, para. 7.

<sup>20</sup> *Ibid*, paras. 11-14.

<sup>21</sup> AFRC *Judgement*, para. 64, states the “Nature and purpose [emphasis added] of the JCE” as the first such fact. See, also, para. 67, “The *common purpose* pleaded in the Indictment does not contain a crime under the Special Court’s jurisdiction” (emphasis added).

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17. The distinctions between “means” and “ends” appear to present a dilemma for the Prosecution, inasmuch as they serve to easily explicate the specious attempts by the Prosecution to advance a purported “common purpose” that amounts to little else than a means to an objective which is, in itself, not a crime within the jurisdiction of the Court. Arguing that no authority is cited by either Professor William A. Schabas, OC MRJA, in his Legal Advisory Opinion<sup>22</sup>, or in the Motion, for the “means”-“ends” distinctions, the Prosecution deems the whole matter to be an “illogical and dangerous proposition,” forgetting along the way that it aver on 4 June 2007 that “...the common plan used criminal *means* [emphasis added] to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal *means* [emphasis added] involved the campaign of terror waged against the civilian population of Sierra Leone that I have described. The crimes identified in the indictment also were involved in the criminal plan and were the natural and foreseeable consequences of it.”<sup>23</sup>
18. Indeed, it is precisely such statements that undergird the further averment or basis of the Motion (also grounded in the AFRC Judgement) to the effect that: if the charged crimes are allegedly within the common purposes, they can logically no longer be a reasonably foreseeable consequence of the same purpose. Indeed, by charging a common purpose that is not inherently criminal, the Prosecution has alleged two forms disjunctively, thereby impeding the Accused’s ability to know the material facts of the JCE against him.

### III. CONCLUSION

In conclusion, and for all of the foregoing reasons and those in the Motion, as well, the Defence respectfully requests that the Trial Chamber issue a decision ordering the severance of JCE as a theory or mode of liability from the Second Amended Indictment.

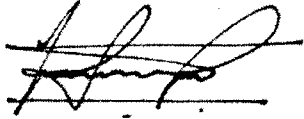
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<sup>22</sup> Schabas, William A. OC MRJA, *Expert Opinion on Joint Criminal Enterprise*, 13 November 2007.

<sup>23</sup> *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 4 June 2007, page 32, lines 17-24.

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Respectfully Submitted,



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**For Courtenay Griffiths, Q.C.**  
Lead Counsel for Charles G. Taylor

Dated this 14<sup>th</sup> day of January 2008, The Hague, The Netherlands



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## Table of Authorities

### Special Court for Sierra Leone Cases

*Prosecutor v. Brima et. al*, SCSL-04-16-T, Judgement, 20 June 2007.

*Prosecutor v. Taylor*, SCSL-03-01-PT-263, Prosecution's Second Amended Indictment, 29 May 2007.

*Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of Proceedings, 4 June 2007.

*Prosecutor v. Taylor*, SCSL-03-01-T, Defence Submission on Behalf of Charles Ghankay Taylor in Respect of Preliminary Motions, 6 June 2006

*Prosecutor v. Taylor*, SCSL-03-01-T-327, Prosecution Notification of Filing of Amended Case Summary, 3 August 2007.

*Prosecutor v. Taylor*, SCSL-03-01-T-327, Case Summary Accompanying the Second Amended Indictment, 3 August 2007.

### ICTY Cases

*Prosecutor v. Kordic and Cerkez*, Case No. IT-65-14/2-A, *Judgement*, 17 December 2004.

*Prosecutor v. Natelic and Martinovic*, Case No. IT-98-34-A, *Judgement*, 3 May 2006.

### Miscellaneous

Schabas, William A. OC MRIA, *Expert Opinion on Joint Criminal Enterprise*, 13 November 2007.