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SCSL-03-01-T
(24536-24584)

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THE SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 2 March 2009

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE	
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THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC WITH ANNEXES

DEFENCE APPLICATION FOR LEAVE TO APPEAL THE *DECISION ON URGENT DEFENCE MOTION REGARDING A FATAL DEFECT IN THE PROSECUTION'S SECOND AMENDED INDICTMENT RELATING TO THE PLEADING OF JCE*

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian

Counsel for Charles G. Taylor:

Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. Introduction

1. This is an application for leave to appeal the *Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, dated and filed on 27 February 2009¹ ("Impugned Decision"). The Impugned Decision was rendered by a majority of the Trial Chamber with the Presiding Judge, Justice Richard Lussick, dissenting². Copies of the Impugned Decision and the Dissenting Opinion are appended hereto in Annex A and Annex B, respectively.
2. A summary of the proceedings relating to the Impugned Decision, starting with a chronology of all relevant documents and their respective dates of filing, is as follows:
 - (a) *Prosecutor v. Taylor*, SCSL-03-01-I-001, *Indictment*, signed 3 March 2003, filed 7 March 2003 ("Initial Indictment");
 - (b) *Prosecutor v. Taylor*, SCSL-03-01-I-75, *Amended Indictment*, signed 16 March 2006, filed 17 March 2006 ("Amended Indictment"), with "Case Summary Accompanying the Amended Indictment," as Annex ("Case Summary");
 - (c) *Prosecutor v. Taylor*, SCSL-03-01-PT-218, *Rule 73bis Pre-Trial Conference Materials Pre-Trial Brief*, 4 April 2007 ("Prosecution Pre-Trial Brief")³;
 - (d) *Prosecutor v. Taylor*, SCSL-03-01-PT-229, *Rule 73bis Taylor Defence Pre-Trial Brief*, 26 April 2007 ("Defence Pre-Trial Brief")⁴;
 - (e) *Prosecutor v. Taylor*, SCSL-03-01-PT-263, *Prosecution's Second Amended Indictment*, 29 May 2007 ("Second Amended Indictment");
 - (f) *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 4 June 2007, pages 26 through 90 ("Opening Statement");

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-752, "Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE", 27 February 2009.

² *Prosecutor v. Taylor*, SCSL-03-01-T-751, "Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick", 27 February 2009. It is noteworthy that the word "Public" appears in the title to the Dissenting Opinion but does not feature in the title of the Impugned Decision; however, there can be no doubt upon reviewing the Dissenting Opinion that it pertains to the Impugned Decision.

³ Filed shortly after the Prosecution's Pre-Trial Brief was *Prosecutor v. Taylor*, SCSL-03-01-PT-219, "Prosecution Corrigendum & Motion for Leave to Substitute Pages of the Prosecution Rule 73bis Pre-Trial Conference Materials", 17 April 2007 ("Corrigendum to Pre-Trial Brief"). The relief prayed for in the Corrigendum to the Pre-Trial Brief was granted by the Trial Chamber in *Prosecutor v. Taylor*, SCSL-03-01-PT-224, "Decision on Prosecution Motion for Leave to Substitute Pages of the Prosecution Rule 73bis Pre-Trial Conference Materials", 23 April 2007.

⁴ Filed shortly after the Defence Pre-Trial Brief was *Prosecutor v. Taylor*, SCSL-03-01-PT-243, "Corrigendum to Rule 73bis Taylor Defence Pre-Trial Brief", 18 May 2007 ("Corrigendum to Defence Pre-Trial Brief").

- (g) *Prosecutor v. Taylor*, SCSL-03-01-T-327, *Prosecution Notification of Filing of Amended Case Summary* (“Notification”), with “Case Summary Accompanying the Second Amended Indictment,” as Annex, 3 August 2007 (“Amended Case Summary”);
- (h) *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 2007 (“the Motion”);
- (i) *Prosecutor v. Taylor*, SCSL-03-01-T-380, *Public 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 (“Response”);
- (j) *Prosecutor v. Taylor*, SCSL-03-01-T-388, *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’*, 14 January 2008 (“Reply”);
- (k) *Prosecutor v. Taylor*, SCSL-03-01-T-434, *Scheduling Order in Relation to the Urgent Defence Motion regarding a Fatal Defect in the Prosecution’s Second Amended Indictment relating to the Pleading of JCE*, 6 March 2008 (“Scheduling Order”);
- (l) *Prosecutor v. Taylor*, SCSL-03-01-T-446, *Consequential Submission in Support of Urgent Defence Motion regarding a Fatal Defect in the Prosecution’s Second Amended Indictment relating to the Pleading of JCE*, 31 March 2008 (“Consequential Motion”);
- (m) *Prosecutor v. Taylor*, SCSL-03-01-T-463, *Prosecution Response to the Defence’s Consequential Submission regarding the Pleading of JCE*, 10 April 2008 (“Consequential Response”);
- (n) *Prosecutor v. Taylor*, SCSL-03-01-T-473, *Defence Reply to Prosecution Response to the Defence’s Consequential Submission regarding the Pleading of JCE*, 15 April 2008 (“Consequential Reply”);
- (o) *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 19 February 2009, pages 24052 (line 26) through 24053 (line 3) (“Oral Decision”);
- (p) Dissenting Opinion⁵;
- (q) Impugned Decision⁶.

The above chronology of filed pleadings and transcripts of relevance to the Impugned Decision conveys a fourteen-month procedural history between the filing of the Motion on 14 December 2007 and the Oral Decision on 19 February 2009. The Impugned Decision is

⁵ See footnote 2, supra.

⁶ See footnote 1, supra.

the “properly reasoned” and filed decision referred to in the Oral Decision which dismissed the Motion.⁷ Though having been filed out-of-time within the meaning of Rule 72(A) of the Rules⁸, the Impugned Decision found that the delay in the filing of the Motion was occasioned by “good cause”⁹ and further that it was in the interests of justice to entertain the Motion at this stage of the proceedings¹⁰.

Holding that, “Reading the Indictment¹¹ as a whole the Trial Chamber [*sic*]¹² is satisfied that the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him,”¹³ it was opined in the Impugned Decision that paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Second Amended Indictment, when taken together, “fulfil the requirements for pleading JCE and serve to put the Defence on notice that the Prosecution intended to charge the Accused with having participated in a Joint Criminal Enterprise.”¹⁴ It is as a consequence of this holding and opinion that the Defence now seeks leave to appeal the Impugned Decision.

II. Applicable Legal Principles

3. The Defence applies for leave to appeal pursuant to Rule 73(B) of the Rules.¹⁵ That Rule provides that decisions rendered on motions filed after the Initial Appearance of an accused “are without interlocutory appeal. However in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal.”
4. It has been noted that an interlocutory appeal does not lie as of right: the party seeking leave to appeal must meet the conjunctive requirements of “exceptional circumstances” and

⁷ See, Oral Decision, page 24053, line 2.

⁸ *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, as amended on 27 May 2008 (“Rules”);

⁹ Impugned Decision, para. 55.

¹⁰ *Ibid.*, para. 56.

¹¹ Reference here is to the Second Amended Indictment. See title to sub-section “D” of the Impugned Decision, paras. 69 – 76.

¹² Use here of the phrase “the Trial Chamber” might arguably be less precise than the phrase “the Majority of the Trial Chamber” [emphasis added].

¹³ Impugned Decision, para. 76.

¹⁴ *Ibid.*, para. 70.

¹⁵ See, *Practice Direction for certain Appeals before the Special Court*, 30 September 2004, filed under SCSL-04-16-PT-111, in particular, sub-section II (6), requiring, *inter alia*, identification of the specific provision of the Rule under which leave to appeal is sought.

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“irreparable prejudice” before the Trial Chamber can exercise its discretion.¹⁶ ‘Exceptional circumstances may exist depending upon particular facts and circumstances, where for instance... the course of justice might be interfered with or it is of fundamental legal importance’.¹⁷

5. The main purpose behind this is to ensure that interlocutory appeals only proceed in very limited and exceptional situations. Rule 73(B) is a restrictive provision.¹⁸ The rationale behind this rule is that criminal trials must not be heavily encumbered and consequently unduly delayed by interlocutory appeals. The Appeals Chamber has however noted that although most decisions will be capable of disposal at final appeal ‘the underlying rationale for allowing such appeals is that certain matters cannot be cured or resolved by final appeal against judgment’.¹⁹

III. Argument

Errors in the Impugned Decision

6. The Defence submits that errors in the Impugned Decision which undergird its application for leave to appeal include those of law, mixed question(s) of fact and law, and in the application of the law.²⁰ Those errors independently, collectively, or some in combination with others, led to the primary holding and error of the Impugned Decision, to the effect that no defect is to be found in the pleading of JCE when the text of the Second Amended Indictment is considered as a whole.²¹ Subsidiary errors which contributed to that erroneous holding and which support the conclusion that the conjunctive standards of “exceptional circumstances” and “irreparable prejudice” of Rule 73 (B) have been satisfied include the following:

- (i) The finding that “a campaign to terrorize the civilian population of the Republic of Sierra Leone”, as alleged in paragraph 5 (when read in conjunction with paragraph

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-PT-164, Joint Decision on Defence Motions on adequate Facilities and adequate Time for the Preparation of Mr. Taylor’s Defence, 23 January 2007.

¹⁷ *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-2004-15-T-357, “Decision on Defence applications for leave to Appeal ruling of 3rd February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005.

¹⁸ *Prosecutor v. Sesay*, SCSL-01-03-T-1001, “Decision on Prosecution Application for Leave to Appeal Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution Witnesses”, 25 February 2008, para.12.

¹⁹ *Prosecutor v. Norman et al.*, SCSL-04-14-T-669, “Decision on prosecution appeal against Trial Chamber decision of August 2004 Refusing leave to file an interlocutory appeal”, 17 January 2005.

²⁰ Reference to the above three permutations of error need not be read as excluding the possibility (or suggesting waiver by the Defence) of errors in fact and/ or procedure that may also be alleged against the Impugned Decision.

²¹ Impugned Decision, paras. 76 and 70.

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33) of the Second Amended Indictment was the “common purpose” of the JCE²². That finding constitutes errors both of law and in the application of the law²³, bearing in mind the view of the Dissenting Opinion with which the Defence agrees, to the effect that nowhere in the Second Amended Indictment is “any specific common purpose in respect of which the Accused is alleged to be criminally responsible” to be identified²⁴;

(ii) In finding that JCE has not been defectively pleaded in the Second Amended Indictment, the Impugned Decision adequately considered *only some* of a number of factors which speak to the question of whether or not JCE has been sufficiently pleaded in the Second Amended Indictment and it invariably resolved those that it did consider in favour of upholding the Second Amended Indictment [emphasis added].

Otherwise relevant factors that were not expressly considered or addressed in any detail in the Impugned Decision, include: (1) what the contemplated *means* of achieving the ultimate objective or “common purpose” of the JCE is, as pleaded in the Second Amended Indictment [emphasis added]²⁵; and (2) the legal significance and effect on the Accused’s fair trial (notice) rights under Article 17 of the Statute²⁶ owing to the deletion of paragraphs 23, 24, and 25 (all pertaining to JCE) from the Initial Indictment upon the filing of the Amended Indictment and the non-appearance of those paragraphs also in the Second Amended Indictment.²⁷ An example of a factor which was considered in the Impugned Decision, but nonetheless and ostensibly deemed not significant enough to uphold the Motion is the fact that the phrase “Joint Criminal

²² Ibid., para. 71. The Defence’s reading of the Impugned Decision, as such, is consistent with the Dissenting Opinion’s reading of the same. See, Dissenting Opinion, paras. 11 and 12. This specific finding of the Impugned Decision appears immediately below the sub-heading, “(i) The existence of a common plan, design or purpose amounting to or involving a crime under the Statute”, see, Impugned Decision, paras. 70 -71, and the conclusion is inescapable that the excerpted language from the Second Amended Indictment was found by the Majority of the Trial Chamber to be the ostensible “common purpose” of the alleged “JCE.”

²³ See, Dissenting Opinion, para. 2, regarding the “proper application” of pleadings principles.

²⁴ Dissenting Opinion, para. 5.

²⁵ See, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, SCSL-04-16-A, Judgment, 22 February 2008, filed on 3 March 2008 (“AFRC Appeals Judgement”), paras. 84 and 82, in particular, para. 76, stating that, “The objective and the means to achieve the objective constitute the common design or plan.”

²⁶ *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 (“Statute”), Article 17.

²⁷ See, Impugned Decision, paras. 2, 8, 9 and 11; see, also, Defence Pre-Trial Brief, para. 45. The Defence submits that language which has been deleted from the Initial Indictment may properly be considered just as is language which appears in, and/ or is omitted from, both the Amended Indictment and Second Amended Indictment when evaluating the sufficiency of the Second Amended Indictment.

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Enterprise” appears nowhere within the Second Amended Indictment.²⁸ The effect of both the failure to adequately consider other relevant factors (obvious on the record) in the analytical process and of resolving those that were considered in favour of upholding the Second Amended Indictment was tantamount to shifting the burden or onus regarding the sufficiency of the pleading of JCE in Second Amended Indictment from the Prosecution to the Accused.²⁹ Such an analytical process with the alleged and resulting shift in the burden of proof was an error of law.

(iii) The Majority of the Trial Chamber committed an error of law when it opined that “taken together... [paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Second Amended Indictment] fulfil the requirements for pleading JCE and serve to put the Defence on notice that the Prosecution *intended* to charge the Accused with having participated in a Joint Criminal Enterprise”³⁰ [emphasis added]. In this regard, the Defence submits that finding sufficient notice of an “intention to charge” is not the same thing as discerning whether or not clear notice has been given in an Indictment of all material elements of a JCE.

Exceptional Circumstances

7. The primary holding of the Impugned Decision was as follows: when the Second Amended Indictment is read as a whole, no defect is to be found in the pleading of JCE and therefore sufficient details have been provided to place the Accused on notice of the case against him.³¹ That holding constitutes an error of law and amounts to “exceptional circumstances” warranting leave to appeal in order to avoid “irreparable prejudice” to the Defence, all within the meaning of Rule 73 (B). The subsidiary errors which contributed to that holding – some of which are illustrated immediately above – buttress or reinforce the conclusion that the dual-standards of Rule 73 (B) have been met in the instant case, counselling in favour of granting leave to appeal.
8. More specifically, these “exceptional circumstances” derive, in large measure, from the fact that the holding of the impugned Decision implicates matters of fundamental legal

²⁸ See, Impugned Decision, para. 75, acknowledging as much.

²⁹ While the “movant” of a motion ordinarily bears the burden of demonstrating that they are entitled to the relief being sought, the ultimate burden of demonstrating that an Indictment sufficiently pleads JCE does not shift from the Prosecution.

³⁰ Impugned Decision, para. 70.

³¹ Impugned Decision, paras. 76 and 70.

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importance to the Special Court. One need look no further than the Dissenting Opinion to discern that the issues are such that reasonable minds, though well-meaning, might easily disagree on questions, such as whether the text of Second Amended Indictment explicitly discloses a “common purpose” of any alleged JCE, whether a *means* to achieve or accomplish any arguably pleaded “common purpose” is to be found anywhere in the text of the Second Amended Indictment, and if so, whether such alleged *means* is a crime under the Statute [emphasis added]?³² Not to mention the question of whether or not the Prosecution was merely pleading the crime of Acts of Terrorism, pursuant to Article 3 of the Statute and Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, as the Dissenting Opinion avers³³ and the Defence concurs, versus articulate a “common purpose” in that paragraph to be read in conjunction with paragraph 33 of the Second Amended Indictment.

9. There would undoubtedly be lacunae in the jurisprudence of the Special Court if the Appeals Chamber is not given the opportunity to make pronouncements regarding these issues, not to mention the innumerable questions that are bound to arise, should the trial of the Accused result in a conviction on charges that are grounded on the alleged and disputed JCE mode of liability on the instant record.
10. Accordingly, the Defence maintains that it has met the requirement under Rule 73 (B) of showing “exceptional circumstances” on the basis of the foregoing reasons and the additional reason that the course of justice would be interfered with, should the Impugned Decision be allowed to stand. (This latter argument is developed immediately below, inasmuch as it serves also to illustrate why “irreparable prejudice” would inure to the Accused, should leave to appeal be denied.)

Irreparable Prejudice

11. To constitute irreparable prejudice, a Trial Chamber decision must not be remediable after the final disposition of trial.³⁴ For a variety of reasons, the Defence submits that the

³² The related issues of discerning, identifying, and distinguishing between the *means* vis-à-vis the “common purpose” of an alleged JCE, particularly whether one or both of them is a crime within the Statute are part and parcel of the analytical framework that has been prescribed (indeed some might say “mandated”) by the AFRC Appeals Judgment.

³³ See, Dissenting Opinion, para. 11.

³⁴ *Prosecutor v. Norman et al.*, SCSL-04-14-T-231, “Decision on Joint Request for Leave to Appeal against Decision on Prosecution’s Motion for Judicial Notice”, dated 19 October, 2004, filed 20 October 2004, para. 23.

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Impugned Decision is not one that "... will be capable of effective remedy in [a] final appeal".³⁵

12. Given the holding of the Impugned Decision, an important question that arises is to which of the eleven counts in the Second Amended Indictment is JCE being advanced as a mode of criminal liability within the purview of Article 6 (1) of the Statute?³⁶ Paragraph 71 of the Impugned Decision helps answer that question by stating that: "According to paragraphs 5 and 33 of the [Second Amended] Indictment, the crimes charged in Counts 2 through 11 were part of the 'campaign of terror' or were a reasonably foreseeable consequence thereof." The time or period of existence of the alleged JCE is said in paragraph 72 of the Impugned Decision to be identical to the time periods that are alleged in all of the "Particulars" of all of the counts in Second Amended Indictment (i.e., between 30 November 1996 and 18 January 2002).
13. The inescapable conclusion to be drawn from these paragraphs is that the Impugned Decision finds JCE to have been properly alleged as a mode of liability in connection with each and every count of the Second Amended Indictment. That being the case, it is submitted that the Accused has already been prejudiced by such a finding at the stage of the proceedings, bearing in mind that lines of inquiry that could have been pursued during cross-examination of Prosecution witnesses (had a decision been rendered much earlier in respect of the Motion) were not pursued during the Prosecution's case-in-chief. Such prejudice will certainly become irreparable, should leave to appeal not be granted. And there is the additional fact that investigations have already been undertaken by the Defence, in light of the status quo *ante* the Impugned Decision. As has been rightly observed by the Dissenting Opinion, "the Accused should not be required to undergo the brain-twisting exercise of reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the [Second Amended] Indictment in order to fathom what liability facts are most likely to form the basis for his alleged joint criminal enterprise."³⁷ Under these circumstances, the Defence cannot and should not be blamed for having failed to investigate and/ or pursue lines of inquiry under

³⁵ *Prosecutor v. Norman* SCSL-04-14-T-319, "Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing leave to file an Interlocutory Appeal", 17 January 2005, Para 29.

³⁶ See, AFRC Appeals Judgment, para. 72, confirming that there are five (5) modes of liability explicitly stated in Article 6 (1) for acts or transactions that an Accused personally engages or otherwise participates in.

³⁷ Dissenting Opinion, para. 15.

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cross-examination regarding JCE in relation to each of the eleven counts of the Second Amended Indictment.

14. A finding, *proprio motu* by the Appeals Chamber, during any prospective appeal that JCE was defectively pleaded in the Second Amended Indictment and may thus not serve as a mode of liability to sustain any conviction on any of the eleven counts, would not cure the prejudice to the Accused of having undertaken to defend himself with the cloud of JCE hanging over his head and expending his legal and investigative resources during the Defence case as a consequence thereof, bearing in mind the deleterious effect that the focus of such energy and resources on JCE would have vis-à-vis his ability to defend other alleged modes of liability under Article 6 (1), not to mention liability under Article 6 (3).
15. On the basis of the foregoing, the Defence submits that irreparable prejudice would result to the Accused, should leave to appeal not be granted.

IV. Conclusion

16. For all of the foregoing reasons, the Defence respectfully submits that it has satisfied the conjunctive standard of Rule 73 (B), requiring a demonstration of both exceptional circumstances and irreparable prejudice in order for leave to appeal to be granted.
17. The Defence consequently and respectfully requests that the Trial Chamber grant it leave to appeal the Impugned Decision.

Respectfully submitted,



Courtenay Griffiths, Q.C.

Lead Counsel for Charles G. Taylor

Dated this 2 day of March 2009,

The Hague, The Netherlands

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List of Authorities

SCSL

Prosecutor v Taylor

Prosecutor v. Taylor, SCSL-03-01-PT-164, “Joint Decision on Defence Motions on adequate Facilities and adequate Time for the Preparation of Mr. Taylor’s Defence”, 23 January 2007.

Prosecutor v Taylor, SCSL-03-01-PT-218 “Public Rule 73bis Pre-Trial Conference Materials Pre-Trial Brief”, 4 April 2007

Prosecutor v. Taylor, SCSL-03-01-PT-219, “Prosecution Corrigendum & Motion for Leave to Substitute Pages of the Prosecution Rule 73bis Pre-Trial Conference Materials”, 17 April 2007.

Prosecutor v. Taylor, SCSL-03-01-PT-243, “Corrigendum to Rule 73bis Taylor Defence Pre-Trial Brief”, 18 May 2007.

Prosecutor v. Taylor, SCSL-03-01-PT-224, “Decision on Prosecution Motion for Leave to Substitute Pages of the Prosecution Rule 73bis Pre-Trial Conference Materials”, 23 April 2007.

Prosecutor v. Taylor, SCSL-03-01-T-410, “Prosecution’s Amended Witness List”, 7 February 2008.

Prosecutor v. Taylor, SCSL-03-01-T-429, “Public with Confidential Annexes - Prosecution Notice under Rule 92Bis for the Admission of Evidence Related to *Inter Alia* Kenema District”, 29 February 2008.

Prosecutor v. Taylor, SCSL-03-01-T-751, “Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution’s Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick”, 27 February 2009.

Prosecutor v. Taylor, SCSL-03-01-T-752, “Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution’s Second Amended Indictment relating to the Pleading of JCE”, 27 February 2009.

RUF

Prosecutor v. Sesay, Kallon and Gbao, SCSL-2004-15-T-357, “Decision on Defence applications for leave to Appeal ruling of 3rd February 2005 on the Exclusion of Statements of Witness TF1-141”, 28 April 2005.

Prosecutor v. Sesay, SCSL-01-03-T-1001, “Decision on Prosecution Application for Leave to Appeal Decision on the *Sesay* Defence Motion Requesting the Lifting of Protective Measures in respect of Certain Prosecution Witnesses”, 25 February 2008.

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CDF

Prosecutor v. Norman et al., SCSL-04-14-T-231, "Decision on Joint Request for Leave to Appeal against Decision on Prosecution's Motion for Judicial Notice", dated 19 October, 2004, 20 October 2004.

Prosecutor v. Norman SCSL-04-14-T-319, "Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing leave to file an Interlocutory Appeal", 17 January 2005.

Prosecutor v. Norman et al., SCSL-04-14-T-669, "Decision on prosecution Appeal against Trial Chamber Decision of August 2004 Refusing Lave to File an Interlocutory appeal", 17 January 2005.

AFRC

Prosecutor v. Brima, et al., SCSL-04-16-PT-46, "Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment", 1 April 2004.

Prosecutor v. Brima, et al., SCSL-04-16-PT-147, "Further Amended Consolidated Indictment", 18 February 2005.

Prosecutor v. Brima, et al., SCSL-04-16-T-628, "Judgment", 20 June 2007.

Prosecutor v. Brima, et al., SCSL-04-16-A-675, "Judgment", 22 February 2008.

ANNEX A

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SCSL-03-01-T
(24496-24520)

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SPECIAL COURT FOR SIERRA LEONE

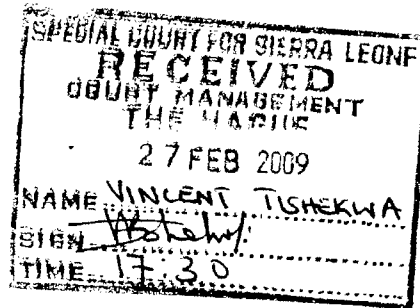
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL03-1-T

Date: 27 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

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

Office of the Prosecutor:

Brenda J. Hollis
Nick Koumjian

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

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TRIAL CHAMBER II ("Trial Chamber") of the Special Court for Sierra Leone ("Special Court");

SEISED of the "Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 14 December 2007 ("Motion");¹

NOTING 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 ("Response");²

NOTING ALSO the "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'", filed on 14 January 2008 ("Reply");³

RECALLING the Chamber's "Scheduling Order in Relation to the Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 6 March 2008 ("Scheduling Order");⁴

NOTING the "Consequential Submission in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", filed on 31 March 2008 ("Consequential Motion");⁵

NOTING ALSO the "Prosecution Response to the Defence's Consequential Submissions Regarding the Pleading of JCE", filed on 10 April 2008 ("Consequential Response");⁶ and the "Defence Reply to the Prosecution Response to the Defence's Consequential Submission Regarding the Pleading of JCE", filed on 15 April 2008 ("Consequential Reply");⁷

RECALLING the Indictment, dated 7 March 2003 ("Initial Indictment")⁸, the Amended Indictment, dated 16 March 2006 ("Amended Indictment"),⁹ the Second Amended Indictment, dated 29 May 2007 ("Second Amended Indictment");¹⁰ the Case Summary appended to the Amended Indictment, dated 16 March 2006 ("Case Summary"),¹¹ the Amended Case Summary, dated 3 August 2007 ("Amended Case Summary");¹² the

¹ SCSL-03-01-T-378.

² SCSL-03-01-T-380.

³ SCSL-03-01-T-388.

⁴ SCSL-03-01-T-434.

⁵ SCSL-03-01-T-446.

⁶ SCSL-03-01-T-463.

⁷ SCSL-03-01-T-473.

⁸ SCSL-03-01-PT-001.

⁹ SCSL-03-01-PT-75.

¹⁰ SCSL-03-01-PT-263.

¹¹ SCSL-03-01-PT-75.

¹² SCSL-03-01-PT-327.

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Prosecution Pre-Trial Brief, dated 26 April 2007 ("Prosecution Pre-Trial Brief")¹³ and the Defence Pre-Trial Brief, dated 26 April 2008 ("Defence Pre-Trial Brief");¹⁴

RECALLING the Trial Chamber's oral Decision of 19 February 2009 wherein the Chamber dismissed the Motion and stated that a properly reasoned decision would follow;¹⁵

COGNISANT OF the provisions of the Statute of the Special Court ("Statute") in particular Articles 6 and 17 and Rules 26bis, 47(C), 50, 26 72(A), 72(B)(ii), 72(C) and 73 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone ("Rules");

HEREBY DELIVERS ITS REASONED DECISION AS FOLLOWS, based solely on the written submissions of the parties, pursuant to Rule 73 of the Rules.

I. INTRODUCTION

A. Procedural History

1. The Initial Indictment against the Accused, accompanied by supporting material, was approved on 7 March 2003 and made public on 12 June of the same year.¹⁶ On 16 March 2006, the Prosecutor filed an Amended Indictment and Case Summary. On 25 May 2007, the Trial Chamber granted the Prosecution leave to further amend the Amended Indictment¹⁷ and the Prosecution filed a Second Amended Indictment on 29 May 2007.

2. On 6 June 2006, Mr. Karim Khan the former Defence Counsel of the Accused, notified the Trial Chamber that he would not file any preliminary motions pursuant to Rule 72 of the Rules.¹⁸ However, in the Defence Pre-Trial Brief, he submitted that "a notable feature of the Amended Indictment was the deliberate decision to drop the allegation, present in the original indictment, that Mr Taylor was part of a Joint Criminal Enterprise ("JCE")."¹⁹

¹³ SCSL-03-01-PT-218.

¹⁴ SCSL-03-01-PT-229.

¹⁵ *Prosecutor v. Taylor*, SCSL-03-01-T, Transcript of 19 February 2009, pp 24052 ln. 26-24053, ln.3.

¹⁶ *Prosecutor v. Taylor*, SCSL-03-01-PT-003, "Decision Approving the Indictment and Order for Non-Disclosure", 7 March 2003 and *Prosecutor v. Taylor*, Order for the Disclosure of the Indictment, the Warrant of Arrest and Order for Transfer and Detention and the Decision Approving the Indictment and Order for Non-Disclosure, 12 June 2003.

¹⁷ *Prosecutor v. Taylor*, SCSL-03-01-PT-255, Decision on the Prosecution Motion Requesting Leave to Amend Indictment, 25 May 2007.

¹⁸ SCSL-03-01-PT-105, Defence Submission on Behalf of Charles Ghankay Taylor in Respect of Preliminary Motions, 6 June 2006.

¹⁹ Defence Pre-Trial Brief, para. 45, submitting that "the doctrine, scope and case law of JCE was well known to the Prosecutor as it has been employed in other cases before the SCSL. It has been judicially considered in a great many cases before the ICTY and ICTR. The decision to drop it from the Amended Indictment in the case of Mr. Taylor cannot be taken to have been accidental".

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3. Soon thereafter on the 20 June 2007, the Trial Chamber, in its Judgement in the case of the *Prosecutor v. Brima, Kamara and Kanu* ("AFRC Trial Judgement")²⁰, held that the Indictment in that case with respect to Joint Criminal Enterprise ("JCE") as a mode of criminal responsibility, had been defectively pleaded since the "common purpose" alleged was not a criminal purpose recognized by the Statute and that the "common purpose" did not constitute a crime under the Special Court's jurisdiction. The Trial Chamber held that arguing the basic and extended forms of JCE in the alternative impeded the ability of the Accused to understand the material facts of the JCE, and that crimes charged within the common purpose could not also be a reasonably foreseeable consequence of that purpose²¹ Finally, the Trial Chamber held that the Prosecution is required to know its case before the start of trial; that if the purpose of the JCE changed over time, all new and different purposes must also be pleaded in the Indictment; and that the Prosecution is not permitted to mould its case as the trial progresses.²²

4. On 3 August 2007, the Prosecution, in consistency with the Trial Chamber's findings on JCE in the AFRC Judgement and "out of an abundance of caution", filed an Amended Case Summary with respect to the present case, amending paragraphs 42-44 of the Case Summary notwithstanding that it disagreed with those findings and would appeal the Judgement.²³ The Prosecution filed an appeal against the AFRC Trial Judgment on 13 September 2007.²⁴

5. Although Mr. Karim Khan the former Defence Counsel of the Accused had notified the Trial Chamber that the Defence would not file any preliminary motions pursuant to Rule 72 of the Rules, the new Defence team filed this Motion regarding the defective pleading of the JCE on 14 December 2007, pending the resolution of the Appeal. The AFRC Appeal Judgement was delivered on 22 February 2008.²⁵

6. In its AFRC Appeal Judgement, the Appeals Chamber concluded that the Trial Chamber erred in finding that the "common purpose" of the JCE must constitute a crime under international law. The Appeals Chamber held-

84....The common purpose of the joint criminal enterprise was not defectively pleaded. Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. ..

85. Several other issues arose in the context of JCE for which the Appeals Chamber wishes to express itself. The Trial Chamber erred in concluding that the Prosecution could not plead the basic and extended forms of joint criminal enterprise liability in the alternative on the grounds that the

²⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-628, Judgement, 20 June 2007, para. 67 ("AFRC Trial Judgement").

²¹ AFRC Trial Judgement, para. 71.

²² AFRC Trial Judgement, para. 80.

²³ Amended Case Summary, para. 6.

²⁴ *Prosecutor v. Brima, Kamara, Kanu*, SCSL-2004-16-A, Appeal Brief of the Prosecution, 13 September 2007

²⁵ *Prosecutor v. Brima, Kamara and Kanu* SCSL-04-16-A-675, Judgement, 22 February 2008 ("AFRC Appeal Judgement").

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two forms, as pleaded, logically exclude each other. Pleading the basic and extended forms of JCE in the alternative is now a well-established practice in the international criminal tribunals. The Trial Chamber erred in finding that the Indictment failed to specify the period covered by the JCE. That period is that covered by all of the alleged crimes, which in this case is between 25 May 1997 and January 2000.²⁶

7. After the publication of the AFRC Appeal Judgement, the Trial Chamber invited both parties to file Consequential pleadings, taking into consideration the Appeals Chamber's findings²⁷. Consequential Submissions were filed by the Parties on the 31 March 2008²⁸, 10 April 2008²⁹ and 15 April 2008³⁰, respectively.

B. Pleading of a Joint Criminal Enterprise in the Indictments and supporting documents

8. In its Initial Indictment, the Prosecution alleged JCE in very similar terms to the Indictment in the AFRC Trial³¹. The Initial Indictment alleged as follows:

23. The RUF and the AFRC shared a common, plan purpose or design (joint criminal enterprise) which was 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. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

24. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abduction, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.

25. The Accused participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the government of Sierra Leone.³²

9. In its Amended Indictment filed on 16 March 2006, the Prosecution amended its pleading regarding JCE by deleting the above paragraphs and alleging instead that:

33. The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, or which crimes amounted to or were involved within a

²⁶ AFRC Appeal Judgement, paras. 84-85.

²⁷ Scheduling Order, SCSL-03-01-T-434.

²⁸ Consequential Motion.

²⁹ Consequential Response.

³⁰ Consequential Reply.

³¹ Prosecutor v. Brima et al, Case No. SCSL-04-16, Further Amended Consolidated Indictment, SCSL-04-16-PT-147, paras.33-34.

³² Initial Indictment, paras 23-25.

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common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose. [emphasis added]³³

10. The Amended Indictment further alleged under the Particulars at Paragraph 5 that:

5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED burned civilian property and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

In addition, the Particulars of each count in the Amended Indictment was prefixed with the following words:

[.....] members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED....³⁴

11. The Second Amended Indictment did not alter these pleadings as far as the pleading of JCE is concerned.³⁵

12. The Prosecution has made further submissions regarding the alleged JCE and its "common purpose" in its Case Summary,³⁶ Pre-Trial Brief,³⁷ Opening Statement,³⁸ and Amended Case Summary,³⁹ In its Prosecution Notification of Filing of Amended Case Summary⁴⁰ which was filed subsequent to the Second Amended Indictment and the AFRC Trial Judgement, the Prosecution submitted that although it had provided prior notice concerning "the common plan, design or purpose in the Indictment", nevertheless in order to be "consistent with the AFRC Trial Judgement and out of an abundance of caution, the Prosecution has amended paragraphs 42, 43 and 44 of the Case Summary which accompanies the Indictment, in order to further articulate the common plan, design or purpose which has been alleged in this case."⁴¹ The relevant paragraphs of the Amended Case Summary state as follows:

Participation in a common plan, design or purpose

42. 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

³³ Amended Indictment, para. 33.

³⁴ Amended Indictment paras. 9, 14, 18, 22, 23, 28.

³⁵ See Prosecution's Second Amended Indictment, para. 5 and prefix to Particulars.

³⁶ Case Summary, paras 42-44.

³⁷ Prosecution Pre-Trial Brief, paras 6-8

³⁸ Prosecution Opening Statement, 4 June 2007, p. 271, lines 9-20; p. 275, lines 9-12; p. 282, lines 12-29.

³⁹ Amended Case Summary, paras 42-43.

⁴⁰ *Prosecutor v. Taylor*, SCSL-03-01-T-327, Prosecution Notification of Filing of Amended Case Summary, 3 August 2007.

⁴¹ *Ibid.* paras 4-6.

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charged in the Second Amended Indictment, in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.

43.1 The crimes charged in Counts 1 through 11 of the Second Amended Indictment were within the common plan as it existed from 30 November 1996 through 18 January 2002. The Accused and the other participants in the common plan intended the commission of each of the charged crimes.

43.2 Alternatively, from November 1996 through about January 2002, the following crimes were within the common plan, design or purpose: acts of terror against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under the age of 15 years; enslavement of civilians and pillage. The Accused and other participants in the common plan agreed upon and intended the commission of these crimes. The crimes charged in Counts 2, 3, 4, 5, 6, 7, and 8 were foreseeable consequences of the crimes agreed upon in the common plan. The Accused participated in the common plan despite the awareness that these were foreseeable consequences.

44.1 Others participated in the common plan, design or purpose during the various periods including:

- (i) Foday Saybana Sankoh, leader of the RUF, who participated between about 1988 and January 2002;
- (ii) Other commanders and other leaders of the RUF, from about 1990 until 18 January 2002;
- (iii) Other commanders and other leaders of the NPFL from about 1988 until 18 January 2002;
- (iv) Commanders and other leaders of Liberian organised armed groups who worked in concert with or under the direction of the Accused and participated from about 1989 until about 18 January 2002;
- (v) Commanders, and other leaders of the AFRC who agreed to and commenced participation in the common plan on or about 28 May 1997 through about May 2000;
- (vi) After August 1997 when the Accused was sworn-in as President of Liberia, commanders and other leaders of his Liberian government and armed forces, including specialised units, police and military forces who participated through about 18 January 2002;
- (vii) Associates of the Accused who worked under his direction or in cooperation with him to further the common plan from about 1988 until about 18 January 2002.

II. SUBMISSIONS

A. Defence Motion

13. The Defence made submissions on the admissibility and merits of the Motion and requests that the Trial Chamber order the severance of JCE as a mode of criminal liability from the Second Amended Indictment.

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1. Submissions on the Admissibility of the Motion

14. The Defence acknowledges that the Motion was filed after the 21-day period provided for pursuant to Rule 72(A) and notes that Rule 72(B) details the manner in which motions regarding defects in an indictment are to be filed.⁴² It argues, however, that current Counsel were assigned over a year after the expiration of the 21-day period, and submits that the deadlines contemplated in Rule 72(A) are superseded by Article 17 of the Statute and by notions of “natural justice” and fundamental fairness.⁴³

2. Submissions on the Merits of the Motion

15. In arguing that the Second Amended Indictment is fatally defective with regards to JCE,⁴⁴ the Defence submits that the *actus reus* of JCE liability requires first, that there be a plurality of persons not necessarily organised in a military, political or administrative structure; second, the existence of a common plan, design or purpose amounting to or involving the commission of a crime prohibited in the Statute; and, third, participation by an accused in the common design involving the perpetration of one of the crimes in the Statute.⁴⁵ The Defence further points to the four criteria that must appear in any Indictment charging JCE:

- (i) The nature and purpose of the JCE;
- (ii) The time at which or the period over which the enterprise is said to have existed;
- (iii) The identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group; and
- (iv) The nature of the participation of the accused in that enterprise.⁴⁶

16. The Defence argues that the “common purpose” of a JCE must be a crime within the Statute of the Special Court, and that this purpose is a material fact which must be pleaded in the indictment.⁴⁷ In support of its position, the Defence attaches an expert opinion of Prof. William Schabas to its Motion.⁴⁸ The Defence submits that the Prosecution has not pleaded a crime within the jurisdiction of the Special Court as the “common purpose” of the JCE in the Second Amended Indictment and that this mode

⁴² Motion, para. 5.

⁴³ Motion, para. 6.

⁴⁴ Motion, para. 3. The four criteria are: (i) the nature or purpose of the JCE; (ii) the time at which or the period over which the enterprise is said to have existed; (iii) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group; (iv) the nature of the participation by the accused in that enterprise. See *infra* para. 63 and accompanying footnotes.

⁴⁵ Motion, para. 21.

⁴⁶ Motion, para. 22.

⁴⁷ Motion, para. 22.

⁴⁸ Motion, Annex I.

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of liability is therefore fatally defective and should be severed.⁴⁹ The Defence further submits that the Prosecution's attempt to cure the defect in its Amended Case Summary by proposing two alternative and mutually exclusive theories does not cure the defect.⁵⁰

17. The Defence argues that the "common purpose" of the JCE must be criminal in and of itself, regardless of whether or not the means by which the "common purpose" was achieved constituted crimes within the jurisdiction of the Special Court.⁵¹

18. Further, the Defence submits that the Prosecution's further description of the "common plan, design or purpose" of the JCE in the Amended Case Summary, specifically, "to carry out a criminal campaign of terror [...] in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone,"⁵² is "ill-defined at best" and "not legally sufficient to sustain the JCE mode of liability where the 'common plan' or objective is not defined at all, or is ill-defined at best, and where such objective or 'common purpose' is not intrinsically a crime within the jurisdiction of the court."⁵³ Furthermore, the Defence argues that the Prosecution's use of the word "pillaging" in the Amended Case Summary does not suffice as a description of a criminal purpose "where the overall context in which it has been used renders it tantamount to verbs such as usurping, controlling, cultivating, or monopolizing the resources of Sierra Leone vis-à-vis the crime of pillage as recognised under international law."⁵⁴

19. The Defence also argues that the Prosecution provided two alternative and mutually-exclusive theories of the purpose of the JCE in the Amended Case Summary, firstly a "criminal campaign of terror [...] in order to pillage the resources of Sierra Leone," with Counts 1 through 11 of the Second Amended Indictment falling within the common plan,⁵⁵ and alternatively, "acts of terror against civilians in Sierra Leone," with seven additional counts charged as "foreseeable consequences of the crimes agreed upon in the common plan."⁵⁶ The Defence argues that if the Prosecution alleges that a particular crime is within the "common purpose" of the JCE, it cannot also be a "reasonably foreseeable consequence" of that same purpose.⁵⁷ Because the Prosecution has alleged two different forms of JCE disjunctively, the Defence argues that the Accused's ability to understand the case against him has been impeded.⁵⁸

⁴⁹ Motion, para. 23.

⁵⁰ Motion, paras 24-27.

⁵¹ Motion, para. 28.

⁵² Motion, para. 25.

⁵³ Motion, para. 26.

⁵⁴ Motion, para. 30.

⁵⁵ Motion, para. 25.

⁵⁶ Motion, para. 31.

⁵⁷ Motion, para. 32.

⁵⁸ Motion, para. 32.

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B. Defence Consequential Motion

20. The Defence reiterates its core positions that the Accused has not been placed on sufficient notice of the case he is to meet and that the Trial Chamber should issue a decision ordering the severance of JCE as a mode of criminal liability from the Second Amended Indictment.⁵⁹ The Defence submits that the notice provided by the Prosecution to the Accused of the nature and cause of the charges against him has been legally insufficient due to the constantly changing “common purposes” of the alleged JCE pleaded by the Prosecution in this case. It adds that “the Accused is not to enter into the minds of the Prosecution and [...] divine exactly what the ‘common purpose’ is that the alleged means pertain to”.⁶⁰
21. The Defence submits that the “common purposes” pleaded in the Prosecution’s Pre-Trial Brief, Opening Statement, and Amended Case Summary, are tantamount to “gaining or maintaining of political power or control over the territory of Sierra Leone [...] in order to exploit the natural resources of the country.”⁶¹ However, according to the Defence, the Prosecution now maintains that the “common purpose” is to “inflict a campaign of terror on the citizens of Sierra Leone.”⁶² The Defence submits that the AFRC Appeal Judgement has advanced the underlying claim of the Accused that he has not received adequate notice of the pleading of the JCE in this case because the Prosecution has repeatedly modified different theories of the “common purpose”, pointing to the various iterations of the “common purpose” in the Case Summary, Pre-Trial Brief, Opening Statement, Second Amended Indictment, Amended Case Summary and more general disclosure.⁶³
22. Pointing to findings of the AFRC Appeal Judgement that “the determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment, not whether it adduced evidence [at trial] to support the allegations”, the Defence argues that the Prosecution is required to know its case from the start.⁶⁴ On the contrary, the Prosecution has adopted a “fluid and constantly evolving ‘common purpose’” which is inconsistent with the spirit of the AFRC Appeal Judgement which contemplated a consistently pleaded “common purpose”.⁶⁵
23. The Defence concedes that the “basic” and “extended” forms of JCE may be pleaded disjunctively and this, alone, may not serve to invalidate the notice given to an Accused regarding the case to be met.⁶⁶

⁵⁹ Consequential Motion, Conclusion.

⁶⁰ Consequential Motion, para. 26.

⁶¹ Consequential Motion, para. 11.

⁶² Consequential Motion, para. 19.

⁶³ Consequential Motion, para. 18.

⁶⁴ Consequential Motion, para. 14.

⁶⁵ Consequential Motion, para. 20.

⁶⁶ Consequential Motion, para. 15.

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C. Prosecution Response

24. The Prosecution opposes the Motion and requests the Trial Chamber to dismiss it.⁶⁷

1. Submission on the Admissibility of the Motion

25. The Prosecution notes that the Defence has conceded that the Motion was filed in violation of Rule 72(A). The Prosecution argues that the current Defence team had over four months available between the filing of the Amended Case Summary and the filing of the Motion, which it notes, was filed on the last day before judicial recess, and concludes that the Motion was not filed in a timely manner.⁶⁸

26. The Prosecution however, acknowledges paragraph 24 of the Trial Chamber's Judgement in the AFRC case in which the Trial Chamber stated that it was "not precluded from reviewing in [a] judgement whether shortcomings in the form of the Indictment [...] resulted in prejudice to the rights of the Accused."⁶⁹ Therefore, unless the Trial Chamber's position on the issue has changed, the Prosecution does not oppose a review of the Second Amended Indictment at this stage of the presentation of evidence.⁷⁰

2. Submissions on the Merits of the Motion

27. The Prosecution submits that the Trial Chamber should dismiss the Motion, arguing that the Prosecution provided the Defence with "adequate notice of the alleged common plan, design, or purpose to commit crimes within the jurisdiction of the Special Court".⁷¹ In addition, the Prosecution argues that the Defence position "erroneously focuses JCE liability on the existence of a criminal *purpose* to the exclusion of liability based on the existence of a criminal plan or design." Further, "purpose" should not be defined too narrowly.⁷² The Prosecution further argues that Professor William Schabas' opinion as contained in his letter to the Defence did not take into account the Amended Case Summary and should be ignored.⁷³

28. The Prosecution argues that the details of the alleged JCE were sufficiently articulated in the Amended Case Summary⁷⁴ as a "common plan, design or purpose to inflict a campaign of terror on the citizens of Sierra Leone."⁷⁵ The Prosecution further argues that "acts of terrorism", which constitute a violation of Common Article 3 of the Geneva Conventions, is a crime punishable under Article 3(d) of the Statute.⁷⁶

⁶⁷ Response, para. 7.

⁶⁸ Response, para. 5.

⁶⁹ Response, para. 6, citing AFRC Trial Judgement, paras 24, 25.

⁷⁰ Response, para. 6.

⁷¹ Response, para. 7.

⁷² Response, paras 7, 13.

⁷³ Response, para.9.

⁷⁴ Amended Case Summary, Annex.

⁷⁵ Response, para. 10.

⁷⁶ Response para. 10.

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29. The Prosecution rejects the Defence's argument that those who enter into an agreement or understanding to commit international crimes such as acts of terrorism have not formed a JCE so long as their ultimate 'purpose' is not in and of itself criminal.⁷⁷ The Prosecution argues that "agreements that have criminal ends and those that plan or employ criminal means," are the same, stating that "[t]he harm or danger from such criminal agreements or understandings is equal whether the crime is considered the ultimate objective or the means agreed upon to achieve that objective."⁷⁸
30. The Prosecution submits that even if the ultimate "objective" or "end" of the plan is not criminal, a JCE exists if there is a common state of mind that a crime within the jurisdiction of the Court be committed, be it an agreed criminal plan, purpose or design.⁷⁹
31. In addition, the Prosecution argues that it alleged not only a common intent to employ criminal means, but also that part of the ultimate objective of the joint criminal enterprise was criminal. The Amended Case Summary states that "the campaign of terror in the JCE was used in part 'to pillage the resources of Sierra Leone, in particular the diamonds.'"⁸⁰ The Prosecution submits that "pillage" is a crime under Article 3(f) of the Statute and well defined in international law is not used by the Prosecution as a synonym for "cultivating" as the Defence has argued.⁸¹
32. The Prosecution submits that it has pleaded two different categories of JCE, the "basic" and the "extended" categories, in the alternative⁸² and argues that it is well established in international criminal jurisprudence that it may plead different, mutually-exclusive modes of responsibility in the alternative.⁸³

D. Consequential Prosecution Response

33. The Prosecution submits that the Defence Motion and Consequential Submissions should be dismissed.⁸⁴ The Prosecution notes a change of focus in the Defence submissions on the defective pleadings of the JCE *viz.* that the Accused has not been placed on sufficient notice of the case he is to meet.⁸⁵ It responds that its pleadings on JCE have been consistent.⁸⁶ However, the Prosecution asserts that even if its pleadings had been inconsistent, "there is no prohibition against evolving theories."⁸⁷ Finally, the Prosecution avers that the Defence's arguments on this point are disingenuous considering that the current Defence team was appointed at the time the Second

⁷⁷ Response, para. 11.

⁷⁸ Response, paras. 11-14.

⁷⁹ Response, para. 15.

⁸⁰ Response, para. 16.

⁸¹ Response, para. 16.

⁸² Response, paras 17-19.

⁸³ Response, para. 17.

⁸⁴ Consequential Response, para. 26.

⁸⁵ Consequential Response, paras 2, 3.

⁸⁶ Consequential Response, paras 20, 23.

⁸⁷ Consequential Response, para. 23.

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Amended Indictment was in place and at about the same time the Amended Case Summary was filed. From the outset the current Defence team had the full pre-trial articulation of the common plan, design or purpose, or JCE, in this case from the outset of their appointment.⁸⁸

34. The Prosecution submits that the “common purpose” of the JCE alleged in this trial has always been “to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, particularly the diamond mining areas.”⁸⁹ The Prosecution further submits that it has put the Defence on notice that both the objective of the JCE and the means to achieve that objective involve crimes within the jurisdiction of the Special Court even though it is sufficient to prove that either the objective or the means involve a crime or crimes within the jurisdiction of the Court.⁹⁰

35. The Prosecution submits that the Second Amended Indictment, the Amended Case Summary, the Pre-Trial Brief and the Prosecution’s Opening Statement provide the Defence with sufficient detail about the alleged JCE.⁹¹ It further reiterates that as it is entitled to amend indictments or case summaries, there cannot be a prohibition on “evolving theories.”⁹²

E. Defence Reply

1. Submission on Admissibility of Motion

36. In the Defence’s view, the fact that the Prosecution does not oppose a review is significant and represents a “tacit acknowledgement of the legal significance and practical implications which are raised by the Motion.”⁹³

2. Submissions on Merits of Motion

37. With respect to the Prosecution’s argument that adequate notice was given to the Defence, the Defence does not dispute that the Prosecution has attempted to advance a JCE theory of liability through a variety of submissions and materials but submits the dispute lies 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”.⁹⁴ The Defence argues that the crux of the matter is the failure of the Prosecution to plead a crime within the jurisdiction of the Court as the “common purpose” of the JCE.⁹⁵ It concludes that the Prosecution has not provided adequate

⁸⁸ Consequential Response, para. 24.
⁸⁹ Consequential Response, paras 20, 23.

⁹⁰ Consequential Response, para. 21.

⁹¹ Consequential Response, para. 22.

⁹² Consequential Response, para. 23.

⁹³ Reply, para. 4.

⁹⁴ Reply, para. 7.

⁹⁵ Reply, para. 12.

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notice of the nature and cause of the charges against the Accused, as it “keeps modifying and advancing different theories” of the alleged “common purpose”.⁹⁶

38. Regarding the distinctions between “common purpose”, “common plan,” “common design,” and “means” and “ends”, the Defence submits that the Prosecution has placed “legally irrelevant” emphasis on the Defence’s preferential use of the phrase “common purpose”.⁹⁷ The Defence notes that they simply employed language mirroring this Chamber’s Judgement in the AFRC case.⁹⁸

39. The Defence reiterates its argument that if the charged crimes are allegedly within the “common purposes”, they cannot logically be a reasonably foreseeable consequence of the same purpose.⁹⁹ Furthermore, the Defence reiterates that by pleading two forms of JCE disjunctively, the Prosecution has impeded the Accused’s ability to understand the material facts of the JCE alleged against him by charging a common purpose that is not inherently criminal.¹⁰⁰

F. Consequential Defence Reply

40. The Defence submits that it has not shifted its core position; its challenge on the form of the Second Amended Indictment directly impacts the question of adequate notice to the Accused of the case against him and the Prosecution argument erroneously assumes that the question of the manner and form in which an issue is pleaded can be divorced from the question of notice. The Defence submits that the Prosecution’s attempt to divorce these two issues is “legal nonsense”.¹⁰¹

41. The Defence submits that the Second Amended Indictment, as the principal accusatory document, must be written with clarity and sufficient detail, pursuant to Article 17(4)(a) of the Statute.¹⁰² In this vein, the Defence cites the ICTY Appeal Judgement in *Kordic and Cerkez* for the proposition that the nature of the Accused’s alleged responsibility must be unambiguous in an indictment.¹⁰³ The Defence states that the obligation on the Prosecution is two-fold, and entails the duty to inform the Accused of the *nature and cause* of the charges against him as well as a concise description of the facts underpinning the charges.¹⁰⁴

42. The Defence specifically contests the Prosecution’s assertion that it has pleaded the “common purpose” of the JCE in a consistent manner. The Defence reiterates the allegation made in paragraph 19 of its Consequential Submission that the Prosecution’s case has been constantly shifting. This shift is apparent, the Defence submits, in the

⁹⁶ Reply, para. 14.

⁹⁷ Reply, para. 16.

⁹⁸ Reply, para. 16.

⁹⁹ Reply, para. 18.

¹⁰⁰ Reply, para. 18.

¹⁰¹ Consequential Response, paras 10, 13.

¹⁰² Consequential Reply, para. 11.

¹⁰³ Consequential Reply, para. 12.

¹⁰⁴ *Ibid.*

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amendments to the Indictment and in other processes outlined in Prosecution Response, paragraphs 4 through 9.¹⁰⁵ The Defence reiterates that the Prosecution's position on the "common purpose" has shifted from "to take and maintain political and physical control over Sierra Leone in order to exploit its natural resources" to "to inflict a campaign of terror on the citizens of Sierra Leone."¹⁰⁶ The Defence acknowledges that the Prosecution is permitted to amend the indictment for clarity's sake, but stresses that the Prosecution may not "mould its case as it goes along."¹⁰⁷

43. The Defence notes the finding of the AFRC Appeal Judgement which held that the criminal purpose under JCE may derive from the ultimate objective or from the means and that in determining the legal sufficiency of a JCE pleading the means must be viewed in conjunction with the pleaded "common purpose." However, the evolving nature of the pleaded "common purpose" in the present case sets the present Indictment outside this purview.¹⁰⁸

44. Finally, in response to the Prosecution claim that the Defence was being disingenuous in alleging a lack of proper notice on the question of "common purpose", the Defence submits that notice is provided to the Accused and not to the Defence team and it is in this respect that the issue has been raised.¹⁰⁹

III. APPLICABLE LAW

45. Article 17 of the Statute of the Special Court relating to "Rights of the Accused" provides:

1. All Accused shall be equal before the Special Court.
2. The Accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The Accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the Accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he or she understands, of the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with Counsel of his or her choosing;
 - c. To be tried without undue delay;

¹⁰⁵ Consequential Reply, para. 14.

¹⁰⁶ Consequential Reply, para. 14.

¹⁰⁷ Consequential Reply, para. 15.

¹⁰⁸ Consequential Reply, para. 17, paraphrasing AFRC Appeal Judgement, para. 80.

¹⁰⁹ Consequential Reply, para. 19.

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d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

e. To examine or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

f. To have the Free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

g. Not to be compelled to testify against himself or herself or to confess guilt.

46. Rule 26bis relating to "Chambers" provides:

The Trial Chamber and Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, with full respect for the rights of the Accused and due regard for the protection of victims and witnesses.

47. Rule 47 relating to "Review of Indictments" provides

A. An Indictment submitted in accordance with the following procedure shall be approved by the designated Judge.

B. [...]

C. The Indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence. It shall be accompanied by a Prosecutor's case summary briefly setting out the allegations he proposes to prove in making his case.

D. [...]

E. The designated Judge shall review the Indictment and accompanying material to determine whether the Indictment should be approved. The Judge shall approve the Indictment if he is satisfied that-

(i) the Indictment charges the suspect with a crime or crimes within the jurisdiction of the Special Court; and

(ii) that the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularised in the Indictment.

48. Rule 50 relating to "Amendment of Indictment" provides:

A. The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it, but in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.

B. If the amended indictment includes new charges and the accused has already made his initial appearance in accordance with Rule 61:

(i) A further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges;

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(ii) Within seven days from such appearance, the Prosecutor shall disclose all materials envisaged in Rule 66(A)(i) pertaining to the new charges;

(iii) The accused shall have a further period of ten days from the date of such disclosure by the Prosecutor in which to file preliminary motions pursuant to Rule 72 and relating to the new charges.

49. Rule 72 relating to "Preliminary Motions" provides:

A. Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i).

B. Preliminary motions by the accused are:

(i) Objections based on lack of jurisdiction;

(ii) Objections based on defects in the form of the indictment;

C. [...]

IV. DELIBERATIONS

A. Preliminary issue: Admissibility of the Defence Motion:

50. In evaluating the timeliness of the Motion presented by the Defence, the Trial Chamber is guided specifically by Rules 72(A) and 72(B)(ii) and more generally by Article 17 of the Statute and the interests of justice.

51. Whilst the Second Amended Indictment was filed on 29 May 2007 and the accompanying Amended Case Summary on 3 August 2007, the Motion challenging the form of Indictment was not filed until 14 December 2007, clearly out of time. Although the Motion is time-barred pursuant to Rule 72(A), the Trial Chamber may in the interest of justice review issues such as the pleading of JCE at any stage of the proceedings, particularly when violations of the rights of the accused are at risk.¹¹⁰ The Appeals Chamber has emphasised that challenges to the form of an indictment should be made at a relatively early stage of the proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules.¹¹¹ However, the Appeals Chamber has also held that a failure to challenge the form of an indictment at the pre-trial stage is not an absolute bar to challenges at a later stage.¹¹²

52. Parties may not misuse such exceptions for tactical purposes. Consequently a party requesting an exception is required to show good cause for its late filing.¹¹³

¹¹⁰ Prosecutor v. Karemera, ICTR-98-44-T, Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, inter alia, Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001, para. 9.

¹¹¹ AFRC Appeal Judgement, para. 43.

¹¹² AFRC Appeal Judgement, para. 43.

¹¹³ See for example Rule 72 of the ICTY and ICTR Rules.





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53. The initial Defence team was withdrawn on 4 June 2007 and a new team was not in place until early August 2007. The initial Defence team informed the Trial Chamber that it would be filing no preliminary motions¹¹⁴ but stated in its Defence Pre-Trial Brief that a “notable feature of the Amended Indictment was the deliberate decision to drop the allegation, present in the original indictment, that Mr. Taylor was part of a Joint Criminal Enterprise”.¹¹⁵

54. The current Defence team has not addressed the initial Defence team’s position, but nevertheless appears to have adopted a different approach in relation to the Prosecution’s pleading of JCE.

55. At a status conference held in August 2007, the Trial Chamber granted the Defence five months to prepare its case. Given the complexity of the instant case and the amount of documents and information provided by the Prosecution to the Accused and the Defence,¹¹⁶ the Trial Chamber finds that the late filing of the Motion was not unreasonable and therefore that the Defence has shown good cause.

56. In addition, the Trial Chamber recalls that an Appeals Chamber may reverse a conviction as a result of a defective indictment¹¹⁷ and that it is therefore important that any formal defects of an indictment be addressed as early as possible, and if possible before a final trial judgement. We note that the Prosecution, while observing that the Motion was not filed in a timely manner, nevertheless does not oppose a review on the basis of the Trial Chamber’s reasoning in the AFRC judgement.¹¹⁸ We are of the opinion that it is in the interests of justice to address the issue raised at this stage of the proceedings. The Trial Chamber will therefore entertain the Motion, notwithstanding that it was filed out of time.

B. Pleading Requirements of an Indictment

57. Article 17(4)(a) of the Statute provides that an accused is entitled to be “informed promptly and in detail [...] of the nature and cause of the charge against him or her.” Rule 47(C) of the Rules specifies that an “indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence.” These provisions constitute an obligation on the part of the Prosecution to

¹¹⁴ SCSL03-01-PT-105.

¹¹⁵ Defence Pre-Trial Brief, para. 45.

¹¹⁶ See for example, *Prosecutor v. Taylor*, SCSL03-01-PT-148, Defence Motion on Adequate Time for the Preparation of Mr. Taylor’s Defence, 15 December 2006, in particular para. 17 in which the Defence stated that the initial Prosecution disclosure consisted of 34,000 pages of material and that it had recently received an additional 154 statements and transcripts and a large amount of other information. See also for example, *Prosecutor v. Taylor*, SCSL03-01-PT-323, Defence Motion for Adjournment to allow the Defence adequate time and facilities to prepare and other ancillary matters, 31 July 2007, in particular para. 13 in which the Defence notes that in addition to that earlier disclosure it had six motions pending including one with close to 2000 pages of evidential material.

¹¹⁷ *Niyitegeka v. The Prosecutor*, ICTR 96-14-A, Judgement, 9 July 2004 [Niyitegeka Appeal Judgement], para. 195.

¹¹⁸ Response para. 5.

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plead the material facts underpinning the charges with enough detail to inform an accused clearly of the charges against him so that he may prepare a defence, but not the evidence by which such material facts are to be proven.¹¹⁹ The materiality of a particular fact depends on the nature of the Prosecution case and on the context of the alleged criminal conduct with which an accused is charged.¹²⁰

58. The Trial Chamber recalls that an indictment is the primary accusatory instrument¹²¹ and that any other accusatory instruments cannot add charges or material facts that were not pleaded in the indictment.¹²² Any assessment of supporting material provided by the Prosecution by the Trial Chamber is an exceptional measure. To do otherwise would allow the Prosecution to circumvent the procedure set out in Rule 50 of the Rules by including material facts in documents supplementary to the Indictment.

59. The Trial Chamber observes that any lack of precision or specificity in an indictment interferes with judicial economy, as the Prosecutor also benefits from a clear and unambiguous indictment which enables him to focus his case and hence to allocate his-limited resources reasonably.¹²³ Therefore, the Trial Chamber stresses that a specific and unambiguous indictment is an essential prerequisite to a fair and expeditious trial.¹²⁴

60. The fact that the case summary, provided for in Rule 47(C) of the Rules, is appended to the Indictment does not suggest that the case summary forms a part of the Indictment. The Appeals Chamber in the *Norman* case stated that:

The case summary which should accompany the Indictment forms no part of it. The significance of this practice is that once a defendant is arraigned [...] no word or phrase of any count or any particular of a count may be changed without the permission of the court, by an application to amend the Indictment which is made in the presence of the Defence. The Prosecutor's case summary, however, is not a document susceptible to amendment by the court. It accompanies the Indictment in order to give the Accused better details of the charges against him and to enable the designated judge to decide whether to approve the Indictment under Rule 47(E).¹²⁵

61. Therefore, the case summary is primarily a document intended for the confirmation stage of an indictment. In addition the case summary, like the pre-trial brief but in a more concise form, expands on the legal and factual issues the Prosecution intends to develop at trial. Therefore, any material fact that appears only in a case summary cannot substitute for the pleading of that material fact in the Indictment since,

¹¹⁹ AFRC Trial Judgement, para. 27.

¹²⁰ AFRC Trial Judgement, para. 29.

¹²¹ *Prosecutor v. Blaskic*, IT-95-14-A, Judgement, 29 July 2004 ["Blaskic Appeal Judgement"], para. 220; Kupreskic Appeal Judgement, para. 114; Cyangugu Appeal Judgement, para. 114.

¹²² *Prosecutor v. Rasevic*, IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004.

¹²³ *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended indictment, 15 July 2004, para. 28.

¹²⁴ *Prosecutor v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended indictment, 15 July 2004, para. 28.

¹²⁵ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T-397, Decision on Amendment of the Consolidated Indictment, 16 May 2005, paras 51-52.

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as the Appeals Chamber has concluded, the case summary "is not a document susceptible to amendment by the court".¹²⁶ The material facts of the case must be pleaded in an indictment and may only be amended with leave of the Trial Chamber pursuant to Rule 50(A).

62. The Appeals Chamber held that:

In order to guarantee a fair trial the Prosecution is obliged to plead material facts with a sufficient degree of specificity. The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.¹²⁷

63. The Appeals Chamber also held that in order to determine whether the Prosecution properly pleaded a joint criminal enterprise, the Indictment should be read as a whole.¹²⁸

64. The pleading of a JCE is a material fact and its elements must be pleaded in the indictment with sufficient specificity.¹²⁹ In its Case Summary, Prosecution Pre-Trial Brief and the Opening Statement of the Prosecutor on 4 June 2007 the Prosecution indicates that it intends to rely on JCE liability in this case.

65. The Trial Chamber will therefore consider whether the JCE was adequately pleaded in the Second Amended Indictment.

C. Pleading Requirements for Joint Criminal Enterprise

66. With regards to modes of liability in general, there is ample jurisprudence asserting that nature of the alleged responsibility of an accused must be unambiguous in an indictment.¹³⁰

67. As for pleadings regarding JCE liability, the Trial Chamber recalls that the *actus reus* of JCE liability comprises three elements:

- (i) A plurality of persons;
- (ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;
- (iii) Participation of the Accused in the common plan, design or purpose involving the perpetration of one of the crimes provided for in the Statute.¹³¹

¹²⁶ *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-15-T, Decision on Amendment of the Consolidated Indictment, 16 May 2005, paras 51-52.

¹²⁷ AFRC Appeal Judgement, para. 37 [footnotes omitted].

¹²⁸ AFRC Appeal Judgement, para. 138.

¹²⁹ See for example, *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, Judgement, 21 July 2001, para. 147; *Blaskic* Appeal Judgement, para. 215; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, 17 December 2004, para. 129; *Gacumbitsi*, para. 167; *Ntagerura* Appeal Judgement, para. 23.

¹³⁰ See for example, *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, para. 147; *Blaskic* Appeal Judgement, para. 215; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, 17 December 2004, para. 129. *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003, para. 303.

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68. The Appeals Chamber has found that following four categories of facts must be pleaded in any indictment charging an accused with JCE liability:¹³²

- (i) The nature or purpose of the JCE;¹³³
- (ii) The time at which or the period over which the enterprise is said to have existed;¹³⁴
- (iii) The identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category as a group;¹³⁵
- (iv) The nature of the participation by the accused in that enterprise.¹³⁶

D. Pleading of the JCE in the Second Amended Indictment

69. Bearing in mind the Appeals Chamber's finding that an Indictment must be read as a whole,¹³⁷ the Trial Chamber considers the following paragraphs of the Second Amended Indictment, namely:

a) **Para. 5** which states that:

*Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.*¹³⁸ [Emphasis added]

b) **Para. 33**, which states that:

¹³¹ *Prosecutor v. Tadic*, IT-94-1-A, Judgement, 15 July 1999 ["Tadic Appeal Judgement"], para. 227.

¹³² AFRC Appeal Judgement, footnote 146. See also AFRC Trial Judgement, para. 64.

¹³³ *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, 28 February 2005, ["Kvocka Appeal Judgement"], para. 28; *Niyitegeka* Appeal Judgement, para. 194; *Kupreskic* Appeal Judgement, paras 88, 114; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A ["Gacumbitsi Appeal Judgement"], para. 162; *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 ["Krnojelac Decision"], para. 16; *Prosecutor v. Milutinovic, Sainovic, Odjanic*, IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 ["Milutinovic Decision"], p. 4.

¹³⁴ *Krnojelac* Decision, para. 16; *Milutinovic* Decision, p. 4.

¹³⁵ *Kvocka* Appeal Judgement, para. 28; *Niyitegeka* Appeal Judgement, para. 194; *Kupreskic* Appeal Judgement, paras 88, 114; *Gacumbitsi* Appeal Judgement, para. 162; *Krnojelac* Decision, para. 16; *Milutinovic* Decision, p. 4.

¹³⁶ *Kvocka* Appeal Judgement, para. 28; *Niyitegeka* Appeal Judgement, para. 194; *Kupreskic* Appeal Judgement, paras 88, 114; *Gacumbitsi* Appeal Judgement, para. 162; *Krnojelac* Decision, para. 16; *Milutinovic* Decision, p. 4.

¹³⁷ AFRC Appeal Judgement, para. 138.

¹³⁸ Second Amended Indictment, para. 5 [emphasis added].

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The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, or which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.¹³⁹ [Emphasis added]

c) Para. 34, which states,

In addition, or alternatively, pursuant to Article 6.3 of the Statute, the Accused, while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, RUF/AFRC Junta or alliance, and/or Liberian fighters, is individually criminally responsible for the crimes referred to in Articles 2.3 and 4 of the Statute as alleged in this Amended Indictment. The Accused is responsible for the criminal acts of his subordinates in that he knew or had cause to know that the subordinate was about to commit such acts or had done so and the Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. [Emphasis added]

d) Paras 9, 14, 22, 23, 28, under the heading of the particulars of each count of the Indictment, which are prefixed with the following words:

[...] Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters [...] acting in concert [...] with the ACCUSED."¹⁴⁰ [Emphasis added]

70. The Trial Chamber by a Majority opines that taken together, these paragraphs fulfil the requirements for pleading JCE and serve to put the Defence on notice that the Prosecution intended to charge the Accused with having participated in a Joint Criminal Enterprise.

(i) The existence of a common plan, design or purpose amounting to or involving a crime under the Statute:

71. With regards to the common purpose, design or plan, paragraph 5 of the Indictment provides that the Accused together with others took part in "a campaign to terrorize the civilian population of the Republic of Sierra Leone." According to paragraphs 5 and 33 of the Indictment, the crimes charged in Counts 2 through 11 were part of the "campaign of terror" or were a reasonably foreseeable consequence thereof.

(ii) The time or period of the alleged criminal enterprise:

72. Following the direction of the Appeals Chamber that the Indictment must be read as a whole, it is clear that the JCE is alleged to have existed between 30 November 1996 and 18 January 2002.¹⁴¹

¹³⁹ Second Amended Indictment, para. 33 [emphasis added].

¹⁴⁰ Second Amended Indictment, paras 9, 14, 22, 23, 28 [emphasis added].

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(iii) A plurality of participants in the criminal enterprise:

73. The Indictment states that, the alleged participants in the criminal enterprise included "members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters."¹⁴² The specific groups alleged to have participated have been clearly identified, and thus the Accused has been provided with adequate notice of the material fact of those engaged in the enterprise.

(iv) The nature of the Accused's participation in the criminal enterprise:

74. The Indictment alleges that the Accused participated in the criminal enterprise by "planning, instigating, ordering, committing or aiding and abetting the planning, preparation or execution of"¹⁴³ the alleged crimes; or alternatively, that "while holding positions of superior responsibility and exercising command and control over subordinate members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, the Accused is responsible for the acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit the crimes or had done so but failed to take the necessary and reasonable measures to prevent the crimes or to punish the perpetrators."¹⁴⁴ This clearly identifies the nature of the Accused's participation in the enterprise

75. Finally the fact that the Prosecution has not used the words "Joint Criminal Enterprise" in the indictment does not, in and of itself, indicate a defect. It is possible that other phrasings might effectively convey the same concept. The question is not whether particular words have been used but whether an accused has been meaningfully informed of the nature of the charges so as to be able to prepare an effective defence.¹⁴⁵ To rely on JCE, an indictment need not plead the doctrine *ipsissima verba* if the intention is clear.¹⁴⁶

76. Reading the Indictment as a whole the Trial Chamber is satisfied that the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him.

¹⁴¹ See for example, Indictment paras. 6, 9, 14, 18, 22, 28. See also AFRC Appeals Judgement, para. 86 and in particular footnote 147 in which the Appeals Chamber noted that paras 33 to 35 of the AFRC Indictment did not provide a time frame for the alleged JCE, but held that these paragraphs should be read together with paragraph 32 which alleged that "[a]t all times relevant to this Indictment" the accused participated in the JCE.

¹⁴² Second Amended Indictment, paras. 5, 6, 9, 14, 18, 22, 34.

¹⁴³ Ibid. para.33.

¹⁴⁴ Ibid. para.34.

¹⁴⁵ *Gacumbitsi v. Prosecutor* ICTR-2001-64-A 7 July 2006 para. 165.

¹⁴⁶ Ibid. Separate Opinion of Judge Shahabuddeen para. 29.

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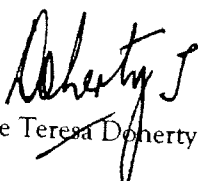
V. DISPOSITION

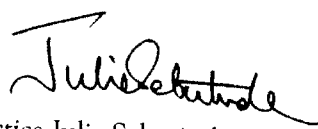
FOR THE ABOVE REASONS by a majority

DISMISSES the Defence Motion

Justice Richard Lussick appends a Dissenting Opinion.

Done at The Hague, The Netherlands, this 27th day of February 2009.


Justice Teresa Doherty


Justice Julia Sebutinde



ANNEX B

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SPECIAL COURT FOR SIERRA LEONE

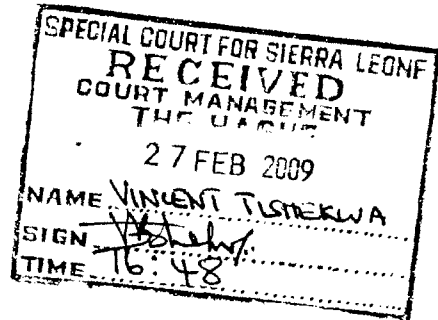
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL03-1-T

Date: 27 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

DECISION ON PUBLIC URGENT DEFENCE MOTION REGARDING A FATAL
DEFECT IN THE PROSECUTION'S SECOND AMENDED INDICTMENT RELATING
TO THE PLEADING OF JCE -
DISSENTING OPINION OF JUSTICE RICHARD LUSSICK

Office of the Prosecutor:

Brenda J. Hollis
Nicholas Koumjian

Defence Counsel for Charles G. Taylor:

Courtenay Griffiths, Q.C.
Terry Munyard
Andrew Cayley
Morris Anyah

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DISSENTING OPINION OF JUSTICE RICHARD LUSSICK

Introduction

1. I have had the opportunity of reading the Majority Decision of my learned colleagues and have to say that I agree with their finding that the Defence has shown good cause for the late filing of the Motion. I dissent, however, from their finding that the joint criminal enterprise responsibility of the Accused has been properly pleaded in the Indictment.
2. I agree with the views expressed in the Majority Decision regarding the applicable law on the pleading requirements for indictments generally and for joint criminal enterprise specifically. Such views are well founded in the international jurisprudence of the *ad hoc* tribunals. Nevertheless, a proper application of those pleading principles leads to the conclusion, in my opinion, that the Indictment has been defectively pleaded with respect to joint criminal enterprise.

Defective Pleading of Joint Criminal Enterprise

3. The initial Indictment in this case was filed on 7 March 2003¹. An Amended Indictment was filed with leave on 17 March 2006. In that indictment, joint criminal enterprise is pleaded in the following terms:

The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, *or which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.*²

¹ Pleading of joint criminal enterprise in the initial Indictment is mentioned *infra* in the "Remedy" section.

² Amended Indictment dated 16 March 2006, filed on 17 March 2006, para. 33 [emphasis added].



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4. A Second Amended Indictment - which did not alter the wording of the pleading of joint criminal enterprise contained in the Amended Indictment - was filed on 29 May 2007³. (Hereinafter, unless otherwise indicated, a reference to "Indictment" will be a reference to the Second Amended Indictment, which is the current indictment.)
5. It is notable that the Indictment fails to identify any specific common purpose in respect of which the Accused is alleged to be criminally responsible. Hence, in my view, the Indictment is not sufficiently specific to clearly inform the Accused of the case he is required to meet in relation to joint criminal enterprise and is thus defective.
6. It is well established in international law that an indictment alleging the participation of the accused in a joint criminal enterprise must plead the nature of the common purpose of the joint criminal enterprise as a material fact, otherwise the indictment is defective⁴. The Appeals Chamber has found that "[e]stablished case law on the pleading of joint criminal enterprise requires that an indictment must allege the nature of the enterprise, the time period, the persons involved, and the nature of the accused's participation in the joint criminal enterprise."⁵ The Appeals Chamber has also found that "determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment".⁶

³ Second Amended Indictment, para 33.

⁴ *Kupreskic* Appeal Judgement, paras 88, 114; *Blaskic* (AC) Judgement, 29 July 2004, para 220; *Kronjelac* (AC) Judgement, 17 September 2003, para 116; *Ntagerura* (AC) Judgement, 7 July 2006, para 24; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, 28 February 2005, ["Kvočka Appeal Judgement"], paras 28, 42; *Niyitegeka* Appeal Judgement, para. 194; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A ["Gacumbitsi Appeal Judgement"], para. 162; *Prosecutor v. Krnojelac*, IT-97-25-PT, Decision on the Form of the Second Amended Indictment, 11 May 2000 ["Krnojelac Decision"], para. 16; *Prosecutor v. Milutinovic, Sainovic, Odjanic*, IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 ["Milutinovic Decision"], p. 4; *Prosecutor v. Hadzihasanovic et al.*; Case No. IT-01-47-PT, Decision of Form of Indictment, 7 December 2001, para 10; *Gacumbitsi* Appeal Judgement, para. 167; *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brdanin to the Form of the Amended Indictment, 23 February 2001, para 13; *Prosecutor v. Furundzija*, IT-95-17/1-A, 21 July 2000, Judgement, 21 July 2001, para. 147; *Blaskic* Appeal Judgement, para. 215; *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, 17 December 2004, para. 129; *Cyangugu* Appeal Judgement, para. 23.

⁵ *AFRC Appeal Judgement*, footnote 164.

⁶ *AFRC Appeal Judgement*, para 84.

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7. On 3 August 2007 the Prosecution filed an Amended Case Summary, no doubt with the intention compensating for the deficiencies of the Indictment. The Prosecution claims that by virtue of this Amended Case Summary it cannot be said that "the Prosecution has failed to allege a common purpose to commit a crime within the Statute⁷." The Amended Case Summary provided (*inter alia*) the following details of the alleged common purpose:

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 pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.⁸

8. The specific objective of the joint criminal enterprise detailed in the Amended Case Summary is obviously a material fact which should have been pleaded in the Indictment. The Amended Case Summary purports to change the count against the Accused by substituting a common purpose which was not charged in the Indictment. In my opinion, this cannot cure the defect in the Indictment. Material facts must be pleaded in an indictment - not in a case summary - and can only be amended by leave of the Trial Chamber under Rule 50. Since the indictment is the primary accusatory instrument, it is not possible for the Prosecution to cure a defective indictment by amending a case summary⁹.

9. I disagree with the Majority Decision that "[r]eading the Indictment as a whole, (...) the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment." One cannot argue with the proposition that the Indictment should be read as a whole, but I do not agree that in the present case, reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Indictment is sufficient to fulfil the requirements for pleading joint criminal enterprise.

⁷ Response, para. 10.

⁸ Case Summary Accompanying the Second Amended Indictment ("Amended Case Summary"), para 42.

⁹ *Prosecutor v. Hadzihasanovic et al*; Case No. IT-01-47-PT, Decision of Form of Indictment, 7 December 2001, para 12; *Prosecutor v. Rasevic*, IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004.

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10. (i) Para. 5 of the Indictment states that:

*Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters), assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charged in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.*¹⁰

(ii) Paras 9, 14, 22, 23, 28, under the heading of the particulars of each count of the Indictment, make reference to “members of the RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, assisted and encouraged by, acting in concert with, under the direction and/or control of, and/or subordinate to the ACCUSED.”¹¹

(iii) Para. 33 of the Indictment states that:

*The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this Amended Indictment, which crimes the Accused planned, instigated, ordered, committed, or in whose planning, preparation or execution the Accused otherwise aided and abetted, or which crimes amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.*¹²

11. The plain language of those paragraphs does not, in my opinion, support the Majority finding that paragraph 5 provides that the common plan, design or purpose of the joint criminal enterprise was “to terrorize the civilian population of the Republic of Sierra Leone.” Not only does paragraph 5 fail to specify any purpose for the joint criminal enterprise, it does not mention joint criminal enterprise at all. That is because paragraph 5 is not concerned with joint criminal

¹⁰ Second Amended Indictment, para. 5 [emphasis added].

¹¹ Second Amended Indictment, paras 9, 14, 22, 23, 28 [emphasis added].

¹² Second Amended Indictment, para. 33 [emphasis added].



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enterprise but is a count charging acts of terrorism, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Bearing in mind that the Amended Case Summary, which particularises "a common, plan, design or purpose to carry out a criminal campaign of terror" was not in existence when the Indictment was filed, there is no more reason for reading paragraph 33 together with paragraph 5 than there is for reading paragraph 33 together with any other paragraph of the Indictment.

12. Furthermore, paragraph 5, when read with paragraph 33, does not clearly identify a common purpose. The campaign "to terrorize the civilian population of the Republic of Sierra Leone" would more likely be the means of achieving a common purpose rather than an end in itself. Indeed, the Amended Case Summary relied upon by the Prosecution alleges an objective different from paragraph 5, namely that the Accused participated in the "criminal campaign of terror, as charged in the Second Amended Indictment *in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone*"¹³.
13. Moreover, in view of the difference between the objective stated in paragraph 5 of the Indictment and the objective stated in the Amended Case Summary, it follows that not even the Prosecution would agree with the Majority theory of a common purpose.
14. I do not interpret the Appeals Chamber Decisions in *Norman* and in the *AFRC Appeal Judgement* as meaning that the Appeals Chamber has adopted pleading principles which are any less stringent than those of other international courts nor, in particular, that it has departed from well established pleading principles by deciding that the common purpose of a joint criminal enterprise need not be clearly specified in an Indictment. Such an interpretation would obviously be an infringement of the statutory right of the Accused to be informed clearly of the charges against him so that he may prepare a defence.
15. My final point is that the Accused should not be required to undergo the brain-twisting exercise of reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Indictment in order to fathom what liability facts are most likely to form the

¹³ See Amended Case Summary, para 42; see also Motion, para 27.

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basis for his alleged joint criminal enterprise. An indictment which requires an accused to do so is obviously defective in that it fails to clearly inform the accused of the case he is required to meet¹⁴.

Remedy

16. Having found the Indictment to be defective in respect of its pleading of joint criminal enterprise, it is nonetheless clear that the Accused was given ample notice by the Prosecution in its various supporting documents, initial indictment and opening statement that he was to be charged with participation in a joint criminal enterprise, even though the objective of that enterprise was not always expressed in the same way.
17. The initial Indictment, filed on 7 March 2003, stated that “the common plan, purpose or design (joint criminal enterprise)” was “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. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.”¹⁵
18. The Amended Indictment filed on 17 March 2006, and the Second Amended Indictment filed on 29 May 2007, charged the Accused with being criminally responsible for crimes which “amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose”¹⁶, but no common plan, design or purpose was specified.
19. The initial Case Summary filed on 7 March 2006 provided the following details of the common plan, design or purpose:
42. This shared common plan, design or purpose was to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra

¹⁴ *Kupreskic* Appeal Judgement, paras 88,114; *Kvočka* Appeal Judgement, para 28; *Ntakirutimana* Appeal Judgement, para 470; *Niyitegeka* Appeal Judgement, para 195; *Ntagerura* Appeal Judgement, para 22.

¹⁵ Indictment, filed on 7 March 2003, para 23.

¹⁶ See paragraph 33 of both documents.

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Leone, in particular the diamonds, were to be provided primarily to the ACCUSED and other persons outside Sierra Leone.

43. The Common plan, design or purpose included taking any actions necessary to gain and exercise physical and political control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to those persons engaged in achieving the objectives of the common plan, design or purpose. This common plan, design or purpose amounted to, or involved the commission of, the crimes alleged in the Amended Indictment. The alleged crimes, amounting to or involved within the common plan, design or purpose, were either intended by the ACCUSED, or were a foreseeable consequence of the common plan, design or purpose.

44. The ACCUSED participated in this common plan, design or purpose as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone, in particular diamonds, to destabilize the Government of Sierra Leone in order to facilitate access to such mineral wealth, and to install a government in Sierra Leone that would be well disposed toward, and supportive of, the ACCUSED's interests and objectives in Liberia and the region.

20. The Prosecution's Pre-Trial Brief, filed on 4 April 2007, set out the alleged joint criminal enterprise responsibility of the Accused at some length. The common plan, design or purpose was particularised as follows:

The Emergence of the Common Plan, Design or Purpose (Common Plan)

Prior to the commencement of the armed conflict in Sierra Leone, and throughout the armed conflict, 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. Implementation of this common plan included overthrowing the government of Sierra Leone in order to facilitate access to its natural resources and to install a government that would be well disposed toward, and supportive of, the Accused's interests and objectives in Liberia and the region.¹⁷

¹⁷ Exs. 1.011; 1.018.

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This common plan amounted to or involved the commission of the crimes alleged in the Amended Indictment (Indictment). 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, including widespread and continuing killings, rapes, beatings and mutilations, enslavement of the civilian population for use as fighters, "bush wives" and forced labour, looting and burning of civilian property. Children were used to carry out this criminal campaign and in active hostilities.¹⁸

The Accused, as leader of the NPFL was instrumental in the creation of this common plan. The Accused and Foday Sankoh, the leader of the RUF (Revolutionary United Front), made common cause to assist each other in their respective countries to achieve the common plan. From the outset, the Accused and his forces worked virtually as one with Sankoh and his RUF forces, and with the organised armed groups and forces that later evolved. To that end, Sankoh and his RUF forces assisted the Accused during the Liberian armed conflict which commenced in 1989.¹⁹

21. The Amended Case Summary, filed on 3 August 2007, alleged joint criminal enterprise in the following terms:

42. 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 pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.

43.1 The crimes charged in Counts 1 through 11 of the Second Amended Indictment were within the common plan as it existed from 30 November 1996 through 18 January 2002. The Accused and the other participants in the common plan intended the commission of each of the charged crimes.

43.2 Alternatively, from 30 November 1996 through about 18 January 2002, the following crimes were within the common plan, design or purpose: acts of terror

¹⁸ Wits. TF1-020; 071; 139; 227; 334; 336; 366; 532; Ellis. Exs. 1.020; 1.021; 1.067; 1.082; 1.095; 1.152; 1.155; 1.156; 1.157; 1.159; 1.169; 1.170; 1.177; 1.178; 1.184; 1.295.

¹⁹ Wits. TF1-168; 274; 275; 515; 532; 542; Ellis. Exs. 1.058; 1.138; 1.141; 1.157; 1.232; 1.254; 1.261; 1.269.

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against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under the age of 15 years; enslavement; and pillage. The Accused and other participants in the common plan agreed upon and intended the commission of these crimes. The crimes charged in Counts 2, 3, 4, 5, 6, 7 and 8 were foreseeable consequences of the crimes agreed upon in the common plan. The Accused participated in the common plan despite his awareness that these were foreseeable consequences.

22. The Prosecutor, in his opening statement on 4 June 2007, addressed joint criminal enterprise in this way:

The accused is responsible 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....within that overall plan there were, of course, sub-plans and strategies and operations, and the execution of that plan, of course, changed and varied in its tactics due to the unfolding events and the resistance that it faced.²⁰

Further on in his opening statement, the Prosecutor asserted that "the evidence will show that the accused's plan to control territory in Sierra Leone through a campaign of terror began at least in 1991..."²¹

Later in his address, the Prosecutor reiterated that

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. This was part of a larger strategy that included helping other militarily in their respective revolutions to take over their respective countries, and the first one was to be Liberia...The agreement made by the accused and Sankoh was to begin...in Liberia with the help of Sankoh's forces, and Liberia would then be used as a base from which to move into Sierra Leone with the help of the forces of the accused...access to

²⁰ Prosecution Opening Statement, 4 June 2007, p. 30, lines 9-20.

²¹ ²¹ Prosecution Opening Statement, 4 June 2007, p. 34, lines 9-12.

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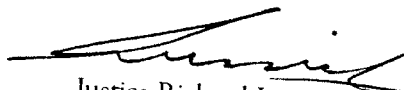
Sierra Leone's abundant resources was a primary objective, but Sierra Leone would also be a source of manpower.²²

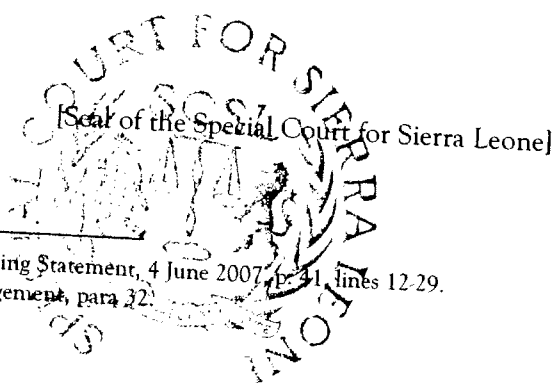
23. Thus, notwithstanding the defective indictment, an appraisal of the above material leaves no doubt that the Accused was put on notice at a very early stage in the case that he was going to have to answer an allegation of participating in a joint criminal enterprise. Although there are some obvious differences in the way the various materials describe the common purpose, such divergences are not so diffuse as to deprive the Accused of a fair opportunity to prepare his defence. Accordingly, I believe the justice of the case would be met by ordering the Prosecution to amend the indictment.²³

Disposition

24. For the foregoing reasons, I would have determined as follows:

- (i) The claim of the Defence that joint criminal enterprise is defectively pleaded in the Second Amended Indictment is upheld.
- (ii) The Defence prayer for severance is denied.
- (iii) The Prosecution is ordered to file within 14 days a further amended indictment which pleads clearly and unambiguously as a material fact the common plan, design or purpose of the joint criminal enterprise in which the Accused is alleged to have participated.


Justice Richard Lussick



²² Prosecution's Opening Statement, 4 June 2007, p. 41, lines 12-29.

²³ Kvočka Appeal Judgement, para 32.