772) SCSL-03-01-T (25045-25068) 25045

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice Emmanuel Ayoola
Justice Jon M. Kamanda
Justice George Gelaga King

Registrar: Mr. Herman von Hebel

Date filed: 3 April 2009

THE PROSECUTOR **Against** **Charles Ghankay Taylor**

Case No. SCSL-03-01-T

PUBLIC

PROSECUTION RESPONSE TO DEFENCE APPEAL AGAINST MAJORITY DECISION ON THE PLEADING OF JOINT CRIMINAL ENTERPRISE IN THE SECOND AMENDED INDICTMENT

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I. INTRODUCTION

1. The Prosecution files this Response to the "Defence Notice of Appeal and Submissions regarding the Majority Decision concerning the Pleading of JCE in the Second Amended Indictment," filed on 26 March 2009 and served on the Prosecution on 27 March 2009 ("Defence Appeal").[1]
2. The Defence Appeal is opposed. As discussed below, the five grounds of appeal raised by the Defence are without merit and should be dismissed. Consequently, the relief requested should be denied. The Majority in the Trial Chamber ("Majority") did not err in fact or in law, or abuse its discretion, in finding that the Prosecution has adequately fulfilled the pleading requirements of the joint criminal enterprise ("JCE") in the Indictment and provided sufficient details to put the Accused on notice of the case against him. The Second Amended Indictment ("Indictment")[2] charges participation in a common plan, purpose or design, also known as JCE, as a form of liability applying to all crimes alleged in the Indictment. The Amended Case Summary provides further particulars related to this form of liability. The Accused has been on notice of JCE as a form of liability throughout the trial. No relief is warranted.

II. STANDARD OF REVIEW ON APPEAL

3. Under the Statute and Rules of the Special Court, an appeal may be allowed on the basis of an error on a question of law invalidating the decision, an error of fact which has occasioned a miscarriage of justice, and/or a procedural error.[3] The standard of review on appeal is different for each of these types of error.
4. With respect to errors of law, the Appeals Chamber, as the "final authority on the correct interpretation of the governing law",[4] should determine whether the alleged error of substantive or procedural law was in fact made. It is only an error of law *invalidating the decision* of the Trial Chamber that may lead to a reversal or revision of that decision by the

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[1] *Prosecutor v Taylor*, SCSL-03-01-T-767, "Defence Notice of Appeal and Submissions regarding the Majority Decision concerning the Pleading of JCE in the Second Amended Indictment", 26 March 2009 ("**Defence Appeal**").
[2] All references to the "Indictment" in this Response relate to the "Second Amended Indictment".
[3] Article 20 of the Special Court Statute and Rule 106 of the Rules of Procedure and Evidence.
[4] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-688, "Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone", 11 September 2006, para. 7.

Appeals Chamber.[5]

5. With respect to errors of fact, the Appeals Chamber must give a "margin of deference to a finding of fact reached by a Trial Chamber"[6] and "will not lightly overturn" such findings.[7] In order to succeed in its Appeal, the Defence must show that no reasonable Trial Chamber could have reached the conclusion that this Trial Chamber did on the material before it.

6. With respect to procedural errors, a distinction should be drawn between non-compliance with a mandatory procedural requirement, which will not necessarily invalidate the Trial Chamber's decision if there has been no prejudice to the Defence[8] and the alleged erroneous exercise by the Trial Chamber of its discretion. "It is well established that in reviewing the exercise of a discretionary power, an appellate tribunal does not necessarily have to agree with the Trial Chamber's decision as long as that Chamber's discretion was properly exercised in accordance with the relevant law in reaching that decision".[9] In simple terms, the question is whether the exercise of the discretion was "reasonably open" to the Trial Chamber,[10] or whether conversely, the Trial Chamber "abused its discretion".[11]

III. GROUNDS AND SUBMISSIONS IN RESPONSE TO THE APPEAL

First Ground of Appeal

The Majority of the Trial Chamber erred in fact and law in concluding that the doctrine of joint criminal enterprise was not defectively pleaded in the Second Amended Indictment when the text of that document is considered as a whole and therefore, sufficient details have been provided to place the Accused on notice of the case against him.

7. The Prosecution opposes this ground of appeal on the basis, first, that it amounts to an 'umbrella' ground, incorporating all submissions made in respect of grounds two to five

[5] *Prosecutor v Kunarac et al.*, IT-96-23 and IT-96-23/1-A, "Judgement", Appeals Chamber, 12 June 2002, para. 38.
[6] *Prosecutor v Kupreskic et al.*, IT-95-16-A, "Judgement", Appeals Chamber, 23 October 2001, para. 30.
[7] *Prosecutor v Fofana and Kondewa*, SCSL-04-14-A-829, "Judgement", Appeals Chamber, 28 May 2008, para. 33.
[8] See e.g. *Prosecutor v Delalic* et al, IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, paras. 630–639; and *Prosecutor v Krstic*, IT-98-33-A, Judgement, Appeals Chamber, 19 April 2004, para. 187.
[9] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-T-688, "Decision on Interlocutory Appeals against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone", 11 September 2006, para. 5.
[10] *Prosecutor v Delalic et al.*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, para. 274.
[11] *Prosecutor v Delalic et al.*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001, para. 533.

but supported by no separate submissions, and second, that the Trial Chamber did not err in finding that the JCE was adequately pleaded in the Second Amended Indictment.

8. The Defence describes the alleged error of fact and law as being "fundamental" but fails to provide details of the alleged error or state with precision how it invalidates the decision or results in a miscarriage of justice. The Defence refers to the cumulative effect of the errors alleged elsewhere in its appeal resulting in the allegedly erroneous final conclusion of the Trial Chamber, but this does not amount to support for an independent ground which itself alleges further errors. The Appeals Chamber is therefore provided with no basis for a consideration of the first ground of appeal and it should be struck out.

9. Assuming *arguendo* that the Appeals Chamber proceeds to consider the first ground of appeal, the ground is without merit and should be dismissed. The Indictment sufficiently pleads JCE. The Defence is further informed and put on notice of the details of this mode of liability by the additional particulars found in the Amended Case Summary.

10. In deciding whether or not the Prosecution properly pleaded JCE as a mode of liability in the Indictment, both the Majority Decision[12] and the Dissenting Opinion[13] were guided by the Appeals Chamber's Judgment in the AFRC case.[14] Significantly, reliance was placed both on the Appeals Chamber's findings as to the requirements for pleading JCE[15] and to the Appeals Chamber's finding that an Indictment must be read as a whole.[16]

11. The Appeals Chamber, relying on established case law, stated in a footnote 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.[17] The Majority Decision made further reference to established case law in support of each of these requirements.[18] Similarly, the Appeals Chamber's holding, followed by the Majority in its

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[12] *Prosecutor v Taylor*, SCSL-03-01-T-752, "Decision on Urgent Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", 27 February 2009 ("**Majority Decision**").
[13] *Prosecutor v Taylor*, SCSL-03-01-T-751, "Decision on Urgent 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 ("**Dissenting Opinion**").
[14] *Prosecutor v Brima et al.*, SCSL-04-16-A-675, "Judgment", Appeals Chamber, 22 February 2008, ("**AFRC Appeals Judgment**").
[15] Majority Decision, para. 68. Dissenting Opinion, para. 6.
[16] Majority Decision, paras 63 and 69, referring to the AFRC Appeals Judgment, para. 81.
[17] AFRC Appeals Judgement, footnote 146, referring to *Prosecutor v Krnojelac* IT-97-25-PT, "Decision on Form of Second Amended Indictment," 11 May 2000, para. 16.
[18] Majority Decision, footnotes 133-136.

analysis, that in order to determine whether the Prosecution properly pleaded a joint criminal enterprise the Indictment should be read as a whole, is supported by established case law.[19] The Majority correctly concluded that, reading the Indictment as a whole, the Prosecution fulfilled the pleading requirements with respect to JCE.

12. Early in the history of the Special Court, the Prosecution received specific guidance from the Appeals Chamber as to the appropriate pleading regimen for the Special Court as prescribed by Rule 47(C). In its Decision on Amendment of the Consolidated Indictment in the *Norman* case,[20] the Appeals Chamber stated that an indictment should consist only of a list of counts, with each count followed by brief particulars.[21] The Appeals Chamber pointed out in the *Norman* case that "the Indictment included many more 'particulars' than the Prosecution was obliged to give".[22] Notably, and uniquely among international tribunals, the Prosecutor at the Special Court is obliged to accompany any indictment with a case summary containing details of "the allegations he proposes to prove in making his case".[23] Thus, the degree of detail necessary to put the Accused on notice of the case against him required at other tribunals with respect to the pleading of JCE in the indictment is not required under the regimen of the SCSL, which provides for case summaries and aspires towards more succinct indictments.

13. The AFRC Appeals Judgment additionally made it clear that the criminal purpose underlying the JCE can derive from the means contemplated to achieve that objective. "The objective and the means to achieve the objective constitute the common design or plan."[24] The Appeals Chamber further stated that "the requirement that the common plan, design or purpose is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its

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[19] AFRC Appeals Judgement, footnote 138, refers to *Prosecutor v Ntagerura*, ICTR-99-46-T, "Judgement", Trial Chamber, 25 February 2004, para. 30: "In assessing an Indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment." See also *Rutaganda v The Prosecutor*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003, para. 304; *Prosecutor v Nchamihigo*, ICTR-2001-63-R50, "Decision on Defence Motion on Defects in the Form of the Indictment", 27 September 2006, para. 16. Justice Lussick stated in his Dissenting Opinion that: "One cannot argue with the proposition that the Indictment should be read as a whole", Dissenting Opinion, para. 9.

[20] *Prosecutor v Norman, Fofana, Kondewa*, SCSL-04-14-AR73-397, "Decision on Amendment of the Consolidated Indictment", 16 May 2005 ("**Decision on Amendment of the Consolidated Indictment**").

[21] Decision on Amendment of the Consolidated Indictment, para. 52.

[22] Decision on Amendment of the Consolidated Indictment, para. 53.

[23] Rule 47(C).

[24] AFRC Appeals Judgment, para. 76.

objective."[25]

14. Paragraph 33 of the Indictment alleges the Accused's participation in a "common plan, design or purpose" alongside other modes of liability under Article 6(1) of the Statute. Paragraph 33 also alleges that the Accused is individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in the Indictment, which crimes are incorporated by reference by paragraph 32 of the Indictment. These 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 as alleged in paragraph 33. Thus, the language of the Indictment clearly states that all the crimes alleged in the Indictment, i.e. Counts 1 through 11, fall within the common plan, design or purpose, either as intended or as reasonably foreseeable consequences. The additional particulars of that JCE and all other modes of liability are provided in the Amended Case Summary.[26] The Amended Case Summary articulates that 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".[27]

15. The disposition of the Majority is not based on erroneous factual or legal reasoning. The Prosecution cannot be said to have inadequately pleaded JCE in the Indictment and, as elaborated below,[28] has consistently provided sufficient details to place the Accused on notice of the case against him.

Second Ground of Appeal

The finding by a Majority of the Trial Chamber 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 33) of the Second Amended Indictment was the "common purpose" of the JCE constituted an error both of law and in the application of the law.

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[25] AFRC Appeals Judgment, para. 80.
[26] See the Amended Case Summary at paras 30-48, esp: 34 (planning); 35 (instigating); 36-38 (ordering); 39 (committing); 40-41 (aiding and abetting); 42-44 (common plan, design or purpose); 48 (superior authority).
[27] Amended Case Summary, para. 42. Emphasis added.
[28] Paragraphs 33-39.

16. The Prosecution opposes this ground of appeal on the basis that the Majority did not err in concluding that the pleading requirement as to the "nature and purpose of the JCE" was satisfied by the Indictment, read as a whole, and in particular paragraphs 5 and 33.[29] The Majority found that the Indictment sufficiently pleaded the existence of a common plan, design or purpose amounting to or involving crimes under the Statute.[30]

17. The Defence suggestion that the failure to use the particular term "joint criminal enterprise" in the Indictment is fatal to any reliance on this mode of liability is disingenuous. It is clear that the Defence understood that the Prosecution had pleaded a JCE as they entitled their motion "Urgent Defence Motion regarding a Fatal Defect in the *Pleading of a JCE*".[31] The term "joint criminal enterprise" is merely one of number of ways of describing a concept that is now well known to international criminal law. The applicability of this mode of liability to international crimes was first articulated in the *Tadic* case, in which the ICTY Appeals Chamber used a variety of terms to describe it, captioning the relevant section "Article 7(1) of the Statute and the Notion of Common Purpose".[32] The ICTY Appeals Chamber referred to this form of liability as "a common criminal plan, a common criminal purpose, a common design or purpose, a common criminal design, a common purpose, a common design, and a common concerted design".[33] As Trial Chamber I has observed, "the phrases 'common purpose doctrine' on the one hand, and 'joint criminal enterprise' on the other have been used interchangeably in the international jurisprudence and they refer to one and the same thing."[34] In the *Simic* case the ICTY Trial Chamber found that: "'Acting in concert together' plainly means acting jointly, and on the face of it in a criminal context, would refer to co-perpetratorship. It is commonly accepted that a reference to 'acting in concert together' means acting pursuant to a joint criminal

[29] Majority Decision, para. 71.
[30] Majority Decision, heading D(i) and para. 71.
[31] Emphasis added.
[32] *Prosecutor v Tadic*, IT-94-1, "Judgement", Appeals Chamber, 15 July 1999, sub-heading immediately prior to para. 185.
[33] See discussion of terms used in *Prosecutor v Tadic*, IT-94-1, "Judgement", Appeals Chamber, 15 July 1999, at para. 24 of *Prosecutor v Brdjanin & Talic*, IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001.
[34] *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T-785, "Judgement", Trial Chamber, 2 August 2007, para. 206, citing *Prosecutor v Milutinovic* et al., IT-99-37-AR72, "Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*", 21 May 2003, para. 36.

enterprise."[35]

18. The Defence places undue reliance in its submissions on the opinion of an academic commentator[36] in preference to case law, in particular the jurisprudence of this Appeals Chamber.[37]

19. The Majority Decision correctly notes that the absence of the words "joint criminal enterprise" in the Indictment does not constitute a defect as "other phrasings might effectively convey the same concept".[38] There is no single or mandatory formula for pleading JCE as long as the "accused has been meaningfully informed of the nature of the charges so as to be able to prepare an effective defence".[39] Notably, the Prosecution repeats the phrase "acting in concert with" under the particulars for each group of Counts in the Indictment in addition to alleging the participation of the Accused in a common plan, design or purpose in relation to all Counts.

20. The Majority correctly concluded that the Indictment alleges that the Accused, together with others, took part in a campaign to terrorize the civilian population of the Republic of Sierra Leone. Inflicting terror on a civilian population is a crime within the Statute of the Court, as are the acts alleged in Counts 2 through 11 which, together with burning, are

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[35] *Prosecutor v Simic*, IT-95-9-T, Trial Judgement, 17 October 2003, para. 149: "Various labels have been used by the Appeals Chamber and Trial Chambers of the Tribunal to refer to a theory of criminal liability based on the participation of more than one person in the execution of a common criminal plan. 'Joint criminal enterprise', however, appears to have been preferred." In that case the defence took issue with the terminology of the theory of "joint criminal enterprise", arguing that that phrase could not be inferred from "acting in concert together", para. 148. In the *Talic* case, the ICTY Trial Chamber noted that "the only 'purpose' which the prosecution must prove to have been 'common' to the participants in the joint criminal enterprise relates to the crime which fell *within* the agreed object of that enterprise." *Prosecutor v Brdjanin and Talic*, IT-97-25, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001, para. 37.

[36] Defence Appeal, para 29, citing C. Rose, "Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint criminal Enterprise and Sex Based Crimes", (Journal reference not provided), 5 November 2008, pp. 12 and 24.

[37] Notably, the commentator remarks in the portion quoted in paragraph 29 of the Defence Appeal, that paragraph 33 of the Indictment does not use the term "common plan, design or purpose." This is factually incorrect as paragraph 33 of the Indictment uses this exact phrasing. Further, the commentator misreads paragraph 20 of the "Prosecution Response to the Defence's Consequential Submission Regarding the Pleading of JCE" (SCSL-03-01-T-463, 10 April 2008). There, the Prosecution was not re-stating the common purpose but rather noting what the **Defence** had claimed in their Consequential Submission (paragraph 11) to have "identified" as the one common purpose pleaded by the Prosecution in the case. It may also be noted that on p. 18, the commentator puts forward a comment on the AFRC Appeals Judgment which lacks substance. She incorrectly suggests that the Chamber conflated the *actus reus* and *mens rea* requirements of JCE outlined in *Tadic* when in fact the Appeals Chamber's finding was consistent with *Tadic* in that the criminal purpose can be one that involves the commission of crimes in execution of the objective. The Appeals Chamber's holding is fully supported by other international jurisprudence (see paragraph 28 of this Response).

[38] Majority Decision, para. 75.

[39] Majority Decision, para. 75.

incorporated as part of that campaign of terror. The Indictment thus includes a common plan, design or purpose to commit crimes within the SCSL Statute as one of the forms of liability alleged in this case.

21. As noted above,[40] the case summary is unique to the pleading regimen at the Special Court and serves to put the Accused on notice of the case against him. There is a logical distinction between the Indictment, which lists the counts with which the Accused is charged and which may not be amended after the initial appearance without leave of the Trial Chamber,[41] and the case summary which may be amended without leave. While it is clearly part of the judicial role to ensure that persons are not charged with crimes which fall outside the Statute or for which there is no *prima facie* case, it is for the Prosecutor to decide how the Accused's responsibility for the crimes alleged will be proved.

22. Paragraphs 30 to 32, and 42 to 44 of the Amended Case Summary provide further notice to the Accused, alleging that the Accused "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".

23. In his Dissenting Opinion, Justice Lussick disagreed with the Majority in that in his opinion the specific objective of the JCE detailed in the Amended Case Summary was a material fact which should have been pleaded in the Indictment.[42] However, the requirements for proving JCE as a mode of liability include "the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute". The commonly understood meaning of the words "plan" or "design" clearly includes the means by which any objective is to be achieved. Thus the ICTY Appeals Chamber in the *Tadic* case equated common purpose with a "common design to pursue one course of conduct".[43]

24. The allegation that the Accused participated in a "campaign of terror" satisfies the requirement that the "nature **or** purpose"[44] of the JCE be pleaded. In concluding that a

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[40] Paragraph 12.
[41] Rule 50(A).
[42] Dissenting Opinion, para 8.
[43] *Prosecutor v Tadic*, IT-94-1, "Judgement", Appeals Chamber, 15 July 1999, para 204.
[44] Emphasis added – it is of note that these requirements are referred to disjunctively and not cumulatively. In the *Krnojelac* case, the Trial Chamber found that in order to know the nature of the case he must meet, the accused must

"campaign to terrorize the civilian population of the Republic of Sierra Leone" fulfilled the pleading requirement as to the "nature or purpose of the JCE" the Majority's approach was therefore consistent with the jurisprudence relating to a common purpose, plan or design and does not give rise to any error of law or error in the application of the law.

Third Ground of Appeal

The Majority of the Trial Chamber abused its discretion and committed an error of law in finding no defect in the pleading of JCE in the Indictment, inasmuch as it considered only some of a number of factors which speak to the question of whether or not JCE has been sufficiently pleaded, invariably resolved those that it did consider in favour of upholding the Indictment, and thereby impermissibly shifted the burden or onus regarding the sufficiency of the pleading of JCE in the Indictment from the prosecution to the Accused.

25. The Prosecution opposes this ground of appeal on the basis that the Trial Chamber gave a reasoned opinion which addressed all factors relevant to a resolution of the issue raised as to the pleading of JCE in the Indictment and did not reverse the burden of proof. Therefore, the Trial Chamber did not abuse its discretion or make an error of law in reaching its conclusions.

26. While a reasoned opinion is a component of the fair hearing requirement, it is in the discretion of the Trial Chamber as to which arguments to address in detail.[45] Further, choosing to focus on certain arguments does not mean others were completely disregarded. As the ICTY Appeals Chamber has emphasized, "it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision."[46]

27. First, the Defence argument that the Majority failed to consider or to address in any detail

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be informed by the indictment of "the nature or purpose of the joint criminal enterprise (*or its 'essence'* [...])". *Prosecutor v Krnojelac*, IT-97-25-PT, "Decision on Form of Second Amended Indictment", 11 May 2000, para. 16, emphasis added.

[45] *Prosecutor v Furundzija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000, para. 69: "The European Court of Human Rights has held that a 'tribunal' is not obliged to give a detailed answer to every argument." See also *Prosecutor v Kvocka et al.*, IT-98-30/1-A, "Judgement", Appeals Chamber, 28 February 2005, paras 23-24.

[46] *Prosecutor v Kvocka et al.*, IT-98-30/1-A, "Judgement", Appeals Chamber, 28 February 2005, para. 25.

the contemplated *means* of achieving the common purpose of the JCE[47] is baseless. The Indictment makes it clear that the campaign of terror, which included the crimes charged in Counts 1-11 of the Indictment, was the agreed means constituting a criminal design, plan or purpose of the JCE. There was no need for the Trial Chamber to address separately how the campaign of terror would be carried out. The Defence has not shown how this alleged omission invalidated the Majority Decision.

28. Footnote 71 of the Defence Appeal, while acknowledging the AFRC holding that the criminal objective of a JCE can derive from the means agreed upon, refers to an "Expert Opinion" provided to the Defence by Professor William Schabas. It should be noted that this Opinion predates the Judgement of the Appeals Chamber in the AFRC case and it appears that Professor Schabas was not provided with the Amended Case Summary.[48] In any event, Professor Schabas's Opinion rests upon the false premise that an agreement to commit crimes within the Statute in order to attain an objective that is not itself a crime within the Statute cannot form the basis of joint criminal enterprise liability. This premise is clearly contrary to the explicit holding of the Appeals Chamber in its Judgment in the AFRC case, supported by jurisprudence from other international tribunals.[49]

29. Secondly, the Defence argues that the Majority either did not consider or did not address in any detail the issue of notice to the Accused. The corollary of the conclusion by the Majority that the Indictment properly pleaded JCE is that sufficient notice was given to the Accused that he faced allegations of a JCE. There was no reason for the Majority to enter into any further discussion as to the issue of notice; the Indictment was properly pleaded and the Accused had therefore been put on notice. Moreover, the Majority specifically held that it was "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*".[50] The Defence has not demonstrated how the Majority shifted any burden of proof. The Majority simply rejected

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[47] Defence Appeal, para. 35. Emphasis in the original.
[48] Defence Appeal, footnote 71.
[49] AFRC Appeals Judgment, paras 78, 80 and 84 referring to *Prosecutor v Haradinaj*, IT-04-84-PT, "Decision on Motion to Amend the Indictment and to Challenges to the Form of the Amended Indictment", 25 October 2006. See also *Prosecutor v Martic*, IT-95-11-A, "Judgement", Appeals Chamber, 8 October 2008, paras 123-124; *Prosecutor v Kvocka*, IT-98-30/1-A, "Judgment", Appeals Chamber, 28 February 2005, paras 46 and 117; *Prosecutor v Krajisnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009, para. 704.
[50] Majority Decision, para. 76. Emphasis added.

the Defence arguments as they were without merit.

30. Thirdly, the Defence argues that the Majority failed to address the submission that the secondary accusative instruments in the case evidenced a pleading regime as to the common purpose of the JCE that has been inconsistent.[51] The Defence has not demonstrated that the alleged omission invalidated the Majority Decision.

31. The Majority Decision sets out at length the procedural history as well as the pleadings related to JCE in the Prosecutor's secondary accusative instruments. These instruments were considered in detail by Justice Lussick in his Dissenting Opinion where he concluded: "an appraisal of the [...] 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."[52]

32. It should be noted that the Second Amended Indictment was filed on 29 May 2007 while the Amended Case Summary was filed on 3 August 2007, five months prior to the commencement of the presentation of evidence in the Taylor case. Assuming, *arguendo*, there were changes in the Prosecution's pleadings on JCE, the Defence has not demonstrated how it was prejudiced.[53]

33. The Prosecution has consistently alleged that the Accused participated in a common plan, design or purpose to utilize a campaign of terror, including all the crimes charged in the Indictment, in order to pillage the diamond wealth of Sierra Leone and forcibly control the population and territory of Sierra Leone.

34. The first Indictment of 2003 pleaded that: "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 [...] The Accused participated in this joint

[51] Defence Appeal, para. 35.
[52] Dissenting Opinion, para. 23.
[53] The Prosecution refers the Appeals Chamber to its arguments (summarised in the current Response) in: *Prosecutor v Taylor*, SCSL-03-01-T-463, "Prosecution Response to the Defence's Consequential Submission Regarding the Pleading of the JCE", 10 April 2008, paras 4-11, 24.

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."[54]

35. On amending the first Indictment in 2006, the Prosecution also provided a Case Summary in which the following particulars concerning JCE were provided: "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."[55] The Case Summary re-states that the natural resources of Sierra Leone, in particular the diamonds, were to be provided primarily to the Accused and others outside Sierra Leone.[56] The common plan, design or purpose was stated to have amounted to or involved the commission of the crimes alleged in the amended Indictment.[57] The Case Summary alleges that the Accused participated in the 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.[58]

36. The Prosecution's Pre-Trial Brief, filed in April 2007, alleges that: "the Accused participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order to exploit the natural resources of the country."[59] Further: "This common plan amounted to or involved the commission of the crimes alleged in the Amended 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 [...]."[60]

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[54] *Prosecutor v Taylor*, SCSL-03-01-I, "Indictment", 7 March 2003, paras 23 and 25.
[55] *Prosecutor v Taylor*, SCSL-03-01-PT-75, "Amended Indictment and Case Summary accompanying Amended Indictment", 16 March 2006.
[56] Case Summary Accompanying Amended Indictment, para. 42.
[57] Case Summary Accompanying Amended Indictment, para. 43.
[58] Case Summary Accompanying Amended Indictment, para. 44.
[59] *Prosecutor v Taylor*, SCSL-03-01-PT-218, "Public Rule 73*bis*Pre-Trial Conference Materials", 4 April 2007, Pre-Trial Brief, para. 6.
[60] Pre-Trial Brief, para. 7.

37. In the Prosecution's Opening Statement made on 4 June 2007, the Prosecutor stated that "the Accused and other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population in Sierra Leone. These means involved the campaign of terror waged against the civilian population of Sierra Leone."[61] The Prosecutor described the campaign of terror as the one "over-arching crime".[62]

38. Following the AFRC Trial Judgement in June 2007,[63] and out of an abundance of caution, the Prosecution amended its Case Summary in order to further articulate the common plan, design or purpose alleged in this case.[64]

39. The current Defence team has had the full pre-trial articulation of the common plan, design or purpose, or JCE, in this case from the beginning of their appointment. At that time, the Second Amended Indictment was in place; the Pre-Trial Brief had been filed and the Opening Statement had been made. All these filings are consistent regarding the pleading of common plan, design or purpose, also referred to as joint criminal enterprise, as a form of liability in this case.

Fourth Ground of Appeal

The Majority of the Trial Chamber committed an error of law by relying on an irrelevant and erroneous legal principle 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", inasmuch as a finding of sufficient notice of an "intention to charge" is not the same thing as discerning whether or not clear notice of all material elements of a JCE has been given in the Indictment.

40. The Prosecution opposes this ground of appeal on the basis that it constitutes an argument as to semantics and that the Trial Chamber was not putting forward a novel legal principle.

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[61] *Prosecutor v Taylor*, SCSL-03-01-T, Trial Transcript, 4 June 2007, Opening Statement, p. 32, lines 12 - 29.
[62] Opening Statement, p. 31, line 22.
[63] *Prosecutor v Brima et al.*, SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007.
[64] *Prosecutor v Taylor*, SCSL-03-01-T-327, "Public Prosecution Notification of Filing of Amended Case Summary", 3 August 2007.

41. The context of paragraph 70 and the preceding paragraph of the Majority Decision makes it clear that the reference to the Prosecution's "intention" simply meant that there could be no doubt, upon reading the Indictment, that participation in a JCE was being charged despite the fact that the Prosecution did not use that exact terminology. In full, paragraph 70 provides: "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."[65] The full decision explains in detail how each of the requirements for pleading JCE were satisfied by the Second Amended Indictment.

42. Paragraph 75, in which the Majority cites the *Gacumbitsi* case in support of the finding that "[t]o rely on JCE, an indictment need not plead the doctrine *ipsissima verba* if the intention is clear",[66] should also be read in conjunction with paragraph 70. As noted above,[67] the terminology of "joint criminal enterprise" is not exclusive and the original language of *Tadic* is equally valid in making manifest the Prosecution's intentions when charging modes of liability in the Indictment.

Fifth Ground of Appeal

The Majority of the Trial Chamber erred in law by concluding that allegations involving "superior criminal responsibility" in Paragraph 34 of the Indictment serve to fulfil, in part, the requirement that the nature of the Accused's participation in any alleged JCE be clearly pleaded and identified in an indictment.

43. The Prosecution opposes this ground of appeal on the basis that the Defence has extracted the allegedly erroneous conclusion of the Trial Chamber from its proper context and has not established how the alleged error of law invalidates the Majority Decision.

44. Under the heading "the nature of the Accused's participation in the criminal enterprise", the Majority notes all the modes of liability alleged against the Accused, including both individual and superior responsibility and concludes that this identifies the nature of the

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[65] Emphasis added.
[66] Majority Decision, para. 75, citing *Gacumbitsi v Prosecutor*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006, para. 165.
[67] Paragraph 17.

Accused's participation in the enterprise. This analysis is not erroneous. The personal role of an Accused within a JCE necessarily takes different forms and may include any of the forms listed under Article 6(1) and 6(3) of the Statute so long as the elements of JCE liability are proven. The Trial Chamber in *Krajisnik* found that: "An expansion of the criminal means of the objective is proven when leading members of the JCE are informed of new types of crime committed pursuant to the implementation of the common objective, take no effective measures to prevent recurrence of such crimes, and persist in the implementation of the common objective of the JCE."[68] Thus, an accused in a leadership position may contribute to a JCE by consistently failing to take action to prevent crimes or to punish responsible subordinates. Paragraph 34 of the Indictment, which describes the Accused's alleged leadership position, is therefore relevant to the nature of the Accused's participation in the JCE. It may be noted that the Amended Case Summary furthermore establishes a link between the Accused's leadership position and all the modes of liability charged.[69]

45. Even if the Appeals Chamber were to determine that the Majority was incorrect in making reference to the Accused's responsibility as a superior, the Defence has not demonstrated how such an error invalidates the Majority Decision. The superior responsibility aspect may easily be severed from paragraph 74 of the Majority Decision without having any impact on the final conclusion.

IV. SUBMISSIONS ON REQUESTED RELIEF

46. It should be noted that the motion to which the Majority Decision relates was filed five months after the current Defence counsel were assigned to the case, and on the last day before the 2007 end of year judicial recess. By the time all pleadings had been submitted,

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[68] *Prosecutor v Krajisnik*, IT-00-39-T, "Judgement", Trial Chamber, 27 September 2006, para. 1098. In the *Galic* case, it was found in relation to "instigating" that omissions may amount to instigating where a commander has created an environment permissive of criminal behaviour by subordinates. *Prosecutor v Galic*, IT-98-29-T, "Judgement and Opinion", Trial Chamber, 5 December 2003, para. 168, referring to *Prosecutor v Blaskic*, IT-95-14-T, "Judgement", Trial Chamber, 3 March 2000, para. 337: "the failure to punish past crimes, which entails the commander's responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes."

[69] Paragraph 48 of the Amended Case Summary concerning Superior Responsibility incorporates the phrase "individually or in concert with leaders of the RUF, AFRC, AFRC/RUF Junta or alliance and intermediate leaders of the Liberian fighters". See also paragraphs 36 and 44(4) of the Amended Case Summary.

the Trial Chamber was fully engaged in the continuation of the trial. The Defence has therefore contributed in no small manner to the delay in resolving the issue of the JCE pleading. Acting in a timely fashion, the Defence could have been expected to file its motion within 21 days of the filing of the Prosecution's Amended Case Summary.[70] Indeed, the procedure under Rule 72 envisages that objections based on defects in the form of the indictment will ordinarily be brought when the defence team is at an early stage of familiarity with the case.[71]

47. The Defence argues that the uncertainty relating to the JCE pleading has meant that lines of inquiry that could have been pursued during cross-examination of Prosecution witnesses were not pursued. However, the Defence did not at any point state that it was unable to proceed with trial because of the alleged "uncertainty" and, indeed, cross-examined Prosecution witnesses on matter relevant to the JCE. Specifically, the Defence opposed admission of Rule 92*bis* documents where they mentioned the role of other alleged members of the JCE.[72] The Defence cannot claim a remedy for any prejudice suffered by the Accused as a consequence of the Defence's own tactical or strategic choices. As elaborated below, the Defence had clear and consistent information concerning the JCE and cannot be said to have suffered any prejudice during the presentation of the Prosecution's case.

48. Assuming *arguendo* that the Appeals Chamber finds that the JCE was defectively pleaded in the Indictment, the appropriate remedy is neither the dismissal of the case nor the severance of joint criminal enterprise as a mode of liability from the Indictment.

49. It is a well established principle in the practice of international criminal tribunals that in some instances, a defect in an Indictment can be deemed "cured" if the Prosecution provides the Accused with timely, clear and consistent information detailing the factual

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[70] See time limits for preliminary motions under Rule 72(A) of the Rules.

[71] Rule 72(A) provides that preliminary motions shall be brought within 21 days of disclosure by the Prosecutor to the Defence of all material envisaged by Rule 66(A)(i). Under Rule 66(A)(i), disclosure is to occur within 30 days of the initial appearance.

[72] See e.g. *Prosecutor v Taylor*, SCSL-2003-01-T-337, "Defence Response to 'Prosecution's Motion for Admission of Material pursuant to Rules 89(C) and 92bis", 10 September 2007, para. 12: "Since the Prosecution has alleged a joint criminal enterprise between Charles Taylor, the RUF, the AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters proof of the acts or conduct of the accused includes, at a minimum, the acts or conduct of Foday Sankoh, Johnny Paul Koroma and Sam Bockarie. The Prosecution has essentially alleged that the acts of these three individuals are tantamount to the acts of the Accused. As such, the Defence submits that the admission of facts relating to the acts of these three individuals is expressly prohibited under Rule 92bis(A)."

basis underpinning the charges against him.[73] Notably, the ICTY Appeals Chamber in the *Kvocka* case expressly held that even where an indictment failed to allege JCE liability at all, this form of liability could still be considered by the Trial Chamber if timely, clear and consistent information from the Prosecution had cured the defect in the indictment.[74]

50. All three Judges of the Trial Chamber agreed that the Accused was on notice of the case he had to meet. While the Majority found that the language of the Indictment itself put the Accused on notice of the alleged JCE, the Dissenting Opinion found that notice was provided to the Accused through the initial Indictment, the Amended Indictment, the initial Case Summary, the Prosecution's Pre-Trial Brief, the Amended Case Summary, and the Prosecutor's opening statement.[75] Therefore, to the extent that the JCE was defectively pleaded in the Indictment, any such defect has been cured.

51. Indeed, the only issue of first impression in this Appeal is whether the Prosecutor must include full particulars of JCE allegations in the Indictment or, once the Indictment has made it clear that the Accused is charged under this mode of liability for some or all Counts, whether further particulars of the JCE may be provided in the Case Summary. As discussed above,[76] the guidance provided by this Appeals Chamber in its Decision on Amendment of the Consolidated Indictment indicates that the further particulars of this form of liability, as with other forms of liability, are best set out in the case summary, which acts as notice to the Accused.[77]

52. In these circumstances, the most far-reaching remedy that could be warranted as a purely technical measure would be for the Appeals Chamber to order the Prosecution to amend the

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[73] *Prosecutor v Fofana and Kondewa*, SCSL-04-14-A-829, "Judgement", Appeals Chamber, 28 May 2008, para. 363. *Prosecutor v Ntagerura et al.*, ICTR-99-46-A, "Judgment", Appeals Chamber, 7 July 2006, para. 28. See also *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Judgment", Appeals Chamber,13 December 2004, para. 27; *Prosecutor v Kvocka* IT-98-30, "Judgment", Appeals Chamber, 28 February 2005, paras 33 and 54; *Prosecutor v Naletilic and Martinovic*, IT-98-34, "Judgment", Appeals Chamber, 3 May 2006, para. 26; *Prosecutor v Ndindiliyimana*, ICTR-00-56-T, "Decision on Nzuwonemeye's Motion to Exclude Acts Not Pleaded in the Indictment", 4 July 2008, para. 7.

[74] *Prosecutor v Kvocka* IT-98-30, "Judgment", Appeals Chamber, 28 February 2005, paras. 36-54.

[75] Dissenting Opinion, paras 17-22. Justice Lussick concludes in para. 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."

[76] Paragraph 12.

[77] Decision on Amendment of the Consolidated Indictment, para. 52: The Prosecutor's case summary "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)." Emphasis added.

Indictment.[78] In considering such a remedy, it is relevant to take into account the fact that timely and sufficient notice of the JCE has already been provided, that the Prosecution has concluded its case, and that no additional purpose would be served by amending the Indictment at this stage.

53. The Defence Appeal is suitable for a determination on the basis of the extensive written record only and the request for oral arguments is therefore opposed.

V. CONCLUSION

54. On the basis of the above submissions, the Defence Appeal should be denied. Should the Appeals Chamber nevertheless determine that relief is warranted, the appropriate remedy would be an order for the Prosecution to amend the Indictment.

Filed in The Hague,
3 April 2009
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[78] Decision on Amendment of the Consolidated Indictment, para. 78: "In principle, the Indictment may be amended at any stage of the proceedings, up to the conclusion of the trial, if the court is satisfied that the defence will not be prejudiced by the amendment and that making it will be in the interests of justice. The Special Court Rules do not preclude late amendments. By 'Indictment' we mean the counts stating the charges and the short particulars which should accompany them." Further, on the issue of late amendments: *Prosecutor v Kovacevic*, IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998; *Prosecutor v Tolimir*, IT-05-88/2-PT, "Decision on Prosecution's Motion Seeking Leave to File a Second Amended Indictment", 22 December 2008. Other cases also indicate that the appropriate remedy for a defective indictment is an order for amendment: *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, where a motion alleging defects in the form of the indictment was reviewed by the Chamber despite being time-barred and partially granted, with the remedy being an order that the indictment be amended (albeit prior to the commencement of trial); *Prosecutor v Nchamihigo*, ICTR-2001-63-R50, "Decision on Defence Motion on Defects in the Form of the Indictment, 27 September 2006; *Prosecutor v Brdjanin*, IT-99-36, "Decision on Objections by Radoslav Brdjanin to the Form of the Amended Indictment", 23 February 2001.

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8. *Prosecutor v Taylor*, SCSL-03-01-T-751, "Decision on Urgent 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
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1. *Prosecutor v. Brima et al.*, SCSL-04-16-T-613, Judgment, 20 June 2007
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