3788) SCSL-03-01-T (14225-14243) 14225

SPECIAL COURT FOR SIERRA LEONE

Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 14 December 2007

Case No.: SCSL-2003-01-T

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

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 Hollis
Mr. Nicholas Koumjian
Mr. Mohamed Bangura

Counsel for Mr. Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. This urgent Motion is being filed for consideration by the Trial Chamber by the Defence for the Accused, Mr. Charles Ghankay Taylor.
2. The Motion implicates principles of natural justice and fundamental fairness which are reflected, in part, by Article 17(4) of the *Statute of the Special Court for Sierra Leone* ("the Statute")[1] and Rules 72 (B)(i) and (B)(ii) of the Court's *Rules of Procedure and Evidence*[2] ("the Rules").
3. The Defence respectfully submits that the Prosecution's Second Amended Indictment[3] against the Accused, Mr. Charles Ghankay Taylor, is fatally defective in the manner in which the doctrine of "joint criminal enterprise" has been pleaded. Accordingly, the Defence respectfully requests that the Trial Chamber sever, or order the Prosecution to sever, "joint criminal enterprise" (hereinafter "JCE") as a mode of criminal liability from the Second Amended Indictment.

II. PRELIMINARY CONSIDERATION – TIMELINESS OF THE MOTION

4. This Motion identifies what the Defence avers is an incurable defect in the form of the Second Amended Indictment and it necessarily seeks appropriate relief from the Trial Chamber. However, and before addressing the merits of this submission, a preliminary question arises regarding the timeliness of the Motion at this stage of the proceedings. This issue is addressed immediately below.

A. Timing of Motion: the Rights of the Accused and the Interests of Justice require the Trial Chamber to consider this Motion

5. Rule 72(B) expressly contemplates the filing of preliminary motions based on lack of jurisdiction and defects in the form of the Indictment by the Defence. Rule 72(A) mandates

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[1] *Statute of the Special Court for Sierra Leone*, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002; See, also, http://www.sc-sl.org/statute.html.
[2] Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 19 November 2007; See, also, http://www.sc-sl.org/rulesofprocedureandevidence.pdf.
[3] *Prosecutor v. Taylor*, SCSL-03-01-PT-263, *Prosecution's Second Amended Indictment*, 29 May 2007 (hereinafter, "Second Amended Indictment").

that any such motion be brought by the Defence within 21 days following disclosure by the Prosecution to the Defence of all the material envisaged by Rule 66(A)(i).[4]

6. The Defence does not dispute that the 21 days that are contemplated by Rule 72(A) have elapsed. However, the fact that the Accused has a team of counsels that were assigned and contracted over a year after the expiration of the requisite 21-day period, strongly counsels in favour of giving the Motion due consideration. Furthermore, and significantly, it is respectfully submitted that the rights of the Accused under Article 17 of the Statute, as well as notions of natural justice and fundamental fairness, require the Trial Chamber to consider and rule on this Motion in the interests of justice.

(i). Right of the Accused to know the Prosecution's Case against Him

7. Article 17(4) of the Statute of the Court provides, in relevant part, that:

> 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;

8. Rule 47(C) of the Rules provides, in relevant part, that:

> 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.

9. Taken together, these provisions give the Accused the fundamental right to be informed of the nature and cause of the charges against him. This basic right of the accused to be informed of the charges levelled against him is only respected by the Prosecution where there is an indictment that puts the Accused on notice, in an unequivocal and comprehensive fashion, of the case to be met. In this regard, the indictment must state the material facts underlying the charges as well as the modes of liability pleaded to allow him adequate opportunity to prepare his defence.[5] The Defence submits that this natural law right of Mr.

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[4] It is noteworthy that the Prosecution continues to disclose material to the Defence that falls under the purview of Rules 66(A)(i) and (A)(ii).

[5] The Prosecution must plead all material facts, including the particular mode of liability under Article 6 of the Statute that it will be relying on. *See*, in addition, *Prosecutor v. Anatole Nsengiyumva*, ICTR-96-12-I, "Decision on

Taylor cannot be rendered nugatory because of a time-limit imposed by the Rules, a lesser instrument in the hierarchy of applicable legal texts.

10. In addition, the jurisprudence in international criminal courts has been clear that an indictment must be in correct form at the outset of a case to protect the integrity of the proceedings and ensure that no undue procedural hurdles limit the ability of the Accused to adequately and effectively prepare his defence.[6]

11. The Defence submits that the manner in which the Prosecution has pleaded JCE is so fatally defective that it would affect the trial proceedings and would therefore violate the Accused's rights if not addressed by the Trial Chamber before the start of the proceedings. In addition, a failure on the part of the Prosecution to plead JCE and the specific category relied upon constitutes a defect in the form of the indictment.[7] Indeed, the defect in the amended indictment (as set out below) is so grave that it implicates the exercise of this Court's jurisdiction over Mr. Taylor.

12. Similar factors were taken into account in *The Prosecutor v. Édouard Karamera*. In that case, an ICTR Trial Chamber reviewed, in the interests of justice, a preliminary motion about defects in the form of the indictment though the defence had exceeded, well over a year later, the relevant time-limit imposed by Rule 72(F) of the ICTR Rules.

13. For all the above reasons, we submit that it is in the interests of justice that this motion, although on its face time-barred, be entertained by the Trial Chamber pursuant to the letter and spirit of Article 17 of the Statute of the Court and Rules 47 and 72 of the Rules.

(ii) Position of Previous Defence Counsel, Appointment of New Counsel and Right to Change Defence Strategy In Order to Ensure Accused's Rights

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the Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment", 12 May 2000, para. 1: "for an indictment to be sustainable, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence"; and *Prosecutor v. Kanyabashi*, ICTR-96-15-I, "Decision on Defence Preliminary Motion for Defects in the Form of the Indictment", 31 May 2000, para. 5.1: "an Indictment must be sufficiently clear to enable the Accused to fully understand the nature and cause of the charges brought against him"); *Prosecutor v. Edourd Karamera*, ICTR-98-44-T, "Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment", 25 April 2001, para. 16, where an ICTR Trial Chamber observed "that allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him."

[6] *Prosecutor v. Alex Tamba Brima et al*, SCSL-04-16-PT, "Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment," 1 April 2004, at para. 30.

[7] *Prosecutor v. Kvocka et. al.*, IT-98-30/1-A, Judgment, 28 February 2005 at paras. 28, 42.

14. After conducting initial review of the Prosecution disclosure, then Defence Counsel for the Accused Mr. Karim A.A. Khan filed a motion on 6 June 2006 notifying the Trial Chamber that he did not intend to file any preliminary motions under Rule 72(A) of the Rules.[8] Mr. Khan had concluded that insufficient evidence had been proffered by the Prosecution to prove Mr. Taylor's culpability on the basis of direct responsibility, involvement in a common plan, design or purpose, superior responsibility, or any other form of participation alleged by the Prosecution for any of the offences alleged in the Indictment. To Mr. Khan, these issues were matters properly left for trial, especially in the light of the Prosecution's burden to prove Mr. Taylor's guilt beyond all reasonable doubt.

15. The Chamber is aware that just over a year later Mr. Taylor terminated the services of Mr. Khan at the opening of his trial on 4 June 2007.[9] The Chamber subsequently ordered the Principal Defender to assign new counsel to the Accused.[10]

16. In the interim, on 20th June 2007, the Trial Chamber rendered judgment in the AFRC case in which it examined the application of JCE to the three defendants in that case.[11] The Chamber found that the Prosecution had defectively pleaded JCE. JCE was pleaded in this case in identical form to that of the AFRC indictment. The Prosecution in this case, noting that the matter would go on appeal, responded to the Trial Chamber's judgment that the AFRC indictment had been defectively pleaded by purportedly filing, on 3rd August 2007, an Amended Case Summary that further articulates the common plan, design or purpose alleged against Mr. Taylor. [12]

17. Mr. Taylor was assigned a new legal defence team to represent him on 17 July 2007.[13] A Legal Services Contract was concluded with the Principal Defender and the Registrar of the Court on 1 August 2007. The full team, including additional co-counsel as well as national and international investigators, was complete by on or about 20th September 2007.

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[8] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, "Defence Submission on Behalf of Charles Ghankay Taylor in Respect of Preliminary Motions, 6th June 2006, p. 2.
[9] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Transcript – 4th June 2007.
[10] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Transcript – 25th June 2007, p. 43 to 45.
[11] *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu.* SCSL-04-16-T, Judgement, 20 June 2007 ("AFRC Judgement"), paras. 60 – 76.

[12] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T-327, "Prosecution Notification of Filing of Amended Case Summary", 3rd August 2007.
[13] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T-320, "Principal Defender's Decision Assigning New Counsel to Charles Ghankay Taylor, 17 July 2007.

18. Since their appointment, the Defence has engaged upon the assembly and the review of the Prosecution disclosure, and only recently notified the Trial Chamber in the November Status Conference that it now has a complete set of all the disclosure to date.

19. Based on the review of the disclosure provided by the Prosecution, the judgement of the Trial Chamber in the AFRC Case and the Prosecution's amended case summary in early August 2007, the Defence believes that it is in the best interests of Mr. Taylor to challenge what is a fatal defence in the indictment. On such a fundamental issue as the application of JCE, a key legal doctrine underlying the Prosecution case, such a challenge is the only way in which the accused will know the case that he has to meet.

III. APPLICABLE LEGAL PRINCIPLES AND LEGAL ARGUMENT

A. Applicable Legal Principles

20. This Chamber observed in the AFRC Judgement that JCE is not an established mode of liability under Article 6 of the Statute.[14] Rather, it is of jurisprudential origin and is said to have acquired the status of customary international law. Indeed, the various categories or permutations of JCE ("basic," "systemic," and "extended," for example) have now become part of the lexicon of the jurisprudence and literature on criminal responsibility in international criminal courts.

21. The *actus reus* of JCE liability requires that first, there be a plurality of persons not necessarily organized in a military, political or administrative structure; second, that there be the existence of a common plan, design or purpose amounting to or involving the commission of a crime prohibited in the Statute; third, and lastly, that there be participation by an accused in the common design involving the perpetration of one of the crimes in the Statute.[15]

22. According to the Chamber, four types of facts must be present in an indictment charging JCE, to wit:

    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

[14] *AFRC Judgement* at para. 61.
[15] *Ibid.* at para. 63.

iv. The nature of the participation of the accused in that enterprise.[16]

The common purpose or aim of a JCE must be a crime within the Statute of the Court.[17] This is a material fact which must be pleaded in the indictment.

B. Legal Argument

23. In this case, the Defence respectfully submits that the Prosecution has not pleaded a crime within the jurisdiction of the Court as the common purpose of the JCE in the Second Amended Indictment. This mode of liability is therefore fatally defective and should be severed. Indeed, proceeding further with those portions of the Second Amended Indictment which advance JCE as a theory of criminal liability would violate notions of natural justice and fundamental fairness to the Accused.

24. The principal charging instrument in this case is, of course, the Second Amended Indictment. That instrument has since the AFRC Judgment been buttressed and supplemented by the "Amended Case Summary."[18] In the Notification, the Prosecution maintains that it has "provided notice concerning the common plan, design or purpose in the indictment..."[19] by pleading words to the effect that the alleged crimes "amounted to or were involved within the common plan, design or purpose"[20] and that the crimes "were a reasonably foreseeable consequence of such common plan, design or purpose."[21] Furthermore, the Prosecution avers that it has also provided notice regarding the "common plan, design or purpose" in its Pre-Trial Brief, Opening Statement, and pre-trial disclosure."[22]

25. In the first instance, and with respect to the Second Amended Indictment, the Defence takes the view that it is seriously deficient in explicating the crime within the jurisdiction of the Court that is the purpose of the JCE. Indeed, and having apparently recognised this deficiency in the wake of the AFRC Judgement, the Prosecution has attempted to address the issue in the Amended Case Summary by proposing two alternative and mutually-exclusive

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[16] *Ibid.* at para. 64.
[17] *AFRC Judgement*, at para. 67. This position is supported by a long list of authorities from both the ICTY and ICTR.
[18] *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T-327, *Prosecution Notification of Filing of Amended Case Summary* (hereinafter "Notification"), with "Case Summary Accompanying the Second Amended Indictment," as Annex, 3 August 2007 (hereinafter "Amended Case Summary").
[19] Notification, para. 4; see, also, Second Amended Indictment, para. 33.
[20] Notification, para. 4; see, also, Second Amended Indictment, para. 33.
[21] Ibid.
[22] Notification, para. 5.

theories.[23] First, the Prosecution has alleged 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. Counts 1 through 11 are then said to fall within the common plan as it existed from 30 November to 18 January 2002.

26. The Defence submits that the further notice which the Prosecution purports to have given in the Amended Case Summary still does not cure the defect in the Second Amended Indictment in respect of JCE. Notice cannot be said to be legally sufficient to sustain the JCE mode of liability where the "common plan" or objective is not defined at all, or ill-defined at best, and where such objective or "common purpose" is not intrinsically a crime that is within the jurisdiction of the Court.

27. To argue as has the Prosecution that the alleged crimes "amounted to or were involved within a common plan, design or purpose" does not necessarily make the "common purpose" tantamount to the alleged crimes, or vice-versa. The crimes cannot be said to be tantamount to the "common purpose" by reference to paragraph 33 of the Second Amended Indictment when paragraph 42 of the Amended Case Summary suggests that the crimes were a means to and end or objective: with that objective or "common purpose" being "to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone."

28. Indeed, the Defence takes the view that the "common purpose" may be viewed as being akin to the object of the meeting of the minds between one or more defendants. That "agreement," "object," or "common purpose" must be a crime within the jurisdiction of the Court in order to sustain a JCE mode of criminal liability, as a separate and distinct issue from whether or not it is achieved through crimes that come within the jurisdiction of the Court.

29. The collective instruments and arguments which have thus far been advanced by Prosecution cannot sustain the purported JCE theory of criminal liability in this case. Indeed, the Defence is not alone in taking this view, considering the similarly-held opinion of an eminent authority in the field of international criminal law, Professor William A. Schabas, OC MRIA, regarding the JCE formulation in the Second Amended Indictment. The expert opinion of

[23] See, Amended Case Summary, paras. 42-44.

Professor Schabas is annexed to this Motion and he ends his report with the following conclusion:

> For all of these reasons, I conclude that the charges in the Charles Taylor indictment based upon the theory of joint criminal enterprise are *ultra vires* the Special Court for Sierra Leone, in that they allege a common purpose to commit a crime that is not within the jurisdiction of the Court or a crime recognised under public international law as it now stands.[24]

30. The Amended Case Summary does not, with respect, cure the deficiency in how JCE has been pleaded in this case. Indeed, an as noted by Professor Schabas in his expert opinion, carrying out a campaign of terror appears to be more of a means rather than an end.[25] Moreover, such a theory would raise further questions regarding the criminal purpose in respect of which the Accused entered into the JCE; clearly, as pleaded previously in recent iterations of the indictment, and even during the Prosecution's Opening Statement on 4 June 2007, the taking over control of a country such as Sierra Leone is not a crime at international law and, for that matter, within the jurisdiction *ratione materiae* (subject matter jurisdiction) of the Statute. Nor can the use of the word "pillage" paragraph 42 of the Amended Case Summary provide a saving grace, where the overall context in which it has been used renders it tantamount to verbs such as usurping, controlling, cultivating, or monopolising the resources of Sierra Leone vis-à-vis the crime of pillage as is presently recognised under international law.

31. It remains true that as an alternative theory, the Prosecution avers that the common plan, design or purpose, were acts of terror against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under 15 years; enslavement of civilians; and pillage. Indeed, seven additional but separate counts charged in the indictment were said to be foreseeable consequences of the crimes agreed upon in the common plan.[26]

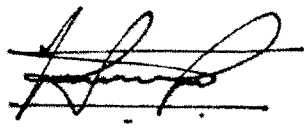
32. Yet, and as the Trial Chamber observed in the AFRC Case, if the crimes charged are allegedly within the common purposes, they can logically no longer be a reasonably foreseeable consequence of the same purpose. Indeed, by charging a common purpose that is not inherently criminal, the Prosecution has alleged two forms disjunctively, thereby impeding the Accused's ability to know the material facts of the JCE against him.

III. CONCLUSION

[24] See Expert Opinion on JCE by Professor William A. Schabas at p. 7.
[25] Ibid.
[26] Amended Case Summary, para. 43.2.

33. In closing, the Defence submits that Prosecution has failed to state the criminal purpose that the Accused, Mr. Charles Ghankay Taylor, is alleged to have engaged in amounting to a crime within the jurisdiction of the Court. It does not suffice that crimes within the jurisdiction of the Court are alleged to have occurred as a by-product of an alleged, but ill-defined and non-criminal (within the meaning of the Statute or international criminal law) "common plan," such as taking political control of a country and/ or usurping its natural resources.
34. Accordingly, the Defence respectfully requests the Trial Chamber issue a decision ordering the severance of JCE as theory or mode of liability from the Second Amended Indictment.

Respectfully Submitted,



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

Dated this 14th day of December 2007, The Hague, The Netherlands

Table of Authorities

Special Court for Sierra Leone Cases

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

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Miscellaneous

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

14236

THE SPECIAL COURT FOR SIERRA LEONE

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

SCSL-2003-01-T

PUBLIC

Annex A

TO THE

PUBLIC

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

14237

National University of Ireland, Galway
Ollscoil na hÉireann, Gaillimh

Irish Centre for Human Rights
An tIonad Éireannach um Chearta Daonna

GALWAY, 13 November 2007

Courtenay Griffiths, QC
Special Court for Sierra Leone
Office for the Defence of Charles Taylor
Binckhorstlaan 400,
2516 BL, The Hague,
The Netherlands

Dear Mr Griffiths,

You have asked me for an opinion on the legal implications of the AFRC Judgement for the Defence of Mr. Taylor.

I am a specialist in international criminal law who has studied the ad hoc tribunals since the establishment of the International Criminal Tribunal for the former Yugoslavia, in 1993. In addition to many journal articles and almost countless public lectures on legal issues relating to the tribunals, I am also author of *The UN International Criminal Tribunals, the former Yugoslavia, Rwanda, Sierra Leone*, which is one of the principal monographs on the subject. Earlier this year it was awarded the prestigious Certificate of Merit of the American Society of International Law. I am also very familiar with developments in Sierra Leone, having served as one of the international commissioners on the Sierra Leone Truth and Reconciliation Commission.

In the AFRC judgment (*Prosecutor* v. *Brima* et al. (Case No. SCSL-04-16-T), Judgment, 20 June 2007), Trial Chamber II dismissed the charges based upon the theory of 'joint criminal enterprise' (JCE). The detailed discussion appears in paragraphs 60-76 of the judgment. As I understand the judgment, the reason this part of the indictment was dismissed is because the criminal act that was the basis of the joint enterprise was not an international crime. As the judgment recalls, the indictment in that case alleged:

> 33. The AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, and the RUF, including ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, 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.
>
> 34. 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, abductions, 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.

Professor William A. Schabas, QC, LLD
Director
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The discussion took place under the heading 'Alleged defects in the form of the indictment'. The clear implication is that had the defence arguments on this issue been raised as a preliminary matter, prior to trial, the counts based on the JCE theory would have been dismissed. That does not foreclose the defence from raising such matters at the conclusion of the trial, but it is obviously desirable that the question be addressed at the outset. Failure of the defence to raise the matter early in the proceedings cannot be an obstacle to the question arising at their conclusion. In my opinion, even the Court could raise the issue *proprio motu*. Convicting an accused person on the basis of a charge rooted in the JCE theory where the enterprise is not one to commit a crime within the jurisdiction of the Court would amount to an excess of jurisdiction, and this is obviously a matter that goes beyond mere procedure.

As the Trial Chamber explained, paragraphs 33 and 34 of the indictment did not disclose a crime within the jurisdiction of the Court as a common purpose of the joint enterprise.

67. With the greatest respect, the Trial Chamber does not agree with the decision of our learned colleagues that the Indictment has been properly pleaded with respect to liability for JCE, since the common purpose alleged in paragraph 33, that is,

> 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

is not a criminal purpose recognised by the Statute. The common purpose pleaded in the Indictment does not contain a crime under the Special Court's jurisdiction. A common purpose "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone" is not an international crime and, as the Appeals Chamber has noted

> Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide. There is no rule against rebellion in international law.

The issue was not considered in the second judgment of the Special Court, in the CDF case, because joint criminal enterprises was not charged.

I understand that the Prosecutor has appealed this aspect of the AFRC decision.

Nevertheless, joint criminal enterprise is alleged in both the RUF case and the Taylor case. The relevant portion of the initial indictment of Charles Taylor, signed by the Prosecutor on 3 March 2003 and issued four days later, reads 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 carring 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, abductions, 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.

The relevant wording in paragraph 23 appears to be identical to the wording in the *AFRC* indictment. This is only logical, given that the AFRC indictment alleged Charles Taylor to be part of the joint criminal enterprise. Paragraph 32 of the *AFRC* indictment, that is, the paragraph immediately preceding the two paragraphs cited by Trial Chamber II in the judgment, states: 'At all times relevant to this Indicment, Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, through their association with the RUF, acted in concert with CHARLES GHANKAY TAYLOR aka CHARLES MACARTHUR DAPKPANA TAYLOR.'

The Amended Indictment, which was signed on 16 March 2006, formulates the issue quite differently. The only reference to JCE in the indictment is the following:

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 common plan, design or purpose in which the ACCUSED participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.

The Amended Indictment does not state what the 'common plan, design or purpose' consisted of, or confirm that it was a crime within the jurisdiction of the Court. This serious shortcoming is addressed in a document accompanying the Amended Indictment, entitled Case Summary Accompanying the Amended Indictment. The relevant portion is found in paragraphs 42-44.

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 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 minimise resistance to their geographic control, and to use members of population to provide support to those persons engaged in achieving the objective 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 reasonably 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 destabilise 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.

The Second Amended Indictment, filed 29 May 2007, formulates the JCE as follows:

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 common plan, design or purpose in which the ACCUSED participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.

The version of the Second Amended Indictment that I have been shown contains no Case Summary Accompanying the Amended Indictment. Thus, based on the Second Amended Indictment alone, there is an allegation of a JCE, but no information is provided as to the international crime that was the purpose of the JCE.

In his opening Statement, the Prosecutor referred on several occasions to the JCE:

> The witnesses that we will call and the documents that we will present will prove that the accused is responsible for the development and execution of a plan that caused the death and destruction in Sierra Leone. That plan, formulated by the accused and others, was to take political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation. Your Honours will hear in this address that 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 of events and the resistance that it faced. The parties, however, to that plan engaged in a multitude of activities designed to ensure its fulfilment.
>
> The evidence will show that the accused's involvement in the crimes alleged in the indictment took a variety of forms - committing acts, planning, instigating, ordering, aiding and abetting, all in the commission of the alleged crimes, and otherwise participating in the execution of a common plan, design or purpose, what in some courts is referred to as a joint criminal enterprise. Additionally, we allege that he is responsible because persons under his effective control committed the crimes for which he had knowledge or reason to know and he failed to prevent or punish their conduct.[1]

Further in his opening address, the Prosecutor said:

> We are talking about all of this that was done in the implementation of a common plan, a common plan that necessarily involved as part of the plan, design or purpose, the commission of these criminal acts, but in any case a plan that necessarily involved these acts as foreseeable consequences. From its inception, the accused and the other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal means involved the campaign of terror waged against the civilian population of Sierra Leone that I have described. The crimes identified in the indictment also were involved in the criminal plan and were the natural and foreseeable consequences of it. As one of the members of the common criminal plan, the accused was fully aware of the horrific consequences that its implementation would visit on the civilian population of Sierra Leone and did nothing to stop them or to prevent or punish these crimes, and indeed continued to act in ways that caused or aided their commission.[2]

And:

> As we have said, the jurisdiction of this Court is limited by the Statute to the crimes committed on the territory of Sierra Leone since 13 November 1996, and of course the crimes charged in this indictment were indeed committed between that date and the end of the Sierra Leone war on 18 January 2002. However, the planning and preparation of these crimes began long before 1996 and critical acts which furthered the plan and led to the crimes often occurred far from the borders of Sierra Leone. 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 when forces supported by him, including many of his own Liberian fighters of his force called the NPFL, or National Patriotic Front for Liberia, first invaded the territory of Sierra Leone in March 1991. But in some respects the planning and the preparation began even sooner. To understand the accused's motivation and his links to other members of the common plan and the Revolutionary United Front rebels, the Liberian group, and the Armed Forces Revolutionary Council , the eventual allies of the RUF, a group of soldiers that took over the country in 1997 and lost it in 1998, one must examine evidence going back to the period before 1996 and look at the international context in which the accused's intervention in Sierra Leone took place. It's also necessary

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1 *Prosecutor* v. *Taylor* (Case No. SCSL-2003-01-T), Transcript, 4 June 2007, p. 30, lines 16-30, p. 31, lines 1-3.

2 *Ibid.*, p. 32, lines 12-32.

to understand his own rise to power in Liberia and the ends to which he was prepared to go to achieve that power; his links to allies in the region and why he saw others as obstacles to his rule.[3]

Further:

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 others militarily in their respective revolutions to take over their respective countries, and the first one was to be Liberia. For that there was created the National Patriotic Front of Liberia, the NPFL, and then of course there was the RUF, the Revolutionary United Front , created for Sierra Leone.[4]

The JCE theory is not set out explicitly in the Statute of the Special Court for Sierra Leone. It is a theory that was developed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadic Appeals Decision* of 15 July 1999. In *Tadic,*, the Appeals Chamber found that the JCE theory was implied within the terms of article 7(1) of the Statute (which is identical to article 6(1) of the Statute of the Special Court for Sierra Leone).

On a reading of the text of article 6(1) of the Statute, the JCE theory is far from evident. The ICTY Appeals Chamber concluded that the theory was already part of customary international law, and that therefore its inclusion was implied by the Security Council when it adopted the Statute of the International Criminal Tribunal for the former Yugoslavia. In order to demonstrate the customary nature of JCE, the Appeals Chamber relied heavily on article 25(3)d) of the Rome Statute of the International Criminal Court.[5] It constitutes the most authoritative codification of the JCE theory:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

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3 *Ibid.*, p. 34, lines 2-27.

4 *Ibid.*, p. 41, lines 12-22.

5 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 222.

The provision is quite explicit in requiring that the 'activity or purpose involves the commission of a crime within the jurisdiction of the Court'.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has made it clear that an essential element of the JCE is the existence of a common purpose or plan to commit a crime within the jurisdiction of the Tribunal. In Brdjanin, it said that one of the requirements of a JCE was 'the existence of a common purpose (or plan) which amounts to or involves the commission of a crime provided for in the Statute'.[6]

The Chambers of the International Criminal Tribunal for the former Yugoslavia have generally formulated the nature of the joint criminal enterprise in that conflict as 'ethnic cleansing'. Thus, for example, in the Tadic appeal, the Appeals Chamber stated 'An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.'[7]

Similarly, in a much more recent decision, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia wrote: 'The Appeals Chamber finds that the common goal identified by the Trial Chamber amounted to a common purpose within the meaning of the Tribunal's joint criminal enterprise doctrine. This common purpose consisted of a discriminatory campaign to ethnically cleanse the Municipality of Prijedor by deporting and persecuting Bosnian Muslims and Bosnian Croats in order to establish Serbian control ("Common Purpose").'[8]

In both of these cases, the Appeals Chamber used the term 'ethnic cleansing' in an attempt to crystallise the nature of the joint criminal enterprise. 'Ethnic cleansing' is a somewhat colloquial term, and one that lacks a precise legal definition in international treaties. In its recent ruling in litigation between Bosnia and Serbia, the International Court of Justice wrote that the term 'ethnic cleansing' is .in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area"'..[9] Ethnic cleansing corresponds to precise crimes within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, namely the crimes against humanity of 'deportations' and 'persecutions on political, racial and religious grounds' as well as, in the most extreme cases, genocide.

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6 *Prosecutor* v. *Brđanin* (Case No. IT-99-36-A), Judgment, 3 April 2007, para. 364.

7 *Prosecutor* v. *Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999, para. 204.

8 *Prosecutor* v. *Brđanin* (Case No. IT-99-36-A), Judgment, 3 April 2007, para. 73.

9 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, 26 February 2007, para. 190, citing the Interim Report of the Commission of Experts, UN Doc. S/35374 (1993), para. 55. I provide a detailed discussion of the origin of the term in my *Genocide in International Law*, Cambridge: Cambridge University Press, 2000.

I am aware that since the *AFRC* decision, in addition to filing the appeal with respect to the JCE issue, the Prosecutor has also attempted to reformulate the concept of JCE in a declaration filed in the RUF case. There, at paragraph 6, the Prosecutor declares: 'The Accused and others agreed upon and participated in a joint criminal enterprise to carry out a campaign of terror and collective punishments, as charged in the Corrected Amended Consolidated Indictment, in order to pillage the resources in Sierra Leone, particularly diamonds, and to control forcibly the population and territory of Sierra Leone'.[10] At paragraph 10 of the same document there is a reference to 'the objectives of the joint criminal enterprise'.

If, indeed, the 'objective' of the JCE was to 'carry out a campaign of terror and collective punishments', then the Prosecutor has saved the validity of the JCE doctrine in the case. Of course, the Prosecutor still has to prove that this was indeed the 'objective' of the RUF. From my knowledge of the evidence in the case, and my more general knowledge of the conflict in Sierra Leone drawn from my experience as a member of the Sierra Leone Truth and Reconciliation Commission, the carrying out of 'a campaign of terror and collective punishments' looks rather more like the means than the end. In other words, 'a campaign of terror and collective punishments' was not the objective of the criminal enterprise, it was not the 'common purpose'. The two acts in question, 'terrorising a civilian population' and 'collective punishments' stand out particularly because they almost inexorably require an answer to the question: but for what purpose? If terrorising and collective punishment were carried out, it was to effect a purpose, rather than as an end in and of themselves. By analogy with the Yugoslavia Tribunal, the purpose of the collective punishments, rapes and murders was ethnic cleansing, as the above citations indicate.

In a general sense, the JCE alleged in *Taylor* is the same as that of the *AFRC* and *RUF* cases. The various indictments imply that it was a similar or identical joint criminal enterprise, the defendants in the three separate cases essentially being alleged to be partners in crime.

For all of these reasons, I conclude that the charges in the Charles Taylor indictment based upon the theory of joint criminal enterprise are *ultra vires* the Special Court for Sierra Leone, in that they allege a common purpose to commit a crime that is not within the jurisdiction of the Court or a crime recognised under public international law as it now stands.

Yours very truly

William A. Schabas OC MRIA

10 *Prosecutor* v.. *Sesay, Kallon and Gbao* (Case No. SCSL-04-15-T), Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment, 3 August 2007.