762) SCSL-03-01-T (24666-24677) 24666

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

TRIAL CHAMBER II

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

Registrar: Mr. Herman von Hebel

Date filed: 13 March 2009

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

Case No. SCSL-03-01-T

PUBLIC

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

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

Counsel for the Accused:
Mr. Courtenay Griffiths Q.C.
Mr. Andrew Cayley
Mr. Terry Munyard
Mr. Morris Anyah

I. INTRODUCTION

1. The Prosecution files this Response to the *"Public with Annexes Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE"*.[1]
2. In relation to the issues raised in the Application, the Prosecution responds as follows.

II. ARGUMENTS

No Error of Law or Error of Mixed Fact and Law:

3. The Defence argument that the majority of the Trial Chamber erred in its ruling that the Prosecution fulfilled the pleading requirements of the alleged JCE is without merit and should be dismissed. The Indictment[2] sufficiently pleaded JCE. The Defence is further informed of this form of liability by the additional particulars found in the Amended Case Summary.

The Trial Chamber's approach to the pleading of JCE in the Indictment:

4. In deciding whether or not the Prosecution properly pleaded JCE in the Indictment, both the majority Decision[3] and the Dissenting Opinion[4] were guided by the Appeals Chamber Judgment in the AFRC case.[5] Both the majority and the Dissenting Opinion applied the test set out in a footnote to the Judgment, in which the Appeals Chamber made a finding that the following four categories of facts must be pleaded in any indictment charging an accused with JCE liability:

> (i) The nature or purpose of the JCE; [footnote omitted]

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[1] *Prosecutor v. Taylor*, SCSL-03-01-T-754, "Public with Annexes Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE", 2 March 2009 ("**Application**").
[2] All references to the "Indictment" in this Response relate to the "Second Amended Indictment".
[3] *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 ("**Decision**").
[4] *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**").
[5] *Prosecutor v. Brima et al*, SCSL-04-16-A-675, "Judgment", Appeals Chamber, 22 February 2008, ("**AFRC Appeals Judgment**").

(ii) The time at which or period over which the enterprise is said to have existed; [footnote omitted]

(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; [footnote omitted]

(iv) The nature of the participation by the accused in that enterprise. [footnote omitted][6]

5. The Trial Chamber also referred itself to the Appeals Chamber's finding in the AFRC Judgment that an Indictment must be read as a whole.[7] The majority of the Trial Chamber correctly concluded that, reading the Indictment as a whole, the Prosecution fulfilled these pleading requirements in respect to JCE.

The majority's application of the first limb of the test - the nature or purpose of the JCE:

6. The Defence argues that the majority erred in the application of the pleading requirements because the finding that "'a campaign to terrorize the civilian population of the Republic of Sierra Leone'" was the "common purpose" of the JCE is erroneous.[8] The Defence relies upon the view expressed by Justice Lussick in his Dissenting Opinion, to the effect that the Indictment "fails to identify any specific common purpose in respect of which the Accused is alleged to be criminally responsible".[9]

7. The Defence argument is without merit. The majority committed no error of law in concluding that the pleading requirement as to the "nature and purpose of the JCE" was satisfied by the Prosecution's pleadings in the Indictment, read as a whole, and in particular paragraphs 5 and 33. [10] 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, as the Prosecution has alleged in all its pleadings on this issue. Inflicting terror on a

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[6] AFRC Appeals Judgment, footnote 146, referred to in the Decision at para. 68 and in the Dissenting Opinion at para. 6.
[7] Decision, para. 69, referring to AFRC Appeal Judgment at para. 138.
[8] Application, para. 6 sub-heading (i).
[9] Ibid., referring to Dissenting Opinion, para. 5
[10] Decision, para. 71.

civilian population is a crime within the Statute of the Court, and the Indictment clearly includes burning and Counts 2 through 11 as part of that campaign of terror. The Indictment thus includes a common plan, design or purpose – also referred to as a JCE – to commit a crime within the SCSL Statute as one of the forms of liability alleged in this case.

8. The Defence argument that the Prosecution ought to have specifically pleaded the "specific objective" of the JCE; by which they seem to mean the "ultimate objective" of the common plan to carry out a campaign of terror is erroneous.[11] There is no requirement that the Prosecution provides further particulars in the Indictment and specifically plead the "ultimate objective" or motive that led the participants to agree to a criminal course of action in the common plan. Indeed, to do so would be contrary to the guidance of the Appeals Chamber as to what is appropriate to plead in the Indictment and what ought to be left for the case summary. [12]

9. Further, in his Dissenting Opinion, Justice Lussick opines that the majority Decision erred in concluding that the common plan, design or purpose was "to terrorize the civilian population of Sierra Leone" because no "purpose" is mentioned.[13] However, the jurisprudence on JCE discusses a common "purpose, plan or design" and 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 *Prosecutor v. Tadic* equated common purpose with a "common design to pursue one course of conduct".[14] The allegation that the Accused participated in this "campaign of terror" satisfies the

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[11] Application, at para. 6(i) and footnote 24, relying upon the Dissenting Opinion at para 5. Notably, at para 5 of the Dissenting Opinion, Justice Lussick states that the Indictment "fails to identify any **specific common purpose** in respect of which the Accused is alleged to be criminally responsible" (emphasis added); at para. 8, Justice Lussick states that "the **specific objective** of the joint criminal enterprise detailed in the Amended Case Summary is obviously a material fact which should have been pleaded in the Indictment" (emphasis added); and at para.11, that the "campaign "to terrorize the civilian population of the Republic of Sierra Leone" would more likely be the means of achieving a common purpose rather than an **end itself**".

[12] *Prosecutor v. Norman et al*, SCSL-2004-14-A-397 "Decision on Amendment of the Consolidated Indictment", 16 May 2005 ("**CDF Indictment Appeal**"), paras. 51 – 53, esp. 53. In this regard, see the Amended Case Summary at para 42 and footnote 19 supra.

[13] Dissenting Opinion, para 5.

[14] *Prosecutor v. Tadic*, Appeal Judgment, 15 July 1999 ("**Tadic**") para 204.

requirements of the test that the "nature **or** purpose" of the JCE be pleaded.[15] In concluding that a "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 mixed error of fact and law.

The Trial Chamber and Appeal Chamber's approach to the pleading of Joint Criminal Enterprise in the Indictment:

10. Under the pleading regimen of the SCSL, there is no reason to require greater specificity in pleading JCE in an Indictment, than is required for other forms of liability. The AFRC Appeals Chamber Judgment relies upon authorities from the ICTY in support of its finding as to what is required in an indictment in respect to the pleading of JCE. However, the indictments at the ICTY have historically contained many more particulars than has been encouraged in Indictments at the Special Court;[16] including particulars not only of JCE liability but also other modes of liability.[17] Additionally, whereas the Prosecutor at the SCSL is obliged to accompany any indictment with a case summary, the same is not true of the Prosecution at the ICTY where the Rules of Procedure and Evidence make no provision for case summaries. These factors demonstrate that whilst it is appropriate to require that particulars of JCE are pleaded in indictments at the *ad hoc* tribunals; this is not required under the regime of the SCSL, which provides for case summaries and aspires towards more succinct indictments. The guidance of the *ad hoc* tribunals is therefore of limited assistance on this issue – owing to the different pleading regimens.
11. In light of the above and mindful of the Appeals Chamber's guidance regarding the requirements of Rule 47(C) that "the "Indictment" should comprise only of a list of counts, with each count followed by brief particulars",[18] the Prosecution

[15] Emphasis added – it is of note that these requirements are referred to disjunctively not cumulatively.
[16] CDF Indictment Appeal, para. 51, where the Appeals Chamber stated that "The Norman Indictment, like the other Indictments laid by the Prosecution, may have been influenced by precedents from the ICTY and ICTR, but it is regrettable that they did not follow more accurately the style prescribed by Rule 47(C)", see also paras 52 – 53.
[17] In the ICTY the indictments typically include particulars relevant to superior responsibility.
[18] CDF Indictment Appeal, para. 52.

cannot be said to have inadequately pleaded JCE in the Indictment. In particular, paragraph 33 of the Indictment alleges the Accused's liability for a "common plan, design or purpose" alongside other modes of liability under Article 6(1) of the Statute. The additional particulars of that JCE and all other modes of liability are provided in the Amended Case Summary.[19]

Failure to consider or to adequately consider relevant factors:

12. The Defence argues that the majority of the Trial Chamber either failed to consider or failed to adequately consider various factors pertaining to the pleading of JCE, and that this shifted the burden of proof from the Prosecution to the Accused, which is an error of law. As discussed below, this argument and the various arguments made in support of it are without merit.

13. First, the Defence argues that the majority either did not consider or did not address in any detail the contemplated means of achieving the ultimate objective or "common purpose" of the JCE. This argument is baseless. The means of achieving the ultimate objective or common purpose are not specified in the four categories of facts that must be pleaded in an Indictment alleging JCE so there was no need for the Trial Chamber to discuss the means through which the campaign of terror would be carried out.

14. 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. Given that the majority concluded that the Indictment properly pleaded JCE, the corollary 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

[19] 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); and noted in particular that the Amended Case Summary explains 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". By articulating the further details of the alleged JCE, in particular, the motive, or ultimate objective of the common plan the Prosecution satisfied the requirement that it should summarise the allegations it intends to prove in making its case, in its case summary, as per the requirements of Rule 47(C).

"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".[20] The issue of notice will be discussed further below.[21]

15. Thirdly, the Defence criticizes the majority Decision for not upholding the Motion on the basis that the phrase "Joint Criminal Enterprise" does not appear in the Indictment. This is a frivolous argument as this issue was adequately addressed by the majority at paragraph 75 of their Decision:

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

16. The majority's discussion of the issue refers to relevant case law from the ICTR.[22] It is also supported by jurisprudence from the ICTY. Most notably in *Tadic,* in which the applicability of this mode of liability to international crimes was first articulated, the Appeals Chamber used a variety of terms to describe this mode of liability, captioning the section "Article 7(1) of the Statute and the Notion of Common Purpose".[23]The Appeals Chamber referred to this form of liability as "a common criminal plan, a common criminal purpose, a common criminal design or purpose, a common criminal design, a common purpose, a common design, and a

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[20] Decision, para. 76. The rather semantic argument made by the Defence at para. 6(iii) of the Application, is also answered in this regard.
[21] See the discussion of notice in the context of "irreparable prejudice" below, paras. 24-26.
[22] Decision, para. 75, footnotes 145 and 146, referring respectively to *Gacumbitsi v. Prosecutor* ICTR-2001-64-A 7 July 2006, para. 165 and the related Dissenting Opinion of Judge Shahabuddeen para. 29.
[23] *Tadic*, sub-heading immediately prior to para. 185.

common concerted design".[24]

In sum, the majority neither failed to consider any relevant factors nor failed to adequately consider any relevant factors. The majority did not therefore err and the Defence argument must fail.

Failure to establish Exceptional Circumstances

17. The Defence argues that "exceptional circumstances" arise because the Decision implicates matters of fundamental legal importance to the Special Court,[25] and that if the Appeals Chamber is not given the opportunity to address the issues raised there will "undoubtedly be lacunae in the jurisprudence of the Special Court".[26]

18. The specific issue of the pleading of JCE has already been considered by the Appeals Chamber of the SCSL. Assuming, *arguendo*, the particulars complained of should have been in the Indictment instead of in the Amended Case Summary, as discussed below the defect has been cured and the Accused is on notice of the case against him. There is no need for the Appeals Chamber to further address these issues as an interlocutory matter therefore no "exceptional circumstances" arise.

Failure to establish Irreparable Prejudice

19. The arguments made by the Defence in support of their claim that the Impugned Decision will give rise to irreparable prejudice do not withstand scrutiny. First and foremost, even if it were established that the majority erred in finding that the Indictment properly pleaded JCE, any defect in the Indictment was cured because the Prosecution provided the Accused with timely, clear and consistent information that he faced allegations of JCE.

20. It is a well established principle in international criminal tribunals that in some instances, a defect in an Indictment can be deemed "cured" if the Prosecution

[24] See discussion of terms used in *Tadic* at para. 24 (footnotes omitted) of *Prosecutor v. Brdjanin & Talic*, IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001.
[25] Application, para. 8.
[26] Application, para 9.

provides the Accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her.[27] Notably, the ICTY Appeals Chamber in the *Prosecutor v. Kvocka* expressly held that even where an indictment fails to allege JCE liability at all, JCE liability can still be considered by the Trial Chamber if timely, clear and consistent information from the Prosecution has cured the defect in the indictment of failing to mention JCE liability.[28]

21. All three Judges agree that the Accused was on notice of the case he had to meet. As noted above, the majority clearly find that the language of the Indictment puts the Accused on notice of the alleged JCE.[29] Further, the Dissenting Opinion identifies the notice provided to the Accused of the JCE allegations in: the initial Indictment,[30] the Amended Indictment,[31] the initial Case Summary,[32] the Prosecution's Pre-Trial Brief,[33] the Amended Case Summary,[34] and the Prosecutor's opening statement.[35] Justice Lussick concludes:

> "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."[36]

22. Justice Lussick's reasoning strongly supports the contention that any prejudice to the Accused has been cured because the Accused was otherwise put on notice of the JCE allegations.

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[27] *Prosecutor v Ntagerura et al.*, ICTR-99-46-A, Appeal Judgment, 7 July 2006, para. 28. See also *Prosecutor v. Ntakirutimana*, Appeal Judgment, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para. 27; *Prosecutor v. Kvocka* IT-98-30, Appeal Judgment, ("**Kvocka Appeal Judgment**") para. 33; *Prosecutor v. Naletilic and Martinovic*, IT-98-34, Appeal Judgment, 3 May 2006, para. 26; *Prosecutor v. Krnojelac*, IT-97-25-PT, "Decision on the Form of the Second Amended Indictment", 11 May 2000, paras 20 – 24.
[28] *Kvocka* Appeal Judgment, paras. 36-54.
[29] See para 15 above.
[30] Ibid., para 17.
[31] Ibid., para. 18.
[32] Ibid., para. 19.
[33] Ibid., para. 20.
[34] Ibid., para 21.
[35] Ibid., para 22.
[36] Dissenting Opinion, para 23.

23. The Defence claims to have suffered prejudice are unmeritorious and should be dismissed.[37] The Defence need only look to the Indictment and the Amended Case Summary to inform themself as to the details of the JCE allegations. Paragraphs 5 and 33 of the Indictment make clear that all crimes charged in the Indictment are either part of, or a foreseeable result of, the JCE, and the Amended Case Summary further details this position.[38] Tactical or strategic choices by the Defence to ignore the particulars of the JCE in the Amended Case Summary, do not give rise to lack of notice and any prejudice thereby inflicted upon the Accused by the Defence cannot give rise to irreparable prejudice.
24. On the basis of the foregoing, it is clear that the Impugned Decision does not result in irreparable prejudice being suffered by the Accused and that the Defence's concerns are unfounded.

III. CONCLUSION

25. As the Defence has failed to satisfy the threshold required by Rule 73(B) in order for leave to appeal to be granted, the Prosecution respectfully requests that the Trial Chamber dismiss the Application.

Filed in The Hague,
13 March 2009
For the Prosecution,

Brenda J. Hollis
Principal Trial Attorney

[37] Application, para. 13.
[38] See the Amended Case Summary, at para: 43.1, which alleges that the crimes charged in counts 1 – 11 were within the common plan (basic JCE liability), and para. 43.2, which alleges that, alternatively the crimes alleged in counts 1,9,10 and 11 were within the common plan and that the crimes charged in counts 2,3,4,5,6,7 and 8 were foreseeable consequences of the crimes agreed upon in the common plan.

LIST OF AUTHORITIES

SCSL Cases:

Prosecutor v. Taylor

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

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

Prosecutor v. Brima, Kamara, Kanu

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

Prosecutor v. Norman, Fofana, Kondewa

Prosecutor v. Norman et al, SCSL-2004-14-A-397 "Decision on Amendment of the Consolidated Indictment", 16 May 2005

ICTY Cases:

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Prosecutor v. Brdjanin & Talic, IT-99-36-PT, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", 26 June 2001
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http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf

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