767) SCSL-03-01-T (24737 – 24805) 24737

THE SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Registrar: Mr. Herman von Hebel

Date: 26 March 2009

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

DEFENCE NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE MAJORITY DECISION CONCERNING THE PLEADING OF JCE IN THE SECOND AMENDED INDICTMENT

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

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

NOTICE OF APPEAL

I. INTRODUCTION

1. The Defence files this Notice of Appeal and accompanying Submissions, pursuant to Rules[1] 73(B) and 108(C), and the Practice Direction for certain Appeals before the Special Court[2].
2. All documents believed by the Defence to be necessary for a decision in this appeal are enumerated in the index that is within Annex A.[3]
3. The particulars of the decision being appealed and a summary of the proceedings relating to that decision, as well as the grounds in support of the appeal and the remedy or relief now being requested are delineated immediately below in seriatim.[4]

II. TITLE AND DATE OF FILING OF THE APPEALED DECISION AND THE DECISION GRANTING LEAVE TO APEAL

4. The decision under appeal is *Prosecutor v. Taylor*, SCSL-03-01-T-752, *Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 27 February 2009 ("Appealed Decision"). The Appealed Decision was rendered by a majority of the Trial Chamber with the Presiding Judge, Justice Richard Lussick, dissenting.[5] The decision granting the Defence leave to appeal was rendered, likewise, by a majority of the Trial Chamber with Justice Julia Sebutinde dissenting: see, *Prosecutor v. Taylor*, SCSL-03-01-T-764, *Decision on 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*, dated 18 March 2009, filed 19 March 2009 ("Decision Granting Leave").

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1 *Rules of Procedure and Evidence of the Special Court for Sierra Leone*, as amended on 27 May 2008 ("Rules").
2 Practice Direction for certain Appeals before the Special Court, 30 September 2004 ("Practice Direction"), filed under, inter alia, SCSL-04-16-PT-111.
3 Practice Direction, Section III, para. 16, requiring an index of "documents believed to be necessary for the decision in the appeal."
4 See, Practice Direction, Section II, para. 10.
5 Prosecutor v. Taylor, SCSL-03-01-T-751, Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 27 February 2009 ("Dissenting Opinion"). See, also, Prosecutor v. Taylor, SCSL-03-01-T-761, Corrigendum: Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick, 12 March 2009 (Corrigendum).
It is noteworthy that the word "Public" appears in the title to the Dissenting Opinion but does not feature in the title of the Appealed Decision; however, there can be no doubt upon reviewing the Dissenting Opinion that it pertains to the Appealed Decision.

III. SUMMARY OF THE PROCEEDINGS REGARDING THE APPEALED DECISION

5. The trial in this case commenced with the Opening Statement of the Prosecutor on 4 June 2007.[6] Current counsel of record were assigned to represent the Accused on 17 July 2007.[7] The Defence on 14 December 2007, filed a motion alleging a fatal defect in the pleading of "joint criminal enterprise" ("JCE") as a mode of criminal liability in the Second Amended Indictment.[8] Several pleadings between the parties were filed subsequent to and in relation to the Motion, and fourteen months after the filing of the Motion, an oral decision was rendered dismissing the Motion on 19 February 2009.[9] The Appealed Decision is the "properly reasoned" and filed decision referred to in the Oral Decision.[10]

6. Though having been filed out-of-time within the meaning of Rule 72(A),[11] the Appealed Decision found that the delay in the filing of the Motion was occasioned by "good cause"[12] and further that it was in the interests of justice to entertain the Motion at that stage of the proceedings[13]. Holding that, "Reading the Indictment[14] as a whole the Trial Chamber [*sic*][15] is satisfied that the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment, and that it has provided sufficient details to put the Accused on notice of the case against him,"[16] it was opined in the Appealed Decision that paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Second Amended Indictment, when taken together, "fulfil the requirements for pleading JCE and serve to put the Defence on notice that the Prosecution intended to charge the Accused with having participated in a

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[6] Prosecutor v. Taylor, SCSL-03-01-T, Transcript of Proceedings, 4 June 2007, pages 26 through 90 ("Opening Statement").
[7] Prosecutor v. Taylor, SCSL-03-01-T-320, "Principal Defender's Decision Assigning New Counsel to Charles Ghankay Taylor," 17 July 2007. A Legal Services Contract was concluded with the Principal Defender and the Registrar of the Court on 1 August 2007. The full Defence team, including additional co-counsel as well as national and international investigators, was complete by on or about 20 September 2007.
[8] Prosecutor v. Taylor, SCSL-03-01-T-378, Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE, 14 December 2007 ("the Motion").
[9] See a chronological enumeration of the relevant pleadings in the index within Annex A hereto; see, also, Prosecutor v. Taylor, SCSL-03-01-T, Transcript of Proceedings, 19 February 2009, pages 24052 (line 26) through 24053 (line 3) ("Oral Decision").
[10] See, Oral Decision, page 24053, line 2.
[11] Rules, Rule 73(A).
[12] Appealed Decision, para. 55.
[13] Ibid., para. 56.
[14] Reference here is to the Second Amended Indictment. See title to sub-section "D" of the Appealed Decision, paras. 69 – 76.
[15] Use here of the phrase "the Trial Chamber" might arguably be less precise than the phrase "the Majority of the Trial Chamber" [emphasis added].
[16] Appealed Decision, para. 76.

Joint Criminal Enterprise."[17] It is as a consequence of that holding and opinion, and the prejudice which has flowed to the Accused as a consequence of both and the fourteen-month delay between the filing of the Motion and the rendition of the Appealed Decision, that the Defence now brings forth this appeal.

IV. GROUNDS OF APPEAL: STATEMENT OF ALLEGED ERRORS

7. **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[18] *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.*

8. **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[19] *constituted an error both of law and in the application of the law.*[20]

9. **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 Indictment from the Prosecution to the Accused [emphasis added].*

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[17] Ibid., para. 70.

[18] Use of "Indictment" herein should be read always as being synonymous with "Second Amended Indictment," albeit that context occasionally makes use of "Second Amended Indictment" necessary.

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

20 See, Dissenting Opinion, para. 2, regarding the "proper application" of pleadings principles.

10. **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"*[21] *[emphasis added], 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 an Indictment.*

11. **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[22] *be clearly pleaded and identified in an indictment.*

V. REQUESTED RELIEF

12. The relief that is respectfully being sought as a consequence of the alleged error in the Appealed Decision are as follows:

(i) That oral arguments be ordered in respect of this appeal and in the exercise of the discretion of the Presiding Judge of the Appeals Chamber and President of the Court, pursuant to Section II, paragraph 14 of the Practice Direction;

(ii) That the Indictment against the Accused be dismissed in its entirety and the Accused be released forthwith from custody, insofar as he has been irreparably prejudiced by virtue of the confusion and ambiguity relating to the pleading of any alleged JCE as occasioned by the fourteen-month delay between the filing of the Motion and the rendition of the Appealed Decision and the concomitantly adverse effects that delay has had on his rights to notice and to cross-examine witnesses called against him, pursuant to Article 17 of the Statute; and/ or

(iii)That JCE be severed as a mode of criminal liability from the Indictment and the Prosecution be barred from relying on it as a mode of criminal liability against the Accused.

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[21] Appealed Decision, para. 70.
[22] See, para. 74 of the Appealed Decision.

SUBMISSIONS BASED ON THE GROUNDS OF APPEAL

A. INTRODUCTION

13. Submissions and arguments in support of each ground of appeal are advanced below under the respective ground of appeal, the Defence having elected to file its submissions as a separate part of the same document containing its Notice of Appeal.[23]

B. APPLICABLE STANDARDS OF REVIEW ON APPEAL

14. Article 20(1) and Rule 106(A) provide that the Appeals Chamber shall hear appeals on the following grounds: (a) a procedural error; (b) an error on a question of law invalidating the decision; or (c) an error of fact which has occasioned a miscarriage of justice.

15. In relation to an error of on a question of law, the error must invalidate the decision of the Trial Chamber[24] and the appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[25] In exceptional circumstances, an Appeals Chamber may consider legal issues which may not lead to the invalidation of the Trial Chamber's decision, where such issues are of general significance to the Tribunal's jurisprudence.[26]

16. In respect of errors of fact, an appellant must demonstrate that the Trial Chamber committed an error of fact and that the error resulted in a miscarriage of justice[27] before a decision will be overturned on appeal. A miscarriage of justice is defined as a "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[28] Furthermore, a "reasonableness standard" is applied by the Appeals Chamber when evaluating the viability of alleged factual errors: to wit - "[W]here

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23 See, Practice Direction, Section II, para. 11.

[24] Prosecutor v. Fofana and Kondewa, Appeals Chamber, Judgment [Fofana Appeal Judgment], 28 May 2008, para. 32.

[25] Prosecutor v. Norman et al, SCSL-04-14-688, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone [Norman Subpoena Decision], 11 September 2006, para. 7.

[26] See e.g., Prosecutor v. Galić, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 30 November 2006, para. 6 [Galić Appeal Judgement]; Prosecutor v. Stakić, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 March 2006, para. 7 [Stakić Appeal Judgement]; Prosecutor v. Kupreškić et al., IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001, para. 22 [Kupreškić Appeal Judgement]; Prosecutor v. Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999, para. 247 [Tadić Appeal Judgement].

[27] Kupreškić Appeal Judgement, para. 29 (citing Prosecutor v Furundzija, IT-95-17/1-A, Judgement, [Furundzija Appeal Judgement] 21 July 2000, para. 37 (citing Serushago v Prosecutor, ICTR-98-39-A, Reasons for Judgement, 6 April 2000, para. 22))).

[28] Kupreškić Appeal Judgement, para.29 (citing Furundzija Appeal Judgement, para. 37 (quoting Black's Law Dictionary (7th ed. 1999)).

no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous," the Appeals Chamber will overturn or interfere with the Trial Chamber's finding of fact.[29]

17. Where an appellant alleges an error relating to the Trial Chamber's exercise of discretion, the Appeals Chamber will overturn the challenged decision if it amounted to a "discernible error" in which "the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[30] A discernible error is one where the Trial Chamber "misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion."[31] This applies both to all errors relating to the exercise of the Trial Chamber's discretion, whether law or fact.[32]

18. Where an alleged error does not implicate an exercise of discretion by the Trial Chamber and is instead concerned with the application of mandatory standards, the issue is whether the Trial Chamber used the correct legal criteria in its determination and that those criteria were correctly interpreted and applied.[33]

C. 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.

19. The Defence submits that this error is of a fundamental nature to the case and arose as a consequence of the constituent errors which are alleged and individually addressed in the

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[29] Fofana Appeal Judgment, para. 33 (citing Kupreškić Appeal Judgement, para. 22, and Prosecutor v. Ntakirutimarna, ICTR-96-10-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgment, 13 December 2004, para. 12).

[30] Fofana Appeal Judgment, para. 36 (citing Norman Subpoena Decision, para. 5, citing Milošević Decision on Appeal from Refusal to Order Joinder, [Milošević Decision] para. 4, and citing Prosecutor v. Karemera, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 9).

[31] Norman Subpoena Decision, para. 6, referring to Milošević Decision, para. 5.

[32] Norman Subpoena Decision, para. 7.

[33] See, e.g., Prosecutor v. Norman et al., SCSL-2004-14-AR73, Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 16 May 2005, para. 28.

second through fourth grounds of appeal below. Those errors independently, collectively, and/ or some in combination with others, led to this fundamental error invalidating the Appealed Decision[34] and occasioning a miscarriage of justice[35] to the Accused. The Defence, accordingly and by reference thereto, incorporates all submissions made in respect of those subsidiary errors in support of its first ground of appeal in sustaining the propriety of the relief being sought on appeal.

D. 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[36] constituted an error both of law and in the application of the law.[37]

20. The Defence submits that the above finding by the majority of the Trial Chamber is erroneous for the same reason that has been given by the Dissenting Opinion – namely, that nowhere in the Second Amended Indictment is "any specific common purpose in respect of which the Accused is alleged to be criminally responsible" to be identified.[38] The absence of a properly pleaded "common purpose" of any alleged JCE in the text of the Second Amended Indictment renders it fatally defective in the pleading of JCE as a mode of criminal liability. That defect has impeded the Accused's ability to know "the nature and cause of the charge against him" within the meaning of Article 17(4)(a) of the Statute and natural law notions of fundamental fairness, thereby depriving and denying the Accused of sufficient notice of the case that he has to defend.[39]

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34 See, Statute, Article 20(1)(b) and Rule 106(A)(b) of the Rules.
35 See, Statute, Article 20(1)(c) and Rule 106(A)(c) of the Rules.
36 Appealed Decision, para. 71. The Defence's reading of the Appealed Decision, as such, is consistent with the Dissenting Opinion's reading of the same. See, Dissenting Opinion, paras. 11 and 12. This specific finding of the Appealed Decision appears immediately below the sub-heading, "(i) The existence of a common plan, design or purpose amounting to or involving a crime under the Statute", see, Appealed Decision, paras. 70 -71, and the conclusion is inescapable that the excerpted language from the Second Amended Indictment was found by the Majority of the Trial Chamber to be the ostensible "common purpose" of the alleged "JCE."
37 See, Dissenting Opinion, para. 2, regarding the "proper application" of pleadings principles.
38 Dissenting Opinion, para. 5.
39 Discussed below is the finding by the majority of the Trial Chamber that the alleged JCE in the Indictment is applicable to all eleven counts therein. That being the case, the Defence submits that the proper scope and effect of the errors in the first and this second ground of appeal extends not just to the question of what notice has been given the Accused in connection with JCE as a mode of criminal liability, but to what notice has been given the Accused regarding the entire case that he has to defend. The applicability of JCE to all eleven counts renders the alleged

21. It is settled law that the nature of the "common purpose" of a JCE is a material fact which must be pleaded in an indictment otherwise the indictment is defective[40]. Indeed, and as acknowledged by the majority of the Trial Chamber, "a specific and unambiguous indictment is an essential prerequisite to a fair and expeditious trial."[41] Furthermore, Rule 26*bis* requires that, "The Trial Chamber and the Appeals Chamber shall ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted in accordance with the Agreement, the Statute and the Rules, *with full respect for the rights of the accused...* [emphasis added]."[42] Article 20(3) adds that "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda."[43]

22. Paragraphs 5 and 33 of the Second Amended Indictment from which the "common purpose" of an alleged JCE was divined in the Appealed Decision reads, in substantial part, as follows:

TERRORIZING THE CIVILIAN POPULATION

COUNT 1: Acts of Terrorism, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.d. of the Statute.

PARTICULARS

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

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error endemic and of a fundamental nature, affecting the sufficiency of the notice given the Accused in the Indictment in relation to each and every count therein and also the Accused's ability to defend against other alleged modes of criminal liability under Articles 6(1) and 6(3). Cf., para. 5 of the Dissenting Opinion, with emphasis on the words "in relation to joint criminal enterprise."

40 See, AFRC Appeals Judgement, f.n., 146, citing Prosecutor v. Krnojelac, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000 ("Krnojelac Decision on Form of Second Amended Indictment"); Dissenting Opinion, para. 6 [citations omitted]; see, also, Prosecutor v. Hadžzihasanović, et al., Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 10 ("Hadžzihasanović Indictment Decision").

41 Appealed Decision, para. 59.

42 Rule 26bis of the Rules.

43 Article 20(3) of the Statute.

INDIVIDUAL CRIMINAL RESPONSIBILITY

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.**

23. The Defence avers that no fair reading of paragraphs 5 and 33 can lead to the conclusion that the "campaign to terrorize the civilian population of the Republic of Sierra Leone" that is alleged in Paragraph 5 is anything other than part of the allegations pertaining to the crime of "Acts of terrorism" under Article 3(d) of the Statute, as derived from Article 3 common to *The Geneva Conventions of August 12, 1949*, and additional Protocol II of 8 June 1977[44]. This is a proposition with which the Dissenting Opinion readily agrees.[45]

24. That Count 1 of the Indictment pertains to the crime of "Acts of terrorism" is beyond dispute. The name of the offence ("Acts of terrorism") is explicitly stated after "Count 1" and there is likewise explicit reference to Article 3(d) of the Statute, following which the "Particulars" of Count 1 are given. Much like the "Particulars" section that follow each of the additional ten counts, the "Particulars" section within Count 1 (i.e., Paragraph 5) is aimed at sustaining the viability of that count and that count alone. The alleged "campaign to terrorize the civilian population..." is part and parcel of the crime being charged in Count 1 – Acts of terrorism – and the "Particulars" merely specify that the burning of civilian property and the crimes alleged elsewhere in the Indictment were part of this campaign to terrorise. Nothing more could reasonably be divined from Paragraph 5 and that proposition does not change when Paragraph 33 or, for that matter, any other paragraph of the Indictment is considered in conjunction with Paragraph 5 while attempting to discern a sufficiently pleaded "common purpose" for any alleged JCE.

44 See, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.
45 Dissenting Opinion, para. 11.

25. Paragraph 33 is concerned with "individual criminal responsibility" within the meaning of Article 6(1) of the Statute. That paragraph contains a delineation of the five modes of criminal liability which are explicitly stated in Article 6(1).[46] Although "joint criminal enterprise" is not explicitly listed as a mode of liability in Article 6(1), the ICTY Appeals Chamber in Tadić has made clear in relation to Article 7(1) of the ICTY Statute (which is in the same terms as Article 6(1) of our Statute), that JCE is an established mode of liability under customary international law.[47] That view has likewise been embraced by our Appeals Chamber in respect of Article 6(1) of our Statute.[48]
26. Following the recitation in Paragraph 33 of the Indictment of the five modes of liability that appear explicitly in Article 6(1), there is this disjunctive phrase: "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" (emphasis added in italics).
27. The majority of the Trial Chamber read that last phrase of Paragraph 33 as having a significant bearing on the sufficiency of the pleading of an alleged JCE in the Indictment,[49] but it readily concedes that the phrase "joint criminal enterprise" (or its acronym "JCE") appears nowhere in the text of the Indictment.[50] Indeed, and of no small significance, is the fact that those words, "joint criminal enterprise," were pleaded in paragraphs 23, 24, and 25 of the Initial Indictment of 7 March 2003,[51] however, all three paragraphs were deleted and did not feature in either the Amended Indictment or the Second Amended Indictment.[52] Furthermore, their deletion highlights a significant difference between the Indictment in this

46 See, AFRC Appeals Judgment, para. 72, confirming that there are five (5) modes of liability explicitly stated in Article 6(1) for acts or transactions that an Accused personally engages or otherwise participates in. Those modes of liability are (i) planning, (ii) instigating, (iii) ordering, (iv) committing, and (v) aiding and abetting a crime that is punishable under the Statute. See, Statute, Article 6(1).
47 See, Prosecutor v. Tadić, IT-94-1-A, Judgment, 15 July 1999 ("Tadić Appeal Judgment"), paras 186, 189 – 193, esp., 220; see, also, The Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, as amended on 29 September 2008 ("ICTY Statute"), Article 7(1).
48 AFRC Appeals Judgement, paras. 72 – 75.
49 Appealed Decision, paras. 69 – 71.
50 Ibid., para. 75.
51 See, Annex B, hereto; see, also, Prosecutor v. Taylor, SCSL-03-01-I-001, Indictment, signed 3 March 2003, filed 7 March 2003 ("Initial Indictment"); Prosecutor v. Taylor, SCSL-03-01-I-75, Amended Indictment, signed 16 March 2006, filed 17 March 2006 ("Amended Indictment"); and Second Amended Indictment.
52 Ibid., see also, Appealed Decision, paras. 2, 8, 9 and 11, acknowledging the same.

case and the *Further Amended Consolidated Indictment*[53] in the AFRC case, in which "joint criminal enterprise" was explicitly mentioned in paragraphs 33, 34, and 35, and whereas those paragraphs were retained in the AFRC Indictment, their almost identical counterparts (paragraphs 23 and 24 of the Initial Indictment are virtually identical to paragraphs 33 and 34, respectively, of the AFRC Indictment) were deleted from the Indictment at bar.

28. The majority of the Trial Chamber acknowledged that such deletions were made and also that their significance to the pleading of JCE in this case was alluded to in the Defence Pre-trial Brief.[54] That the Prosecutor elected to delete those words and paragraphs from the Initial Indictment and to have in their stead what can, at best, be deemed a most ambiguous and elliptical attempt at referring to a "joint criminal enterprise" speaks volumes about the propriety of the majority's holding, especially since JCE is a jurisprudential principle (requiring clear articulation, insofar as it is not explicitly stated in Article 6(1)) that is said to be applicable to all eleven counts of the Indictment.[55]

29. Furthermore, and even if the excerpted language and concluding phrase from Paragraph 33 is tantamount to an *implicit* [emphasis added] allegation of a joint criminal enterprise[56] (not to be confused with the requisite allegation of the "common purpose" of a JCE) as has been suggested by one commentator[57], it does not explicate what the "common purpose" of the JCE was. Indeed, and specifically regarding the Indictment in this case, the same commentator has observed the following:

> On its face, the Amended Taylor Indictment never specifies the common plan of the joint criminal enterprise in which Taylor allegedly took part. This omission is striking given the importance of this form of liability to the Prosecution's case against Taylor...[58]
>
> The pleading of joint criminal enterprise in the [A]mended Taylor Indictment differs substantially from the construction of JCE in the AFRC and RUF Indictments. Whereas

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[53] See, Prosecutor v. Brima, et al., SCSL-04-16-PT, Further Amended Consolidated Indictment, 18 February 2005 ("AFRC Indictment"), esp., paras. 33 – 35.

54 Ibid., see also, Defence Pre-Trial Brief, para. 45. The Defence submits that language which has been deleted from the Initial Indictment may properly be considered just as is language which appears in, and/ or is omitted from, both the Amended Indictment and Second Amended Indictment when evaluating the sufficiency of the Second Amended Indictment.

[55] See, para. 71 -74 of the Appealed Decision, regarding the applicability of JCE to all eleven counts.

56 It is of little consequence as a matter of law in respect of JCE, whether or not allegations are "implicitly" stated in an indictment, inasmuch as the applicable legal principles clearly require explicit allegations of all material facts of a JCE in an indictment.

57 See, "Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes," by Cecily Rose, 5 November 2008 ("Troubled Indictments at the SCSL"), page 23.

[58] Troubled Indictments at the SCSL, page 12.

> the AFRC Indictment raised questions about whether the common purpose amounted to or involved crimes within the Statute, the Taylor Indictment, at first glance, fails to plead a common purpose at all.[59]
>
> Unfortunately the Prosecution's explanation of the common purpose of the joint criminal enterprise finds little support in the amended Indictment itself. While the Indictment clearly alleges terrorization of the civilian population, its function as the common purpose of a joint criminal enterprise is far from clear.[60]
>
> While 'terrorizing the civilian population' thus functions as an overarching goal which encompasses all of the crimes charged within the Indictment, the Prosecution does not clearly allege that 'terrorizing the civilian population' was the common purpose of a joint criminal enterprise. In fact, nothing in the Indictment explicitly links Count 1, alleging terrorization of the civilian population, to paragraph 33, at the end of the Indictment, which implicitly alleges a joint criminal enterprise. Paragraph 33 further muddies the waters by omitting the terms "joint criminal enterprise" and "common plan, design or purpose."[61]
>
> [T]he Taylor Indictment differs from almost all other Indictments at the ICTY and the ICTR because it does not appear to allege an overarching common purpose...[62]

30. Drawing on the foregoing, the Defence maintains that nowhere is a "common purpose" for any purportedly alleged JCE is readily identifiable in the text of the Indictment. There exist no objectively reasonable reason (nor has nay been advanced in the Appealed Decision) for why Paragraph 33 should be read in conjunction with Paragraph 5 vis-à-vis the "Particulars" section that accompanies any of the remaining ten counts.[63] While acknowledging that the pleading of JCE is a material fact that must be pleaded in the text of the Indictment,[64] and declaring also its faithfulness to undertaking a search for, and discernment of, the "common purpose" that was limited to the four corners of the Indictment,[65] the majority of the Trial Chamber erroneously divined a "common purpose" which is no wise discernible in the Indictment and that constituted an error of law; the manner or approach by which that erroneous conclusion was arrived at constituted an error in the application of the law. As a

[59] Ibid., at page 20.
[60] Ibid., at page 22.
[61] Ibid., at page 23.
[62] Ibid., at page 24.
[63] See, para. 11 of the Dissenting Opinion for a similarly-expressed view.
[64] Appealed Decision, para. 64.
[65] Ibid., paras. 58 and 61.

consequence of those errors, the Defence submits that the Accused has not been placed on sufficient notice of the case against which he must defend.

E. 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 Indictment from the Prosecution to the Accused [emphasis added].*

31. The Prosecution bears the burden of proof of sufficiently pleading the material facts of a case. Trial Chamber II has held that Article 17(4)(a) of the Statute and Rule 47(c) of the Rules "translate into an obligation on the part of the prosecution to plead material facts underpinning the charges with enough detail to inform the accused clearly of the charges against him so that he or she may prepare a defense, but not the evidence by which such material facts are to be proven."[66] In the *Fofana* Judgment, Trial Chamber I held that "[g]enerally, if defects in the Indictment are alleged, the Prosecution has the burden of demonstrating that the Accused's ability to prepare his case has not been materially impaired."[67] An indictment is sufficiently plead if "the Accused is provided with sufficient information to adequately and effectively prepare his defense."[68]

32. When considering whether the Prosecution has met its burden of providing the Accused due notice of the charges against him, trial chambers generally weigh each argument advanced by the Defense.[69] The ICTR Trial Chamber, when analyzing defects in the form of the

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[66] Prosecutor v. Brima, Kamara, Kanu, SCSL-04-16-T, Judgment, 20 June, 2007, para. 27 (citing Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, 29 July 2004, para. 209; Prosecutor v. Aloys Simba, Case No. ICTR-2001-76-T, Judgment, 13 December 2005, para. 14).

[67] Prosecutor v. Fofana, Kondewa, SCSL-04-14-T, Judgment, 2 August 2007, para. 27.

[68] Fofana Judgment, para. 22 (citing Prosecutor v. Sesay, SCSL-2003-05-PT, Decision and Order on Defense Motion for Defects in the Form of the Indictment (TC), 13 October 2003, para. 6; Prosecutor v. Kanu, SCSL-2003-13-PT, Decision and Order on Defense Motion for Defects in the Form of the Indictment (TC), 19 November 2003, para. 6; Prosecutor v. Kondewa, SCSL-2003-12-PT, Decision and Order on Defense Motion for Defects in the Form of the Indictment (TC), 28 November 2003, para. 6; Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-PT, 1 April 2004, para. 32.

[69] See, e.g., Prosecutor v. Semanza, ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras. 41-62 (analyzing each argument with respect to defects in the indictment in turn); Prosecutor v. Blaskic, Decision on Defense Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997, paras. 22-38.

indictment, noted that the "duty to ensure the integrity of the proceedings and safeguard the rights of the Accused warrants full consideration of the arguments of the Defense."[70]

33. The Defence submits that by failing to adequately consider all factors relevant to the determination of whether or not JCE has been properly pleaded in the Indictment, the majority of the Trial did not fulfil its duty under Rule 26*bis* to "ensure that a trial is fair and expeditious and that proceedings are conducted... with full respect for the rights of the accused..."; it thereby impermissibly shifted the burden of proof from the Prosecution to the Accused.

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

35. Otherwise relevant factors that were not expressly considered or addressed in any detail in the Appealed Decision, include: (1) what the contemplated *means* of achieving the ultimate objective or "common purpose" of the JCE is, as pleaded in the Indictment [emphasis added][71]; (2) the legal significance and effect on the Accused's fair trial (notice) rights under Article 17 of the Statute owing to the deletion of paragraphs 23, 24, and 25 (all pertaining to JCE) from the Initial Indictment upon the filing of the Amended Indictment and the non-appearance of those paragraphs also in the Indictment[72]; (3) The fact that the secondary accusatory instruments and/ or pronouncements of the Prosecution in this case evidence a pleading regime of the objective or "common purpose" of the JCE that has be fluid, ever-evolving, and far from consistent -- something which has been argued by the Defence and clearly been acknowledged by the Dissenting Opinion and others elsewhere.[73]

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[70] Semanza, Judgment and Sentence, para. 42.

[71] See, AFRC Appeals Judgement, paras. 84 and 82, in particular para. 76, stating that, "The objective and the means to achieve the objective constitute the common design or plan, " and adding that "a review of the jurisprudence of the international criminal tribunals" supports the conclusion that "the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective [emphasis added]." See, also, the discussion regarding the "means" versus the "objective" of the JCE in Schabas, William A. OC MRIA, Expert Opinion on Joint Criminal Enterprise, 13 November 2007.

[72] See, Appealed Decision, paras. 2, 8, 9 and 11; see, also, Defence Pre-Trial Brief, para. 45. This issue has been addressed above in connection with the Second Ground of Appeal.

[73] See, Dissenting Opinion, stating in paragraph 16 that "the objective of [the JCE] was not always expressed in the same way" and in paragraph 23 that "there are some obvious differences in the way the various materials describe the common purpose." See, also, Troubled Indictments at the SCSL at page 25, observing that "by oscillating from one common purpose to another, and by failing to anchor its arguments in text of the Indictment, the Prosecution has

36. An example of a factor which was considered in the Appealed Decision, but nonetheless and ostensibly deemed not significant enough to uphold the Motion is the fact that the phrase "Joint Criminal Enterprise" appears nowhere within the Indictment.[74] The effect of both the failure to adequately consider other relevant factors (obvious on the record) in the analytical process and of resolving those that were considered in favour of upholding the Indictment was tantamount to shifting the burden or onus regarding the sufficiency of the pleading of JCE in Indictment from the Prosecution to the Accused. Such an analytical process with the alleged and resulting shift in the burden of proof was an error of law.

F. 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"*[75] *[emphasis added], 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 an Indictment.*

37. The above "opinion" by the majority of the Trial Chamber was erroneous and in no small measure illustrates that it adopted a wrong legal principle in its analytical approach to the issues that were before it. There is no basis is law for suggesting that an "intention to charge" is in any way sufficient to place an Accused on sufficient notice of the material elements of a JCE and, consequently, of the case that he has to answer. The appearance of such reasoning in the Appealed Decision provides yet another basis for its invalidation.

G. 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

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not only provided the accused with inconsistent and confused information, but it also may have substantially weakened its case against Taylor." See, also, para. 7 of the Defence 14 January 2008 Reply and paras. 20 and 22 of the Defence's 31 March 2008 "Consequential Motion."

[74] See, Appealed Decision, para. 75, acknowledging as much. That issue has been discussed above in connection with the Second Ground of Appeal.

[75] Appealed Decision, para. 70.

part, the requirement that the nature of the Accused's participation in any alleged JCE[76] *be clearly pleaded and identified in an indictment.*

38. On the one hand, Paragraph 34 of the Indictment is expressly concerned with "superior criminal responsibility" within the meaning of Article 6(3) of the Statute. On the other hand, the requirement that the nature of the Accused's participation in the JCE be pleaded in the Indictment[77] is concerned with the proper pleading of a jurisprudential mode of liability falling with the purview of Article 6(1). For the majority of the Trial Chamber to conclude that fulfilment of the pleading requirement of Article 6(3) in Paragraph 34 also served to satisfy the requirement that the Prosecution clearly pleaded the nature of the Accused's participation in the JCE was an error of law, invalidating the Appealed Decision.

H. REQUESTED RELIEF

39. The Defence respectfully requests the following relief in respect of the errors alleged above:

(i) That oral arguments be ordered in respect of this appeal and in the exercise of the discretion of the Presiding Judge of the Appeals Chamber and President of the Court, pursuant to Section II, paragraph 14 of the Practice Direction;

(ii) That the Indictment against the Accused be dismissed in its entirety and the Accused be released forthwith from custody, insofar as he has been irreparably prejudiced by virtue of the confusion and ambiguity relating to the pleading of any alleged JCE as occasioned by the fourteen-month delay between the filing of the Motion and the rendition of the Appealed Decision and the concomitantly adverse effects that delay has had on his rights to notice and to cross-examine witnesses called against him, pursuant to Article 17 of the Statute; and/ or

(iii) That JCE be severed as a mode of criminal liability from the Indictment and the Prosecution be barred from relying on it as a mode of criminal liability against the Accused.

40. In support of these requests, the Defence observes that the Accused has already been prejudiced by, *inter alia*, the uncertainty occasioned by the fourteen-month delay between the

[76] See, para. 74 of the Appealed Decision.

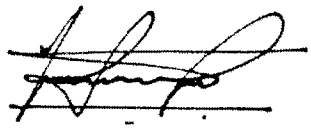
[77] See, AFRC Appeals Judgement, f.n., 146, citing Prosecutor v. Krnojelac, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000 ("Krnojelac Decision on Form of Second Amended Indictment"); Dissenting Opinion, para. 6 [citations omitted]; see, also, Prosecutor v. Hadžzihasanović, et al., Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, para. 10 ("Hadžzihasanović Indictment Decision").

filing of the Motion and the rendering of the Appealed Decision, bearing in mind that lines of inquiry that could have been pursued during cross-examination of Prosecution witnesses (had a decision been rendered much earlier in respect of the Motion) were not pursued during the Prosecution's case-in-chief, and especially considering the majority of the Trial Chamber's determination that JCE as a mode of liability applies to all eleven counts of the Indictment.[78]

41. Such prejudice cannot be remedied by way of permitting an amendment to the Indictment at this late stage of the proceedings, irrespective of whether or not JCE is severed as a mode of liability therefrom because, as stated previously above, "the proper scope and effect of the errors in the first and... second ground[s] of appeal extends not just to the question of what notice has been given the Accused in connection with JCE as a mode of criminal liability, but to what notice has been given the Accused regarding the entire case that he has to defend. The applicability of JCE to all eleven counts renders the alleged error endemic and of a fundamental nature, affecting the sufficiency of the notice given the Accused in the Indictment in relation to each and every count therein and also the Accused's ability to defend against other alleged modes of criminal liability under Articles 6(1) and 6(3)."[79]

42. Under these circumstances, the Defence respectfully seeks the relief requested herein to ensure, at a minimum, that what prejudice has already inured to the Accused is neither continued nor further exacerbated.

Respectfully submitted,



For Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 26th day of March 2009,
The Hague, The Netherlands

[78] The conclusion is inescapable when paragraph 71 of the Appealed Decision is reviewed. It states that: "According to paragraphs 5 and 33 of the [Second Amended] Indictment, the crimes charged in Counts 2 through 11 were part of the 'campaign of terror' or were a reasonably foreseeable consequence thereof." Also, the time or period of existence of the alleged JCE is said in paragraph 72 of the Appealed Decision to be identical to the time periods that are alleged in all of the "Particulars" of the remaining counts in Indictment (i.e., between 30 November 1996 and 18 January 2002).

[79] See, f.n. 39 above.

List of Authorities

SCSL

Organic Documents

Statute of the Special Court for Sierra Leone, annexed to the *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, 16 January 2002 ("Statute").

Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended on 27 May 2008 ("Rules").

Practice Directions

Practice Direction for certain Appeals before the Special Court, 30 September 2004 ("Practice Direction"), filed under, inter alia, SCSL-04-16-PT-111.

Prosecutor v Taylor

(a) *Prosecutor v. Taylor*, SCSL-03-01-I-001, *Indictment*, signed 3 March 2003, filed 7 March 2003 ("Initial Indictment");

(b) *Prosecutor v. Taylor*, SCSL-03-01-I-75, *Amended Indictment*, signed 16 March 2006, filed 17 March 2006 ("Amended Indictment"), with "Case Summary Accompanying the Amended Indictment," as Annex ("Case Summary");

(c) *Prosecutor v. Taylor*, SCSL-03-01-PT-218, *Rule 73bis Pre-Trial Conference Materials Pre-Trial Brief*, 4 April 2007 ("Prosecution Pre-Trial Brief")[80];

(d) *Prosecutor v. Taylor*, SCSL-03-01-PT-229, *Rule 73bis Taylor Defence Pre-Trial Brief*, 26 April 2007 ("Defence Pre-Trial Brief")[81];

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

(f) *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 4 June 2007, pages 26 through 90 ("Opening Statement");

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

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

(g) *Prosecutor v. Taylor*, SCSL-03-01-T-327, *Prosecution Notification of Filing of Amended Case Summary* ("Notification"), with "Case Summary Accompanying the Second Amended Indictment," as Annex, 3 August 2007 ("Amended Case Summary");

(h) *Prosecutor v. Taylor*, SCSL-03-01-T-378, *Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 14 December 2007 ("the Motion");

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

(j) *Prosecutor v. Taylor*, SCSL-03-01-T-388, *Public Defence Reply to* 'Prosecution Response to Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE', 14 January 2008 ("Reply");

(k) *Prosecutor v. Taylor*, SCSL-03-01-T-434, *Scheduling Order in Relation to the Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 6 March 2008 ("Scheduling Order");

(l) *Prosecutor v. Taylor*, SCSL-03-01-T-446, *Consequential Submission in Support of Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 31 March 2008 ("Consequential Motion");

(m) *Prosecutor v. Taylor*, SCSL-03-01-T-463, *Prosecution Response to the Defence's Consequential Submission regarding the Pleading of JCE*, 10 April 2008 ("Consequential Response");

(n) *Prosecutor v. Taylor*, SCSL-03-01-T-473, *Defence Reply to Prosecution Response to the Defence's Consequential Submission regarding the Pleading of JCE*, 15 April 2008 ("Consequential Reply");

(o) *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 19 February 2009, pages 24052 (line 26) through 24053 (line 3) ("Oral Decision");

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

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

(r) *Prosecutor v. Taylor*, SCSL-03-01-T-754, *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*);

(s) *Prosecutor v. Taylor*, SCSL-03-01-T-761, *Corrigendum: Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick*, 12 March 2009 (*Corrigendum*);

(t) *Prosecutor v. Taylor*, SCSL-03-01-T-762, "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'," 13 March 2009 (*Response to the Application*);

(u) *Prosecutor v. Taylor*, SCSL-03-01-T-764, *Decision on 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*, dated 18 March 2009, filed 19 March 2009 (*Decision Granting Leave*);

AFRC

Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, SCSL-04-16-T-628, *Judgement*, dated 20 June 2007, filed 21 June 2007 ("AFRC Trial Judgement"), refiled on 20 July 2007, pursuant to *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, SCSL-04-16-T-628, *Corrigendum to Judgement filed on 21 June 2007*, dated 19 July 2007, filed 20 July 2007.

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

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CDF

Prosecutor v. Fofana and Kondewa, Appeals Chamber, Judgment [Fofana Appeal Judgment], 28 May 2008.

ICTY

Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, 29 July 2004

Prosecutor v. Galić, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 30 November 2006.

Prosecutor v. Stakić, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 March 2006.

Prosecutor v. Kupreškić et al., IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001.

Prosecutor v. Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999.

Prosecutor v Furundzija, IT-95-17/1-A, Judgement, 21 July 2000.

Prosecutor v. Krnojelac, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000.

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Other Commentaries, Opinions and Articles

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

"Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes," by Cecily Rose, 5 November 2008 ("Troubled Indictments at the SCSL").

ANNEX A – INDEX OF DOCUMENTS BELIEVED NECESSARY FOR THE DECISION ON APPEAL, PURSUANT TO *PRACTICE DIRECTION FOR CERTAIN APPEALS BEFORE THE SPECIAL COURT*, 30 SEPTEMBER 2004, SECTION III, PARA. 16.

(a) *Prosecutor v. Taylor*, SCSL-03-01-I-001, *Indictment*, signed 3 March 2003, filed 7 March 2003 ("Initial Indictment");

(b) *Prosecutor v. Taylor*, SCSL-03-01-I-75, *Amended Indictment*, signed 16 March 2006, filed 17 March 2006 ("Amended Indictment"), with "Case Summary Accompanying the Amended Indictment," as Annex ("Case Summary");

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(d) *Prosecutor v. Taylor*, SCSL-03-01-PT-229, *Rule 73bis Taylor Defence Pre-Trial Brief*, 26 April 2007 ("Defence Pre-Trial Brief")[83];

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

(j) *Prosecutor v. Taylor*, SCSL-03-01-T-388, *Public Defence Reply to* 'Prosecution Response to Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE', 14 January 2008 ("Reply");

(k) *Prosecutor v. Taylor*, SCSL-03-01-T-434, *Scheduling Order in Relation to the Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 6 March 2008 ("Scheduling Order");

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(l) *Prosecutor v. Taylor*, SCSL-03-01-T-446, *Consequential Submission in Support of Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 31 March 2008 ("Consequential Motion");

(m) *Prosecutor v. Taylor*, SCSL-03-01-T-463, *Prosecution Response to the Defence's Consequential Submission regarding the Pleading of JCE*, 10 April 2008 ("Consequential Response");

(n) *Prosecutor v. Taylor*, SCSL-03-01-T-473, *Defence Reply to Prosecution Response to the Defence's Consequential Submission regarding the Pleading of JCE*, 15 April 2008 ("Consequential Reply");

(o) *Prosecutor v. Taylor*, SCSL-03-01-T, *Transcript of Proceedings*, 19 February 2009, pages 24052 (line 26) through 24053 (line 3) ("Oral Decision");

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

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

(r) *Prosecutor v. Taylor*, SCSL-03-01-T-754, *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*);

(s) *Prosecutor v. Taylor*, SCSL-03-01-T-761, *Corrigendum: Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick*, 12 March 2009 (*Corrigendum*);

(t) *Prosecutor v. Taylor*, SCSL-03-01-T-762, "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'," 13 March 2009 (*Response to the Application*);

(u) *Prosecutor v. Taylor*, SCSL-03-01-T-764, *Decision on 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*, dated 18 March 2009, filed 19 March 2009 (*Decision Granting Leave*);

ANNEX B – PARAGRAPHS 20, 23 THROUGH 25, OF THE INITIAL INDICTMENT; *PROSECUTOR V. TAYLOR*, SCSL-03-01-I-001, *INDICTMENT*, SIGNED 3 MARCH 2003, FILED 7 MARCH 2003.

20. To obtain access to the mineral wealth of the Republic of Sierra Leone, in particular the diamond wealth of Sierra Leone, and to destabilize the State, the **ACCUSED** provided financial support, military training, personnel, arms, ammunition and other support and encouragement to the RUF, led by FODAY SAYBANA SANKOH, in preparation for RUF armed action in the Republic of Sierra Leone, and during the subsequent armed conflict in Sierra Leone.

23. The RUF and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

24. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, 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.

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Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes

Cecily Rose*

Abstract: This article argues that the indictments at the Special Court for Sierra Leone have pleaded joint criminal enterprise and sex-based crimes in ways that threaten the rights of the accused to notice of the charges against them. While the *Taylor* Indictment neglects to outline the purpose of the joint criminal enterprise in which the accused allegedly took part, the Prosecution's recent arguments in this respect have further confused the matter. In addition, the *RUF* and *AFRC* Indictments alleged forced marriage without clearly indicating what crime such conduct would violate. Although the Appeals Chamber provided guidance on the issues of joint criminal enterprise and forced marriage in its recent *AFRC* Appeal Judgment, its pronouncements may be of limited use or applicability to the ongoing *RUF* and *Taylor* cases. Ultimately, the Prosecution's pleading practices have both harmed the rights of the accused and weakened its cases against them.

Introduction

The indictments at the Special Court for Sierra Leone have been controversial to such an extent that questions have inevitably arisen about the adequacy of the notice they have provided to the accused. The *AFRC*, *RUF* and *Taylor* Indictments, in particular, plead joint criminal enterprise (JCE) and sex-based crimes in an unusually confused and sparse manner that opens much room for debate on this seemingly simple issue of notice to the accused.[1] The basic question is whether these indictments, which are so lacking in clarity and specifics, actually inform the accused of the charges against them and allow the accused to prepare an adequate

* J.D., Columbia; B.A., Yale. Former Associate Legal Officer, Special Court for Sierra Leone. The views expressed in this article are solely those of the author and are not attributable to the Special Court.

[1] *Prosecutor v. Taylor*, SCSL-03-01-PT, Second Amended Indictment, 29 May 2007 [hereinafter Amended *Taylor* Indictment]; *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-PT, Further Amended Consolidated Indictment, 18 February 2005 [hereinafter *AFRC* Indictment]; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-PT, Corrected Amended Consolidated Indictment, 2 August 2006 [hereinafter *RUF* Indictment].

defense. This article argues that although the Prosecution's pleading of joint criminal enterprise and forced marriage technically may not have been defective, these indictments have nonetheless failed to provide the accused with sufficient notice of the nature of the charges against them. Furthermore, the Prosecution's pleading style has not only undermined the rights of the accused, but has also diminished the efficiency and the efficacy of the Special Court's prosecution of those who allegedly bear the greatest responsibility for the crimes committed during the armed conflict in Sierra Leone.

This article begins by providing background information on the conflict in Sierra Leone and the establishment of the Special Court (Part I) and by describing the circumstances surrounding the Chief Prosecutor's issuance of indictments before the Court (Part II). The following section examines the pleading of joint criminal enterprise in the *AFRC* and *Taylor* Indictments, particularly in light of the pleading practices at the *ad hoc* tribunals and the Appeals Chamber's recent ruling on this issue in the *AFRC* Appeal Judgment (Part III). Finally, this article analyzes the pleading of forced marriage and other sex-based crimes in the *AFRC* Indictment, as well as the Appeals Chamber's ruling in the *AFRC* Appeal Judgment that forced marriage may constitute the crime against humanity of 'other inhumane acts' (Part IV).

I. Background on the Conflict and the Establishment of the Special Court

The armed conflict in Sierra Leone began on 23 March 1991 when forces of the Revolutionary United Front (RUF) crossed from Liberia into Sierra Leone with the objective of overthrowing the government of President Joseph Momoh and the All People's Congress (APC).[2] Foday Sankoh led these RUF forces into Sierra Leone with the backing of Charles

[2] *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. II, 2004, para. 1 [hereinafter *Report of the Sierra Leone Truth and Reconciliation Commission*]; Tom Periello and Marieka Weirda,

Taylor who was then the leader of the rebel group known as the National Patriotic Front of Liberia.[3] While the RUF may have reflected a "prevailing discontent and revolutionary fervor" in Sierra Leone at that time, the RUF soon lost its claim to be a people's movement, as it proceeded to wage a war of terror against the civilian population.[4]

Although multiparty elections were held in 1996, the election to power of Ahmad Tejan Kabbah and the Sierra Leone People's Party was marred by violence, and the peace process set in motion by the Abidjan Peace Accord in November 1996 collapsed shortly thereafter.[5] In May 1997 President Kabbah was overthrown in a violent *coup* and Johnny Paul Koroma was installed as the head of the Armed Forces Revolutionary Council (AFRC) that was comprised of officers and soldiers of the Sierra Leone Army.[6] Koroma began his rule by inviting the RUF to join his government in the capital city of Freetown.[7] While President Kabbah was in exile in neighboring Guinea, his Deputy Minister of Defence, Samuel Hinga Norman, mobilized opposition to the AFRC by the Civil Defence Forces (CDF) which were comprised of the Kamajors and other traditional hunters in Sierra Leone.[8]

In January 1999 AFRC-led forces descended upon Freetown, resulting in large-scale loss of life, amputations, and destruction of property, before they were turned back by Nigerian

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International Center for Transitional Justice, *The Special Court for Sierra Leone Under Scrutiny*, March 2006, p. 5 [hereinafter *The Special Court for Sierra Leone Under Scrutiny*]. For further historical information concerning the armed conflict in Sierra Leone *see* David Keen, CONFLICT AND COLLUSION IN SIERRA LEONE, 2005.

[3] *Report of the Sierra Leone Truth and Reconciliation Commission*, para. 24.

[4] *Id.* at paras 115-118. The APC Government's mishandling of the conflict was a direct cause of the relatively bloodless *coup* of 1992 by which Captain Valentine Strasser and the National Provisional Ruling Council (NPRC) came into power. *Id.* at para. 209. Another bloodless *coup* replaced Strasser with Julius Maada Bio, who was very influential in effecting a transition from NPRC military rule to democratic elections. *Id.* at para. 223.

[5] *Id.* at para. 26; *The Special Court for Sierra Leone Under Scrutiny*, p. 6.

[6] *Report of the Sierra Leone Truth and Reconciliation Commission*, para. 27; *The Special Court for Sierra Leone Under Scrutiny*, p. 6.

[7] *The Special Court for Sierra Leone Under Scrutiny*, p. 6.

[8] *Report of the Sierra Leone Truth and Reconciliation Commission*, para. 27.

ECOMOG troops (Economic Community of West African States Monitoring Group) who also committed atrocities.[9] The July 1999 Lomé Peace Agreement provided a military resolution of the conflict, an amnesty for fighters from all factions, and a power-sharing arrangement between President Kabbah and the RUF.[10] Neither side, however, complied in full with the terms of the Peace Agreement, and in May 2000 the RUF took approximately 500 UN peacekeepers hostage.[11] Finally, by January 2002, after UNAMSIL had processed over 45,000 combatants, the war officially came to an end following eleven years of conflict throughout Sierra Leone.[12]

Following the hostage-taking incident and the resumption of violence in 2000, President Kabbah requested that the UN Security Council establish a special tribunal for the prosecution of members of the RUF and its allies.[13] In 2002 the United Nations and the government of Sierra Leone accordingly reached an agreement establishing the Special Court which would be composed of both national and international judges who would apply international as well as Sierra Leonean law.[14] This agreement provided the Special Court with the competence "to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[15] The Court began operating in mid-2002, and by March 2003, the Prosecutor had begun to issue the indictments that form the subject of this article.

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[9] *Id.* at para. 27, 231; *The Special Court for Sierra Leone Under Scrutiny*, p. 6.

[10] *Report of the Sierra Leone Truth and Reconciliation Commission*, para. 28; *The Special Court for Sierra Leone Under Scrutiny*, p. 7.

[11] *The Special Court for Sierra Leone Under Scrutiny*, p. 7.

[12] *Id.*

[13] *Report of the Sierra Leone Truth and Reconciliation Commission*, para. 68.

[14] Statute of the Special Court for Sierra Leone, Preamble. The Agreement was pursuant to Security Council Resolution 1315 (2000).

[15] Statute of the Special Court, art. 1(1).

II. The Circumstances Surrounding David Crane's Indictments

The indictments at the Special Court for Sierra Leone reflect the budgetary and time constraints faced by the Prosecution, the restricted nature of the Court's mandate, Chief Prosecutor David Crane's particular view of the conflict in Sierra Leone, and the Court's unusual requirements for the judicial confirmation of indictments. Altogether, these circumstances contributed to various flaws in the Special Court's indictments by allowing or encouraging the issuance of exceptionally broad, imprecise indictments that sought to pin responsibility for the crimes committed during the conflict on a relatively small number of individuals.

A. Budgetary and Time Constraints Faced by the Prosecution

The unique budgetary and time pressures faced by the Court as a whole must have weighed especially heavily on the Prosecution when it was preparing its indictments. As a result of growing criticism of the cost and slowness of the ICTY and the ICTR (International Criminal Tribunal for the former Yugoslavia and Rwanda, respectively), the Special Court was designed by the United Nations to have a smaller budget and a narrower scope.[16] The Special Court consequently receives its funding through voluntary contributions from UN member states, rather than from the regular budget of the United Nations.[17] The resulting uncertainty of the Court's financial situation, which has been a prevailing concern for the Court from its earliest days, certainly heightened the pressure on David Crane to produce results quickly.[18] In addition, at the time of the Court's creation, the international community not only expected that the

[16] *The Special Court for Sierra Leone Under Scrutiny*, p. 12.

[17] Article 6, Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002.

[18] *Report of the Special Court for Sierra Leone Submitted by the Independent Expert Antonio Cassese*, 12 March 2006, paras 39-43 [hereinafter *Cassese Independent Expert Report*].

Special Court would cost substantially less than the *ad hoc* tribunals, but also spoke of the possibility that it might finish its work within an unprecedented three years.[19]

In accordance with the expectations of the Court at the time of its creation, the Prosecutor issued remarkably swift indictments. The Prosecutor arrived in Freetown in August 2002, and by March 2003, eight indictments were presented to a judge for confirmation, with four more indictments following in June 2003.[20] The Prosecutor's efficient and speedy issuance of these indictments, however, was not without its pitfalls. The degree to which the investigations were planned before David Crane even came to Sierra Leone may have given rise to a somewhat inflexible list of indictees from the outset of the Prosecution's investigations.[21] The Prosecutor's speed may also have resulted in the indictments' unusual breadth and lack of specificity, as well as the need for continued investigations to gather additional evidence after their issuance.[22] The broadness of these indictments may, in turn, have resulted in slower trials by allowing for the admission of a wide range of evidence by the Trial Chamber.[23] Finally, the speed with which the Prosecution investigated and drafted its indictments may have contributed to a number of other unusual problems and flaws in the indictments that have caused considerable complications at the trial and appeal stages, as will be discussed below.

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[19] International Center for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months*, March 2004, p. 2 [hereinafter *The Special Court for Sierra Leone: The First Eighteen Months*].

[20] *Id.* at p. 4.

[21] *The Special Court for Sierra Leone Under Scrutiny*, p. 27.

[22] *The Special Court for Sierra Leone: The First Eighteen Months*, p. 4.

[23] *Cassese Independent Expert Report*, p. 19.

B. The Special Court's Narrow Mandate

After a highly complex conflict that spanned eleven years and involved multiple armed factions, the Chief Prosecutor indicted only thirteen individuals.[24] The limited number of indictments was, of course, due to the restricted mandate of the Court, which has the power to prosecute "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996."[25] The Special Court's narrow mandate represents another manifestation of the Security Council's concerns about the enormous time and expense required by the ICTY and ICTR.[26] In contrast to these *ad hoc* tribunals, which have a much broader power to "prosecute persons responsible for serious violations of international humanitarian law,"[27] the mandate of the Special Court required it "to focus on those who played a leadership role."[28]

Consequently, David Crane only indicted those whom he considered to be the most senior leaders of the RUF, AFRC and CDF, in addition to Charles Taylor, the former President of Liberia.[29] The limited number of indictments has been problematic in good part because of the unknown status of Johnny Paul Koroma, the Chairman of the AFRC, and the deaths of three

[24] On 7 March 2003 the Prosecutor indicted Charles Taylor, Foday Sankoh, Johnny Paul Koroma, Sam Bockarie, Issa Hassan Sesay, Alex Brima, Morris Kallon and Sam Hinga Norman. The Prosecutor later indicated Augustine Gbao (16 April 2003), Brima Bazzy Kamara (26 May 2003), Moinina Fofana and Allieu Kondewa (24 June 2003) and Santigie Borbor Kanu (15 September 2003). *See* http://www.sc-sl.org/index.html.

[25] Art. 1(1), Statute of the Special Court for Sierra Lone.

[26] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, para. 1.

[27] Art. 1, Statutes of the International Criminal Tribunal for the former Yugoslavia and Rwanda [hereinafter ICTY and ICTR, respectively].

[28] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S2000/1234, para. 1.

[29] The Prosecution's apparent understanding of the hierarchies of the RUF, AFRC and CDF differs from the Truth and Reconciliation Commission's findings on this issue, which consist of considerably more lengthy and complex lists of the leadership of these factions. *See Report of the Sierra Leone Truth and Reconciliation Commission*, pp. 48-49, 63-65, 80-83.

of the other most high-ranking accused: Foday Sankoh, the leader of the RUF; Sam Bockarie, the commander of the RUF during Sankoh's imprisonment from March 1997 to April 1999; and Sam Hinga Norman, the National Coordinator of the CDF.[30] Although the absence of these particularly high-profile accused reflects bad luck as opposed to poor Prosecutorial decision-making, the *RUF*, *AFRC* and *CDF* trials nonetheless lost some of their meaning without these very critical figures.

The uncontrollable absence of these four accused, however, was further exacerbated by the Prosecutor's apparent decision to issue indictments based strictly on his interpretation of the formal hierarchies of the RUF, AFRC and CDF. In all of these cases the Prosecution appears to have encountered difficulties gathering sufficient evidence against the accused who were second, third, fourth or fifth in command. In the *CDF* case, for instance, while ample evidence may have supported the charges against Norman, the existing evidence against Moinina Fofana (the CDF's National Director of War) and Allieu Kondewa (the CDF's High Priest and Chief Initiator) very much lacked the same depth and particularity.[31] The Prosecution may have actually been able to present stronger evidence against the commanders who operated immediately under Fofana and Kondewa, such as Albert Nallo, the Deputy National Director of Operations and the Director of Operations for the Southern Region.[32] Although the Court's mandate may be interpreted to require the Prosecution to issue indictments based solely on the supposed hierarchies of these factions, the Prosecution weakened its cases by failing to prosecute other relatively high level

[30] *See* The Special Court for Sierra Leone, Other Cases, http://www.sc-sl.org/cases-other.html; *Prosecutor v. Fofana and Kallon*, SCSL-04-14-T, Special Court for Sierra Leone, Trial Chamber, Judgment, 2 August 2007, paras 4-8 [hereinafter *CDF* Trial Judgment].

[31] *CDF* Trial Judgment, paras 337-347.

[32] *See id.* at paras 278-280, 334-336, 340, 348, 350, 352. Despite Nallo's culpability, the Prosecution's decision not to indict him was most likely influenced by the fact that he came to serve as "the single most important witness in the Prosecution evidence on the alleged superior responsibility of the Accused, particularly Fofana." *Id.* at 279.

commanders who arguably also bore the greatest responsibility for the crimes committed during the conflict in Sierra Leone.[33]

C. David Crane's Prosecutorial Strategy: Dancing with the Devil

In speech after speech during the early years of the Court, David Crane described his prosecutorial strategy as "dancing with the devil."[34] He spoke about holding these 'devils,' who took the form of "some of the worst war criminals in history," responsible for "the murder, rape, maiming and mutilation of over five hundred thousand human beings" and the displacement of over a million more throughout the region.[35] David Crane wove a similar theme throughout his opening statements by repeatedly emphasizing the juxtaposition of good and evil: the "towering summit of justice," "the light of truth," and "the bright and shiny spectre of the law," as opposed to "the beast of impunity," the "jackals of death," and "destruction and inhumanity."[36] The Chief Prosecutor also boldly declared that "there can be no impunity even for the death of one person."[37]

Given the complexity of the conflict in Sierra Leone, as well as the questionable efficacy of international criminal justice, David Crane's view of the conflict and the role of the Special

[33] According to the ICTJ, "[a[lthough formal figures were never given, it was clear from the outset that the general expectation of the international community, including the UN, was that the Special Court would not go beyond 20 to 30 individual indictments." *The Special Court for Sierra Leone: The First Eighteen Months*, p. 4. Given this expectation, the Prosecutor certainly could have chosen to indict more than 13 individuals.

[34] David M. Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts*, 37 Case W. Res. J. of Int'l L. 1 (2005).

[35] *Id.* at 1-2.

[36] Transcript, CDF Opening Statement, 3 June 2004, p. 6; *see also* Transcript, RUF Opening Statement, 5 July 2004, pp.19-31.

[37] Transcript, CDF Opening Statement, 3 June 2004, p. 12.

Court lacked much-needed nuance.[38] His speeches and opening statements failed to acknowledge that although the indictees were at the top of their respective hierarchies, they do not necessarily represent the apex of evil, and they may not bear absolute responsibility, or even the most responsibility, for the atrocities committed during the conflict. By emphasizing the absolutely evil nature of these indicted leaders, David Crane excluded the possibility that other high-level commanders may have born an equivalent level of responsibility for the crimes committed, and perhaps should have been indicted as well. His quest to end impunity "even for the death of one person" also ignored the problems involved in pinning responsibility for all of the atrocities committed during the entire conflict on such a small number of prominent individuals. The indictments bear the imprint of his view of the Special Court's role because they attempt to hold the thirteen accused responsible for all of the different types of crimes that were committed by their respective factions in each part of Sierra Leone in which they were active during the conflict. His vision led to indictments with great breadth but little depth.

D. The Special Court's Standard for Judicial Confirmation of Indictments

The sparseness of the Special Court's indictments has roots in the notably minimal expectations placed upon the Prosecution. Although the same set of basic principles governs the pleading of indictments before the Special Court and the *ad hoc* tribunals, the requirements for judicial confirmation of indictments differ at the Special Court. At all of these tribunals the accused are entitled to some minimum guarantees, including the right to be informed promptly

[38] According to the International Center for Transitional Justice "his military background and rhetorical style, most apparent during his opening statements . . . alienated some." *The Special Court for Sierra Leone Under Scrutiny*, p. 21.

and in detail of the nature and cause of the charges against them.[39] The *ad hoc* tribunals further require that the indictment must provide "the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."[40] The Rules of the Special Court require essentially the same, but also provide that the indictment must be accompanied by a case summary "briefly setting out the allegations he proposed to prove in making his case."[41]

The distinction between the confirmation processes at the Special Court and the *ad hoc* tribunals stems from the role of the case summary at the Special Court. At the ICTY, if the reviewing judge is "satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment."[42] At the Special Court, however, the designated Judge must be satisfied that the indictment "charges the suspect with a crime or crimes within the jurisdiction of the Special Court," and that "the allegations in the Prosecution's case summary would, if proven, amount to the crime or crimes as particularized in the indictment."[43] Effectively case summaries, rather than indictments, must make a *prima facie* case at the Special Court.[44] Consequently, the Rules of the Special Court did not require the Prosecutor to plead all of his allegations within the

[39] Art. 17(4), Statute of the Special Court for Sierra Leone; Art. 21(4)(a), Statute of the ICTY; Art. 20(4)(a), Statute of the ICTR.

[40] Rule 47(C), Rules of Procedure and Evidence of the ICTY and the ICTR.

[41] Rule 47(C), Rules of Procedure and Evidence of the Special Court. The case summaries at the Special Court essentially set forth the allegations that the Prosecution's evidence will prove. *See, e.g., Prosecutor v. Taylor*, SCSL-03-01-T, Case Summary Accompanying the Second Amended Indictment, 3 August 2007 [hereinafter *Taylor* Amended Case Summary].

[42] Art. 19, Statute of the ICTY.

[43] Rule 47(E), Rules of Procedure and Evidence of the Special Court.

[44] *But see The Special Court for Sierra Leone: The First Eighteen Months*, p. 4; *The Special Court for Sierra Leone Under Scrutiny*, p. 22 (stating that "[t]here is a reduced level of judicial review over this process because unlike in indictments before the ICTY and the ICTR, there is no requirement for a case to be meet the *prima facie* standard at the confirmation stage."). By contrast, this article argues that there is a requirement that a case meets a *prima facie* standard at the confirmation stage, but this requirement is applied to the case summary instead of the indictment itself.

four corners of his indictments, thereby allowing for very sparse indictments, though they theoretically represent the primary charging instrument at the Special Court.[45]

III. The Pleading of Joint Criminal Enterprise

On its face, the Amended *Taylor* Indictment never specifies the common plan of the joint criminal enterprise in which Taylor allegedly took part.[46] This omission is striking given the importance of this form of liability to the Prosecution's case against Taylor, as well as the recent controversy surrounding the pleading of the common purpose in the *AFRC* Indictment.[47] In light of the relevant jurisprudence and pleading practices of the ICTY, as well as the recent AFRC Appeal Judgment, this section examines whether the *Taylor* Indictment represents an acceptable variation on the norm, or an impermissible departure from standard pleading practices.

A. Joint Criminal Enterprise at the ICTY

Although the establishment of joint criminal enterprise liability in the 1999 *Tadic* Appeal Judgment has provoked substantial scholarly controversy,[48] the *mens rea* and *actus reus*

[45] According to the ICTJ, the indictments "employ an innovation known as 'notice pleading,' a brief form of pleading that has been upheld and may set a new practice for international criminal proceedings." *The Special Court for Sierra Leone: The First Eighteen Months*, p. 5. *See also Prosecutor v. Kupreskic*, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001, para. 114 (noting that "generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspects of the Prosecution case.").

[46] Amended *Taylor* Indictment, para. 33.

[47] As in the trials of many high profile alleged war criminals, joint criminal enterprise comprises an important form of liability in the *Taylor* case because the Prosecution does not seek to prove that Taylor personally committed any of the alleged atrocities. Also, as will be discussed in detail below, the Trial Chamber in the AFRC case held, at the final judgment stage, that the Indictment defectively pleaded joint criminal enterprise. The Appeals Chamber, however, overturned this decision, but refrained from entering convictions under this form of liability.

[48] *Prosecutor v. Tadic*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999, paras. 185-229 [*Tadic* Appeal Judgment]. *See* Antonio Cassese, *The Proper Limits of Individual Criminal Responsibility Under the Doctrine of Joint Criminal Enterprise*, 5 J. of Int'l Crim. Justice 109 (2007); Jens David Ohlin, *Guilty by Association: Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. of Int'l Crim. Justice 69 (2007).

elements of JCE liability, as set forth in this Judgment, have formed a highly stable part of the jurisprudence of the *ad hoc* tribunals.[49] According to *Tadic*, the *actus reus* element, which is relevant for our purposes, requires, in part, the "existence of a common plan, design or purpose which *amounts to or involves* the commission of a crime provided for in the Statute . . . ."[50] The jurisprudence of the ICTY has also consistently required that indictments pleading joint criminal enterprise set forth certain material facts, including the nature or purpose of the joint criminal enterprise.[51] Despite the still growing body of international criminal jurisprudence that has faithfully applied these pleading requirements, ICTY case law has not expanded upon how an indictment may plead that a common plan, design or purpose amounts to or involves the commission of a crime provided for in the Statute.

Case law on the meaning of the phrase "amount to or involve" does not exist because ICTY indictments have largely pleaded common purposes that *amount to* crimes within the Statute of the Tribunal. Because of the structure of most ICTY indictments, the Tribunal's Chambers have never had cause to address how a common purpose may involve but not amount

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[49] *Tadic* Appeal Judgement, paras 227-228; *see also Prosecutor v. Krnojelac*, IT-97-25-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 17 September 2003, para. 31; *Prosecutor v. Vasiljevic*, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 25 February 2004, para. 100; *Prosecutor v. Kvocka*, IT-98-30-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 February 2004, para. 96.

[50] *Tadic* Appeal Judgment, para. 227 (emphasis added). According to *Tadic*, the *actus reus* element, which is the same for the basic, systemic, and extended forms of joint criminal enterprise, also requires a "plurality of persons" and the [p]articipation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute . . . ." As set forth in *Tadic*, however, each category of JCE requires a different *mens rea*. The first category (basic) requires "the intent to perpetrate a certain crime." *Id.* at para. 228. The second category (systemic) requires "personal knowledge of the system of ill-treatment... as well as the intent to further this common concerted system of ill-treatment." *Id.* The third category (extended) requires "the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group." *Id.*

[51] *Prosecutor v. Krnojelac*, IT-97-25, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16; *Prosecutor v. Hadžihasanović*, IT-01-47, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Form of Indictment, 7 December 2001, para. 10; *Prosecutor v. Brđanin and Talic*, IT-99-36/1, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 February 2001, para. 48.

to a crime within the Statute. ICTY Indictments generally plead joint criminal enterprises which consist of two levels: in the first level the common purpose clearly falls within the scope of the Statute, while in the second level, the fulfillment of this common purpose involves the commission of crimes in violation of the Statute. Many ICTY indictments, for example, have charged leaders with participating in joint criminal enterprises aimed at the permanent forcible removal of Bosnian Muslims and Bosnian Croats from the territory of the planned Serbian State, through the commission of the crimes alleged in the indictment.[52]

Not all ICTY Indictments, however, conform to this general pattern of pleading. The *Haradinaj* Indictment, for example, alleges a joint criminal enterprise with two levels, but only the second level alleges crimes within the Statute. In its first level, the Indictment alleges that the common purpose of the JCE was to consolidate the total control of the Kosovo Liberation Army over the Dukagjin Operational Zone.[53] While such consolidation does not amount to a crime within the Statute, the Indictment's second level further alleges that the accused persons accomplished such consolidation "by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians . . . ."[54] The Indictment thereby alleges that the accused pursued consolidation over Dukagjin by committing crimes against humanity and violations of the laws or customs of war, including murder,

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[52] *Prosecutor v. Brdanin*, IT-99-36, Sixth Amended Indictment, 9 December 2003, para. 27.1 ("The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 through 12."). *See also Prosecutor v. Milosevic*, IT-02-54, Amended Indictment (Bosnia), para. 6 ("The purpose of this joint criminal enterprise was the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina... through the commission of crimes which are in violation of Articles 2, 3, 4 and 5 of the Statute of the Tribunal."); *Prosecutor v. Limaj*, IT-03-66-PT, Second Amended Indictment, para. 7 (The purpose of the joint criminal enterprise "was to target Serb civilians and perceived Albanian collaborators for intimidation, imprisonment, violence, and murder in violation of Articles 3 and 5 of the Statute of the Tribunal.").

[53] *Prosecutor v. Haradinaj*, IT-04-84-T, Forth Amended Indictment, 16 October 2007, para. 26.

[54] *Id.*

persecution, inhumane acts, cruel treatment, unlawful detention, and torture.[55] The Defence in the *Haradinaj* case did not challenge the form in which the common purpose of the joint criminal enterprise was pleaded and the Trial Chamber's *Form of the Indictment Decision* accordingly did not pronounce on this issue, although it did find that the Indictment was not defectively pleaded with respect to JCE.[56]

Finally, ICTY Indictments have also pleaded joint criminal enterprises that consist of three rather than two levels. The *Martic* Indictment, for example, first alleges an overarching objective (a new Serb-dominated state) that does not amount to a crime within the scope of the Statute.[57] The second level, however, alleges a common purpose of forcible transfer that amounts to a crime (namely, "the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one third of the territory of the Republic of Croatia . . . and large parts of the Republic of Bosnia and Herzegovina.").[58] Finally, the third level alleges the fulfillment of the common purpose through the commission of crimes in violation of Articles 3 and 5 of the Statute.[59]

B. Joint Criminal Enterprise at the Special Court

1. JCE in the *AFRC* Indictment

In light of the pleading practices at the ICTY, the *AFRC* Indictment pleaded joint criminal enterprise in a manner that was not totally unprecedented, though it may have been

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[55] *Id.*

[56] *Prosecutor v. Haradinaj*, IT-04-84, International Criminal Tribunal for the former Yugoslaiva, Trial Chamber, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, 25 October 2006, para. 25.

[57] *Prosecutor v. Martic*, IT-05-11-PT, Amended Indictment, 9 December 2005, para. 4.

[58] *Id.*

[59] *Id.*

unusually convoluted. Compared with ICTY Indictments that generally plead JCE in a single paragraph, the AFRC Indictment did so in three paragraphs:

> 33. The AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, and the RUF, including ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTIN 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.
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> 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.
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> 35. ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, by their acts or omissions, are individually criminal 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 Indictment,... which crimes were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.[60]

The Prosecution's decision to plead joint criminal enterprise in three separate paragraphs was significant because it may have contributed to the Trial Chamber's reading of paragraph 33 in isolation from paragraph 34. While the former paragraph alleges a common purpose that does not amount to a crime within the Statute, the latter paragraph clearly alleges that the common purpose involved the commission of many such crimes.

In a June 2007 Judgment, Trial Chamber II dismissed joint criminal enterprise liability in a disjointed manner which suggested that it wished to avoid considering this relatively complicated form of liability.[61] In essence the Trial Chamber held that the Prosecution had defectively pleaded joint criminal enterprise in the Indictment because the common purpose of the JCE—"to take any actions necessary to gain and exercise political power and control over the

[60] *AFRC* Indictment, paras. 33-35. Paragraphs 36-38 of the *RUF* Indictment plead joint criminal enterprise in nearly identical language.

[61] *Prosecutor v. Brima, Kamara and Kanu*, SCSL- SCSL-04-16-T, Special Court for Sierra Leone, Trial Chamber, Judgment, 20 June 2007, paras 56-85 [hereinafter *AFRC* Trial Judgment].

territory of Sierra Leone"—was not an inherently criminal activity.[62] The Trial Chamber also found that while paragraphs 33 and 34 of the Indictment should be read as a whole, these two paragraphs did not clarify the criminal purpose upon which the parties agreed at the inception of the enterprise.[63] The Trial Chamber also dismissed the possibility that a new common purpose had emerged which involved international crimes.[64]

Ultimately, however, the Trial Chamber did not prevail in its determination that joint criminal enterprise was defectively pleaded in the *AFRC* Indictment. In its March 2008 Judgment, the Appeals Chamber overturned the Trial Chamber's ruling that joint criminal enterprise was defectively pleaded. In so doing, the Appeals Chamber's holdings on this issue notably departed from ICTY case law on joint criminal enterprise. The Appeals Chamber found that "the requirement that the common plan, design or purpose of a joint criminal enterprise 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 objective."[65] The Appeals Chamber held that "the common purpose of the joint criminal enterprise was not defectively pleaded because even though "the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute."[66] The Appeals Chamber also found that the Trial Chamber erred in reading paragraph 33 in isolation.[67]

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[62] *Id.* at paras 66-70.

[63] *Id.* at paras 71-76.

[64] *Id.* at para. 79.

[65] *Prosecutor v. Brima, Kamara and Kanu*, SCSL- SCSL-04-16-A, Special Court for Sierra Leone, Appeals Chamber, Judgment, 22 February 2008, para. 80 [hereinafter *AFRC* Appeal Judgment].

[66] *Id.* at para. 84.

[67] *Id.*

The Appeals Chamber's ruling on joint criminal enterprise is concerning because of its holdings as well as its omissions. First, in abandoning the *Tadic* language, whereby the common purpose must 'amount to or involve a crime within the Statute,' the Appeals Chamber conflated the *mens rea* and *actus reus* requirements for joint criminal enterprise.[68] The Appeals Chamber's finding that a common purpose may "*contemplate* crimes within the Statute as the means of achieving its objective," indicates that in order to meet the required *actus reus*, the accused must hold a particular mental state. Thus, in defining the requirement that the common purpose must be inherently criminal, the Appeals Chamber used language that describes a mental state, even though the common purpose requirement comprises the second element of the *actus reus*.[69] While the case law of international criminal tribunals too often repeats legal standards verbatim without adding any nuance or context, the Appeals Chamber's departure from well-established case law on the *actus reus* requirement for joint criminal enterprise could have benefited from further reasoning.

In addition to the Appeals Chamber's conflation of the *mens rea* and *actus reus* elements, the standard it sets forth is problematic because the word 'contemplate' is overbroad. This word potentially encompasses far more than the relatively precise language generally used to describe a required mental state, such as "direct intent" or "awareness of a substantial likelihood."[70] Thus, the Appeals Chamber also neglected to articulate why it chose to adopt new language, and how it is interpreting the word 'contemplate' in this context.

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[68] *See supra* at note 50.

[69] The *actus reus* element of JCE requires: "i. A plurality of persons... ii. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute... iii. Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute..." (emphasis removed). *Tadic* Appeal Judgement, para 227.

[70] The *mens rea* of planning, for example, "requires that the accused acted with *direct intent* in relation to his or her own planning or with the *awareness of the substantial likelihood* that a crime would be committed a in the execution of that plan" (emphasis added). *AFRC* Trial Judgment, para. 766.

Finally, the Appeals Chamber abandoned the *Tadic* language despite its reliance on a provision of the Rome Statute of the International Criminal Court (ICC) that draws upon the language of the *Tadic* Appeal Judgment.[71] Although the Rome Statute does not explicitly use the phrase "joint criminal enterprise," it effectively provides for such liability when a person contributes to the commission of a crime by a group of persons acting with a common purpose which *involves* the commission of a crime within the jurisdiction of the Court.[72] While the Rome Statute abandons the use of the phrase 'amounts to,' it still incorporates the *Tadic* language by requiring that a criminal purpose *involve* the commission of a crime within the jurisdiction of the Court.[73] According to the Appeals Chamber, this "formulation reflects the consensus reached by all of the States negotiating the Statute of the ICC at the Rome Conference, and therefore is a valuable indication of the views of States and the international community generally on the question of what constitutes a common purpose."[74] Given this pronouncement, the Appeals Chamber's departure from the *Tadic* language is at odds with its simultaneous acknowledgment of the importance of this language in the Rome Statute.

2. JCE in the *Taylor* Indictment

Although the *AFRC* Appeal Judgment will provide critical guidance to the *RUF* Trial Chamber, which will be dealing with an identical pleading of joint criminal enterprise, it will not

[71] Article 25(3)(d) of the Rome Statute provides that: "... a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person... contributes to the commission or attempted commission of such 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 the group to commit the crime" (emphasis added).

[72] Art. 25(3), Rome Statute.

[73] *AFRC* Appeal Judgment, para. 79; Art. 25(3), Rome Statute.

[74] *AFRC* Appeal Judgment, para. 79.

necessarily have a direct impact on the *Taylor* case. The pleading of joint criminal enterprise in the amended *Taylor* Indictment differs substantially from the construction of JCE in the *AFRC* and *RUF* Indictments. Whereas the *AFRC* Indictment raised questions about whether the common purpose amounted to or involved crimes within the Statute, the *Taylor* Indictment, at first glance, fails to plead a common purpose at all. In light of the Prosecution's obligation to provide the accused with notice of the nature and purpose of the alleged joint criminal enterprise, the following traces the relevant alterations of the *Taylor* Indictment as well as the Prosecution's changing interpretations of its meaning.

In the original *Taylor* Indictment, issued on 7 March 2003, the Prosecution alleged a joint criminal enterprise in language that almost mirrored that of the *AFRC* and *RUF* Indictments.[75] According to this original Indictment, the AFRC and the RUF shared a common plan 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.[76] In addition, the original Indictment contained one further paragraph alleging that Taylor participated in the JCE "as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of

[75] *Prosecutor v. Taylor*, SCSL-03-01, Indictment, 7 March 2003, paras. 23-24 [hereinafter *Taylor* Indictment].

> 23. The RUF and the AFRC shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.
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> 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.

[76] *Taylor* Indictment, para. 23.

Sierra Leone."[77] The Prosecution's pre-trial brief, submitted on 4 April 2007, clarified that Charles Taylor and the other participants pursued their common plan through criminal means that involved waging a campaign of terror against the civilian population of Sierra Leone.[78]

On 29 May 2007, however, the Prosecution substantially amended and shortened the Indictment such that it now charges joint criminal enterprise in a single paragraph:

> 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 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.[79]

This paragraph was also in the original Indictment, but the Prosecution eliminated the other two paragraphs that expressly alleged a joint criminal enterprise. Despite the amended Indictment's radically different pleading of joint criminal enterprise, during opening arguments on 4 June 2007, the Prosecution continued to allege the same common plan set forth in its original Indictment. The Prosecution argued that Taylor participated in a common plan to achieve and hold political power and physical control over the civilian population of Sierra Leone through criminal means involving a campaign of terror against the civilian population of Sierra Leone.[80]

Meanwhile, the Prosecution further confused the matter by alleging a different common purpose in its 3 August 2007 Amended Case Summary, which accompanied its amended Indictment of May 2007. This time the Prosecution attempted to tailor its arguments to the contours of its amended Indictment by arguing that Taylor participated in a common plan to "carry out a campaign of terror . . . in order to pillage the resources of Sierra Leone, in particular

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[77] *Id.* at para. 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.").

[78] *Prosecutor v. Taylor*, SCSL-03-01-PT, 73*bis* Pre-Trial Brief, 4 April 2007, para. 7.

[79] Amended *Taylor* Indictment, para. 33.

[80] Transcript, Opening Arguments, 4 June 2007, p. 32.

the diamonds, and to forcibly control the population and territory of Sierra Leone."[81] The Prosecution's case summary effectively alleges a joint criminal enterprise that involves three levels. First, the overarching objective of the joint criminal enterprise was to "to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone." The second level involved a criminal purpose—"a campaign of terror"—that was carried out through the third level, involving the crimes alleged in each count of the Indictment.[82]

Unfortunately the Prosecution's explanation of the common purpose of the joint criminal enterprise finds little support in the amended Indictment itself. While the Indictment clearly alleges terrorization of the civilian population, its function as the common purpose of a joint criminal enterprise is far from clear. Count 1 of this Indictment, under the heading "Terrorizing the Civilian Population," alleges that:

> 5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters)... acting in concert with... the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charges in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.[83]

Counts 2 through 11 then charge that members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, acting in concert with the ACCUSED, unlawfully killed an unknown number of civilians, committed widespread acts of sexual violence against civilian women and girls, committed widespread acts of physical violence against civilians, routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities, engaged

[81] *Taylor* Amended Case Summary, para. 42.

[82] The Indictment charges terrorizing the civilian population (Count 1), unlawful killings (Counts 2-3), sexual violence (Counts 4-6), physical violence (Counts 7-8), the conscription or enlistment of child soldiers (Count 9), abductions and forced labour (Count 10), and looting (Count 11).

[83] Amended *Taylor* Indictment, paras 5, 33.

in widespread and large scale abductions of civilians and use of civilians as forced labour, and engaged in widespread unlawful taking of civilian property.

Thus, the charge of 'terrorizing the civilian population' under Count 1 requires the Prosecution to prove the burning of civilian property as well as the various crimes charged under Counts 2 through 11. While 'terrorizing the civilian population' thus functions as an overarching goal which encompasses all of the crimes charged within the Indictment, the Prosecution does not clearly allege that 'terrorizing the civilian population' was the common purpose of a joint criminal enterprise. In fact, nothing in the Indictment explicitly links Count 1, alleging terrorization of the civilian population, to paragraph 33, at the end of the Indictment, which implicitly alleges a joint criminal enterprise. Paragraph 33 further muddies the waters by omitting the terms "joint criminal enterprise" and "common plan, design or purpose."

The lack of clarity with which the Prosecution has pleaded joint criminal enterprise in the *Taylor* Indictment has unsurprisingly given rise to a degree of controversy in Trial Chamber II. A *Taylor* motion currently pending before the Trial Chamber essentially argues that the Prosecution has failed to provide Taylor with sufficient notice of the case he has to meet because it has advanced more than one common plan during the critical early phases of the case.[84] In its response to this *Taylor* Motion, the Prosecution actually exacerbated these inconsistencies by reverting to the common purpose set forth in its original Indictment. By arguing that the common 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

[84] *Prosecutor v. Taylor*, SCSL-03-01-T, Consequential Motion in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, 31 March 2008.

areas," the Prosecution response inexplicably departed from its Amended Case Summary, which provides that the common purpose was to wage a campaign of terror.[85]

The Prosecution's oscillation from one common purpose to the other not only sends a confused message to the accused, but also ignores the actual form of the Indictment, which may support yet another interpretation of the common purpose. While the *Taylor* Indictment does not allege an overarching common purpose of terrorization or of taking "any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas," another interpretation of the Indictment remains open to the Prosecution. According to some jurisprudence, the absence of the term "joint criminal enterprise" as well as an explicit common purpose may not necessarily be problematic.[86] The common purpose alleged in paragraph 33 of the Indictment appears to be simply the violation of Articles 2, 3 and 4 of the Statute (namely, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law).

While the *Taylor* Indictment differs from almost all other Indictments at the ICTY and the ICTR because it does not appear to allege an overarching common purpose, this manner of pleading is not totally unprecedented. The *Simba* Indictment at the ICTR similarly alleged a joint criminal enterprise with an object that was simply the violation of Articles 2 and 3 of the ICTR Statute. The object of the joint criminal enterprise therefore encompassed the four counts of the *Simba* Indictment which charged genocide, complicity in genocide, and extermination and

[85] *Prosecutor v. Taylor*, SCSL-03-01-T, Prosecution's Response to the Defence's Consequential Submission Regarding the Pleading of JCE, 10 April 2008, para. 20.

[86] *Prosecutor v. Gacumbitsi*, ICTR-01-64-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 7 July 2006, para. 165 (holding that the absence of the words "joint criminal enterprise" may not indicate a defect in the indictment because other phrasings may 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.").

murder as crimes against humanity.[87] Notably, there was no specific objection to the pleading of JCE in *Simba*. In addition, the ICTR Trial Chamber in effect inferred an overarching common purpose by finding that "the only reasonable inference from the evidence is that a common criminal purpose existed to kill Tutsi" at three different locations.[88]

Ultimately, by oscillating from one common purpose to another, and by failing to anchor its arguments in text of the Indictment, the Prosecution has not only provided the accused with inconsistent and confused information, but it also may have substantially weakened its case against Taylor.

IV. The Pleading of Sex-Based Crimes

A. The Inclusion of Sex-Based Crimes in the Court's Statute

Widespread sexual violence, especially forced marriage, formed a very salient part of the conflict in Sierra Leone.[89] AFRC and RUF forces perpetrated forced marriages by systematically abducting women and girls and compelling them to engage in regular sexual intercourse, to perform forced domestic labor, to undergo forced pregnancies, and to rear children.[90] Rebel 'husbands' in turn provided food, clothing and protection for their wives from rape by other men.[91] Although the perpetration of forced marriage is not unique to the conflict in Sierra Leone (similar patterns of force marriage also took place during the genocide in Rwanda and the conflict in northern Uganda), such conduct was prosecuted for the first time at the

[87] *Prosecutor v. Simba*, ICTR-01-76-T, Amended Indictment, 6 May 2004, pp. 2-3, 11-12.

[88] *Prosecutor v. Simba*, ICTR-01-76-T, International Criminal Tribunal for Rwanda, Trial Chamber, Judgment, 13 December 2005, para. 402.

[89] For information on sexual violence and the perpetration of forced marriage during the conflict in Sierra Leone, *see generally* Human Rights Watch, *"We'll Kill You if You Cry": Sexual Violence in the Sierra Leone Conflict*, January 2003.

[90] *AFRC* Appeal Judgment, para. 190.

[91] *Id.*

Special Court.[92] Because of the novelty of this issue in international criminal law, the Prosecutor of the Special Court was presented with the unusual challenge of determining how forced marriage should be charged in its Indictments.[93]

Although 'forced marriage' itself goes without mention in the Statute of the Special Court, the Prosecutor was imbued with a substantially greater capacity to prosecute sex-based crimes in comparison to the ICTY and the ICTR.[94] Whereas the Statutes of the *ad hoc* tribunals allow them to prosecute the crime against humanity of rape, the Statute of the Special Court includes the crimes against humanity of rape, as well as sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.[95] The Statute also emphasizes that the Court's personnel should have the capacity to carry out the Court's mandate with respect to sex-based crimes. In particular, the Prosecution must give due consideration to the appointment of staff experienced in gender related crimes and juvenile justice, "given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds."[96]

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[92] *See* Monika Satya Kalra, *Forced Marriage: Rwanda's Secret Revealed*, 7 UC Davis J. Int'l L & Pol'y 197 (2001); Kristopher Carlson and Dyan Mazurana, *Forced Marriage within the Lord's Resistance Army, Uganda*, Feinstein International Center, May 2008.

[93] The ICTJ reports that gender advocates actually criticized the amendment of the AFRC and RUF indictments in January 2004 to include forced marriage on the grounds that it contributes to stigmatizing victims when forced marriage could be "adequately subsumed by existing legal concepts such as enslavement and rape." *The Special Court for Sierra Leone Under Scrutiny*, p. 27.

[94] The Special Court's Statute reflects the expanded list of sex-based crimes in the ICC's Rome Statute. Art. 7(g) enumerates "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."

[95] Art. 2(g), Statute of the ICTY; Art. 3(g), Statute of the ICTR; Art. 2(g), Statute of the Special Court Statute. Article 2(g) of the Special Court's Statute provides that the Special Court shall have the power to prosecute persons who committed rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as part of a widespread or systematic attack against any civilian population.

[96] Art. 15(5), Statute of the Special Court.

B. The Prosecution of Forced Marriage in the *AFRC* Case

In reality, the prosecution of sex-based crimes at the Special Court has fallen short of what the drafters of its Statute envisioned because of both the Prosecution's pleading practices and the Trial Chambers' approaches to such crimes. In the *AFRC* case, the Prosecution alleged forced marriage in a confused manner that later contributed to the Trial Chamber's avoidance of the new and complicated legal issues raised by such allegations. By contrast, the *CDF* Indictment failed to charge any sexual crimes at all, and the Trial Chamber subsequently thwarted the Prosecution's attempts to amend the Indictment to include sex-based crimes, and to introduce evidence of a sexual nature.[97]

In the *AFRC* case, the Prosecution charged five distinct sex-based crimes: rape, sexual slavery, 'any other form of sexual violence,' the crime against humanity of 'other inhumane acts,' and the war crime of 'outrages upon personal dignity.'[98] Although the Prosecution charged these five crimes in four separate counts (sexual slavery and 'any other form of sexual violence' were defectively charged in the same count),[99] a single set of factual allegations supports these five distinct sex-based crimes.[100] While indictments at the ICTY commonly use the same set of factual allegations to support two or more similar but separate counts, such as the crimes of torture and cruel treatment, the indictments at the Special Court took this practice to a new

[97] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone, Appeals Chamber, Judgment, 28 May 2008, pp. 133-148. For a detailed procedural history of this issue, *see id.* at paras 411-414.

[98] *AFRC* Indictment, Counts 6-9, respectively charging rape, sexual slavery and 'any other form of sexual violence,' 'other inhumane acts' and 'outrages upon personal dignity.' *See also* Counts 6-9 of the *RUF* Indictment, which are identical to Counts 6-9 of the *AFRC* Indictment.

[99] In the *AFRC* Appeal Judgment, the Appeals Chamber found that the Trial Chamber defectively pleaded sexual slavery and 'any other form of sexual violence' in the same count of the Indictment.

[100] Paragraphs 52-57 of the *AFRC* Indictment alleged the commission of sexual violence against civilian women and girls in Kono District, Koinadugu District, Bombali District, Kailahun District, Freetown and the Western Area, and Port Loko District.

level.[101] In the *AFRC* Indictment, the Prosecution supported four separate counts with identical allegations that in six different areas throughout Sierra Leone, "[a]n unknown number of women and girls were abducted from various locations within the District and used as sex slaves and/or forced into 'marriage' and/or subjected to other forms of sexual violence."[102] In addition the "'wives' were forced to perform a number of conjugal duties under coercion by their 'husbands.'"[103]

This pleading practice is not only unusual, but also highly problematic. In particular, the Indictment failed to specify whether forced marriage fell under the count charging sexual slavery and 'any other form of sexual violence' or whether it fell under the counts charging 'other inhumane acts' or 'outrages upon personal dignity.' In addition, the Indictment did not specify whether forced marriage, or some other conduct, constituted 'other forms of sexual violence.' The crimes of 'any other form of sexual violence,' 'other inhumane acts' and 'outrages upon personal dignity' are all residual offences, meaning that they function as 'catch all' categories which encompass conduct that does not fall within the enumerated crimes against humanity and war crimes in the Statute.[104] These offences therefore beg for some sort of clarification as to what conduct falls under their ambit.

The Indictment's lack of specificity on the issue of forced marriage raises questions about whether the Indictment actually provided the accused with sufficient notice of the nature of the

[101] *See, e.g.*, *Prosecutor v. Kvocka*, IT-98-30/1, Amended Indictment, 21 August 2000 (alleging torture and cruel treatment in Counts 8-10 and 11-13); *Prosecutor v. Hadzihasanovic*, IT-01-47-PT, Third Amended Indictment, 26 September 2003 (alleging murder and cruel treatment in Counts 1-2, 3-4); *Prosecutor v. Vasiljevic*, IT-98-32-PT, Amended Indictment, 12 July 2001(alleging murder and inhumane acts in Counts 4-7, 10-13, and 14-17).

[102] *AFRC* Indictment, paras 52-57; *see also RUF* Indictment, paras 55-60.

[103] *Id.*

[104] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 17 December 2004, para. 117 ('other inhumane acts' as a crime against humanity was "deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.").

charges against them. Without a specific understanding of how the Prosecution was intending to charge the conduct of forced marriage, were the accused in an adequate position to be able to prepare themselves to answer these allegations? Moreover, the Indictment provided the accused with only the barest skeleton of material allegations. It alleged merely that women and girls were forced into marriages in various districts and towns throughout Sierra Leone over the course of many months.[105] The Indictment also provided no information about specific incidents of forced marriage. The fact that the *RUF* Indictment includes identical allegations further suggests that the Prosecution fell short of its obligation to provide the accused with sufficiently specific material allegations.[106]

By failing to clarify which factual allegations supported which counts, the Prosecution may have been hedging its bets. Due to the lack of jurisprudence on sexual slavery and forced marriage, and the novelty of these issues at international criminal courts, the Prosecution may have be unsure as to whether the Trial Chamber would consider forced marriage under sexual slavery, 'any other form of sexual violence,' 'other inhumane acts' or 'outrages upon personal dignity.' By never specifying which charge encompassed the allegations of forced marriage, the Prosecution was essentially keeping the options open. Unfortunately, the Prosecution's approach to this issue backfired. Had the Prosecution addressed this issue in its pre-trials briefs or its opening statement at the *AFRC* trial, or even during the trial itself, perhaps this lack of clarity would not have become as problematic as it did.

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[105] The Indictment alleged that "[w]idespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists, and forced 'marriages.'" *AFRC* Indictment, para. 51. The Indictment also alleged that in Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area, and Port Loko District "members of the AFRC/RUF raped hundreds of women and girls at various locations" and that "[a]n unknown number of women and girls were abducted from various locations within [these Districts] and used as sex slaves and/or forced into 'marriages' and/or subjected to other forms of sexual violence. The 'wives' were forced to perform a number of conjugal duties under coercion by their 'husbands.'" *Id.* at 51-57.

[106] *RUF* Indictment, paras 55-60.

C. Rulings on Forced Marriage by the Trial and Appeals Chambers

The Prosecution's unusual pleading style, coupled with its failure to clarify what factual allegations supported which counts, permitted the Trial Chamber to dodge the issue of forced marriage. The Trial Chamber found that the evidence of forced marriage was completely subsumed by the crime of sexual slavery, and that no lacuna in the law necessitated a separate crime of forced marriage as an 'other inhumane act.'[107] Notably, the Trial Chamber held that logic required it to interpret the offence of 'other inhumane acts' as applying only to acts of a non-sexual nature because the Statute already contained an exhaustive category of sexual crimes.[108] In addition, the Trial Chamber found that the evidence did not point to "even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery."[109] Moreover, had there been such evidence, it would not have amounted to an 'other inhumane act' because it would not have been of a similar gravity to the other enumerated crimes against humanity, as is required for conduct which qualifies as an 'other inhumane act.' Finally, although the Trial Chamber found that forced marriage was subsumed by the crime of sexual slavery, it ultimately considered evidence of sexual slavery under 'outrages upon personal dignity' due to its dismissal of the count charging sexual slavery because it was defectively pleaded.[110]

The Trial Chamber's holdings undoubtedly caught the Prosecution by surprise, especially in light of its earlier decision, at the motions for acquittal stage, that evidence of forced marriages

[107] *AFRC* Trial Judgment, para. 713.

[108] *Id.* at para. 697.

[109] *Id.* at para. 710.

[110] *Id.* at para. 713.

fell within the offence of 'other inhumane acts.'[111] Although the Prosecution successfully persuaded the Appeals Chamber to overturn the Trial Chamber's findings on forced marriage, the Appeal Judgment's treatment of the issue of forced marriage may be of little jurisprudential value. The Appeals Chamber made three noteworthy findings. First, the Appeals Chamber held that the exhaustive listing of sexual crimes in Article 2(g) of the Statute does not foreclose the possibility of charging 'other inhumane acts' that have a sexual or gender-based component under Article 2(i).[112] Second, the Appeals Chamber found that forced marriage is not subsumed by the crime of sexual slavery.[113] Although forced marriage, like sexual slavery, involves non-consensual sex and a deprivation of liberty, it also has distinguishing features such as a "forced conjugal association" that, unlike sexual slavery, involves exclusivity between 'husband' and 'wife.'[114] Finally, the Appeals Chamber found that instances of forced marriage during the conflict in Sierra Leone were of a similar gravity to the other crimes against humanity enumerated in the Statute of the Court.[115]

Despite these three findings, the Appeals Chamber's ruling on forced marriage does not contribute as much as it could to the development of international criminal law on this issue because the Appeals Chamber failed to define 'forced marriage.' While we now know that forced marriage may qualify as an 'other inhumane act,' we still lack a definition of exactly what sort of conduct constitutes forced marriage. This omission is in stark contrast to the ICTY's approach to 'other inhumane acts,' in so far as ICTY Trial Chambers clearly define the conduct,

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[111] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Special Court for Sierra Leone, Trial Chamber, Decisions on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, para. 165; *AFRC* Trial Judgment, para. 704.

[112] *AFRC* Appeal Judgment, para. 186.

[113] *Id.* at para. 195.

[114] *Id.* at para. 195.

[115] *Id.* at para. 200.

such as forcible transfer, which constitutes an 'other inhumane act.'[116] The Appeals Chamber's failure to define forced marriage as an 'other inhumane act' may compromise the ability of the RUF accused to understand the nature of the charges against them. Because of this omission, the Appeals Chamber also provides little guidance to the Trial Chamber in the *RUF* case, as well as to other international criminal tribunals, such as the International Criminal Court, which may face similar issues concerning forced marriage in the future. While the Appeals Chamber provides detailed descriptions of conduct constituting forced marriage in the context of the Sierra Leone armed conflict, these descriptions may be of little use to other tribunals that could face the issue of forced marriage in very different contexts.[117]

Furthermore, the Appeals Chamber's failure to enter convictions for forced marriage as an 'other inhumane act' also diminishes the significance of its ruling on this issue. The Appeals Chamber acknowledged its awareness that entering convictions for forced marriage as an 'other inhumane act' would reflect the full culpability of the accused for crimes against humanity as well as the war crime of 'outrages upon personal dignity.'[118] In addition, the Appeals Chamber would have been able to base its convictions on the evidence of sexual slavery and forced marriage which the Trial Chamber relied upon in entering convictions for 'outrages upon personal dignity.'[119] Nevertheless, the Appeals Chamber did not enter cumulative convictions for 'other inhumane acts' and 'outrages upon person dignity' because of its determination that society's disapproval of forced marriage would be adequately reflected by its ruling that it

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[116] *Prosecutor v. Brdjanin*, IT-99-36-A, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 3 April 2007, para. 544; *Prosecutor v. Blagojevic and Kokic*, IT-02-60-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Judgement, 17 January 2005, paras 595-602, 623-630.

[117] *AFRC* Appeal Judgment, paras 187-196.

[118] *Id.* at para. 202.

[119] *Id.*

constitutes the crime against humanity of 'other inhumane acts.'[120] Because the Appeals Chamber declined to enter convictions for forced marriage, the Judgment does not provide what might have been useful guidance on the application of the crime forced marriage as an 'other inhumane act.' Altogether, by failing to define forced marriage and to enter convictions accordingly, the Appeals Chamber missed an unusual opportunity to make a strong pronouncement on a very topical issue in international criminal law.

Despite these weaknesses in the Appeals Chamber's ruling on force marriage, the *AFRC* Appeal Judgment will at least provide Trial Chamber I with critical guidance on this issue in the *RUF* case. Given the similarity of the *AFRC* and *RUF* Indictments in this respect, evidence of forced marriages could very well form the basis for convictions under 'other inhumane acts' in the *RUF* case, although we have very little indication of how Trial Chamber I will be likely to deal with this issue because the *CDF* case did not encompass sexual crimes.

Conclusion

Because of the massive scale of the crimes prosecuted by tribunals such as the Special Court, the degree of specificity required in indictments is understandably not as high as that required by domestic courts which do not try large-scale atrocities committed throughout entire countries over the course of many years.[121] Nevertheless, the indictments at the Special Court still demanded for a degree of clarity and particularity which was absent from the Prosecution's pleading of joint criminal enterprise and forced marriage, two particularly salient aspects of the

[120] *Id.*

[121] *Prosecutor v. Kvoćka*, IT-98-30/1, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17.

Prosecution's case against the accused. The Special Court's narrow mandate, which permitted it to prosecute only those who bore the greatest responsibility, heightened the importance of carefully chosen indictees and well-crafted indictments. The Special Court's troubles in these regards may resonate in the future at the International Criminal Court, which also has restricted scope, as well as a similar capacity to prosecute sex-based crimes and joint criminal enterprises which involve but do not amount to crimes within the Court's Statute. The *AFRC* Appeal Judgment presented an unusual opportunity for the Appeals Chamber of the Special Court to provide guidance to the Trial Chambers of the Court, and to other tribunals, concerning acceptable pleading practices. Although the Appeals Chamber clarified that joint criminal enterprises may merely involve crimes, and that forced marriage may constitute an 'other inhumane act' as a crime against humanity, much room still exists for the development of the jurisprudence on these issues.

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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
Stiúrthóir

National University of Ireland, Galway,
Galway, Ireland.
Founded in 1845

Tel: +353 91 524411 ext: 3726
Direct: +353 91 493726
Fax: +353 91 494575
e-mail: william.schabas@nuigalway.ie

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

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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.