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

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SPECIAL COURT FOR SIERRA LEONE

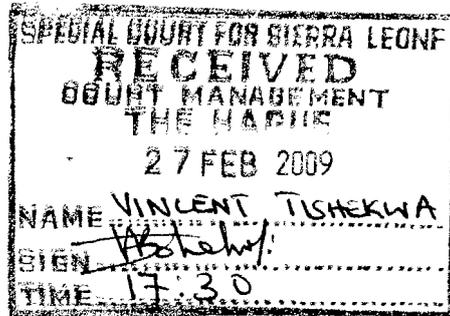
TRIAL CHAMBER II

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

Registrar: Herman von Hebel

Case No.: SCSL-03-1-T

Date: 27 February 2009



PROSECUTOR

v.

Charles Ghankay TAYLOR

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

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Office of the Prosecutor:

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Defence Counsel for Charles G. Taylor:

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

**TRIAL CHAMBER II** (“Trial Chamber”) of the Special Court for Sierra Leone (“Special Court”);

**SEISED** of the “Urgent Defence Motion Regarding a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE”, filed on 14 December 2007 (“Motion”);<sup>1</sup>

**NOTING** the “Prosecution Response to ‘Urgent Defence Motion Regard a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE’”, filed on 7 January 2008 (“Response”);<sup>2</sup>

**NOTING ALSO** the “Defence Reply to ‘Prosecution Response to Urgent Defence Motion Regarding a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE’”, filed on 14 January 2008 (“Reply”);<sup>3</sup>

**RECALLING** the Chamber’s “Scheduling Order in Relation to the Urgent Defence Motion Regarding a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE”, filed on 6 March 2008 (“Scheduling Order”);<sup>4</sup>

**NOTING** the “Consequential Submission in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE”, filed on 31 March 2008 (“Consequential Motion”);<sup>5</sup>

**NOTING ALSO** the “Prosecution Response to the Defence’s Consequential Submissions Regarding the Pleading of JCE”, filed on 10 April 2008 (“Consequential Response”);<sup>6</sup> and the “Defence Reply to the Prosecution Response to the Defence’s Consequential Submission Regarding the Pleading of JCE”, filed on 15 April 2008 (“Consequential Reply”);<sup>7</sup>

**RECALLING** the Indictment, dated 7 March 2003 (“Initial Indictment”)<sup>8</sup>, the Amended Indictment, dated 16 March 2006 (“Amended Indictment”),<sup>9</sup> the Second Amended Indictment, dated 29 May 2007 (“Second Amended Indictment”);<sup>10</sup> the Case Summary appended to the Amended Indictment, dated 16 March 2006 (“Case Summary”),<sup>11</sup> the Amended Case Summary, dated 3 August 2007 (“Amended Case Summary”);<sup>12</sup> the

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<sup>1</sup> SCSL-03-01-T-378.

<sup>2</sup> SCSL-03-01-T-380.

<sup>3</sup> SCSL-03-01-T-388.

<sup>4</sup> SCSL-03-01-T-434.

<sup>5</sup> SCSL-03-01-T-446.

<sup>6</sup> SCSL-03-01-T-463.

<sup>7</sup> SCSL-03-01-T-473.

<sup>8</sup> SCSL-03-01-PT-001.

<sup>9</sup> SCSL-03-01-PT-75.

<sup>10</sup> SCSL-03-01-PT-263.

<sup>11</sup> SCSL-03-01-PT-75.

<sup>12</sup> SCSL-03-01-PT-327.

Prosecution Pre-Trial Brief, dated 26 April 2007 (“Prosecution Pre-Trial Brief”)<sup>13</sup> and the Defence Pre-Trial Brief, dated 26 April 2008 (“Defence Pre-Trial Brief”);<sup>14</sup>

**RECALLING** the Trial Chamber’s oral Decision of 19 February 2009 wherein the Chamber dismissed the Motion and stated that a properly reasoned decision would follow:<sup>15</sup>

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

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

## I. INTRODUCTION

### A. Procedural History

1. The Initial Indictment against the Accused, accompanied by supporting material, was approved on 7 March 2003 and made public on 12 June of the same year.<sup>16</sup> On 16 March 2006, the Prosecutor filed an Amended Indictment and Case Summary. On 25 May 2007, the Trial Chamber granted the Prosecution leave to further amend the Amended Indictment<sup>17</sup> and the Prosecution filed a Second Amended Indictment on 29 May 2007.

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

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<sup>13</sup> SCSL-03-01-PT-218.

<sup>14</sup> SCSL-03-01-PT-229.

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

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

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

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

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

3. Soon thereafter on the 20 June 2007, the Trial Chamber, in its Judgement in the case of the *Prosecutor v. Brima, Kamara and Kanu* (“AFRC Trial Judgement”)<sup>20</sup>, held that the Indictment in that case with respect to Joint Criminal Enterprise (“JCE”) as a mode of criminal responsibility, had been defectively pleaded since the “common purpose” alleged was not a criminal purpose recognized by the Statute and that the “common purpose” did not constitute a crime under the Special Court’s jurisdiction. The Trial Chamber held that arguing the basic and extended forms of JCE in the alternative impeded the ability of the Accused to understand the material facts of the JCE, and that crimes charged within the common purpose could not also be a reasonably foreseeable consequence of that purpose<sup>21</sup> Finally, the Trial Chamber held that the Prosecution is required to know its case before the start of trial; that if the purpose of the JCE changed over time, all new and different purposes must also be pleaded in the Indictment; and that the Prosecution is not permitted to mould its case as the trial progresses.<sup>22</sup>

4. On 3 August 2007, the Prosecution, in consistency with the Trial Chamber’s findings on JCE in the AFRC Judgement and “out of an abundance of caution”, filed an Amended Case Summary with respect to the present case, amending paragraphs 42-44 of the Case Summary notwithstanding that it disagreed with those findings and would appeal the Judgement.<sup>23</sup> The Prosecution filed an appeal against the AFRC Trial Judgment on 13 September 2007.<sup>24</sup>

5. Although Mr. Karim Khan the former Defence Counsel of the Accused had notified the Trial Chamber that the Defence would not file any preliminary motions pursuant to Rule 72 of the Rules, the new Defence team filed this Motion regarding the defective pleading of the JCE on 14 December 2007, pending the resolution of the Appeal. The AFRC Appeal Judgement was delivered on 22 February 2008.<sup>25</sup>

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

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

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

<sup>20</sup> *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-628, Judgement, 20 June 2007, para. 67 (“AFRC Trial Judgement”).

<sup>21</sup> AFRC Trial Judgement, para. 71.

<sup>22</sup> AFRC Trial Judgement, para. 80.

<sup>23</sup> Amended Case Summary, para. 6.

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

<sup>25</sup> *Prosecutor v. Brima, Kamara and Kanu* SCSL-04-16-A-675, Judgement, 22 February 2008 (“AFRC Appeal Judgement”).

two forms, as pleaded, logically exclude each other. Pleading the basic and extended forms of JCE in the alternative is now a well-established practice in the international criminal tribunals. The Trial Chamber erred in finding that the Indictment failed to specify the period covered by the JCE. That period is that covered by all of the alleged crimes, which in this case is between 25 May 1997 and January 2000.<sup>26</sup>

7. After the publication of the AFRC Appeal Judgement, the Trial Chamber invited both parties to file Consequential pleadings, taking into consideration the Appeals Chamber's findings<sup>27</sup>. Consequential Submissions were filed by the Parties on the 31 March 2008<sup>28</sup>, 10 April 2008<sup>29</sup> and 15 April 2008<sup>30</sup>, respectively.

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

8. In its Initial Indictment, the Prosecution alleged JCE in very similar terms to the Indictment in the AFRC Trial<sup>31</sup>. The Initial Indictment alleged as follows:

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

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

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

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

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

<sup>26</sup> AFRC Appeal Judgement, paras. 84-85.

<sup>27</sup> Scheduling Order, SCSL03-01-T-434.

<sup>28</sup> Consequential Motion.

<sup>29</sup> Consequential Response.

<sup>30</sup> Consequential Reply.

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

<sup>32</sup> Initial Indictment, paras 23-25.

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]<sup>33</sup>

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

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

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

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

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

12. The Prosecution has made further submissions regarding the alleged JCE and its "common purpose" in its Case Summary,<sup>36</sup> Pre-Trial Brief,<sup>37</sup> Opening Statement,<sup>38</sup> and Amended Case Summary,<sup>39</sup> In its Prosecution Notification of Filing of Amended Case Summary<sup>40</sup> which was filed subsequent to the Second Amended Indictment and the AFRC Trial Judgement, the Prosecution submitted that although it had provided prior notice concerning "the common plan, design or purpose in the Indictment", never-the-less in order to be "consistent with the AFRC Trial Judgement and out of an abundance of caution, the Prosecution has amended paragraphs 42, 43 and 44 of the Case Summary which accompanies the Indictment, in order to further articulate the common plan, design or purpose which has been alleged in this case."<sup>41</sup> The relevant paragraphs of the Amended Case Summary state as follows:

**Participation in a common plan, design or purpose**

42. Between about 1988 and about 18 January 2002, the Accused and others agreed upon and participated in a common plan, design or purpose to carry out a criminal campaign of terror, as

<sup>33</sup> Amended Indictment, para. 33.

<sup>34</sup> Amended Indictment paras. 9, 14, 18 22, 23, 28.

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

<sup>36</sup> Case Summary, paras 42-44.

<sup>37</sup> Prosecution Pre-Trial Brief, paras 6-8

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

<sup>39</sup> Amended Case Summary, paras 42-43.

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

<sup>41</sup> *Ibid.* paras 4-6.

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

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

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

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

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

## II. SUBMISSIONS

### A. Defence Motion

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

1. Submissions on the Admissibility of the Motion

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

2. Submissions on the Merits of the Motion

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

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

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

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<sup>42</sup> Motion, para. 5.

<sup>43</sup> Motion, para. 6.

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

<sup>45</sup> Motion, para. 21.

<sup>46</sup> Motion, para. 22.

<sup>47</sup> Motion, para. 22.

<sup>48</sup> Motion, Annex I.

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

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

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

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

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<sup>49</sup> Motion, para. 23.

<sup>50</sup> Motion, paras 24-27.

<sup>51</sup> Motion, para. 28.

<sup>52</sup> Motion, para. 25.

<sup>53</sup> Motion, para. 26.

<sup>54</sup> Motion, para. 30.

<sup>55</sup> Motion, para. 25.

<sup>56</sup> Motion, para. 31.

<sup>57</sup> Motion, para. 32.

<sup>58</sup> Motion, para. 32.

## B. Defence Consequential Motion

20. The Defence reiterates its core positions that the Accused has not been placed on sufficient notice of the case he is to meet and that the Trial Chamber should issue a decision ordering the severance of JCE as a mode of criminal liability from the Second Amended Indictment.<sup>59</sup> The Defence submits that the notice provided by the Prosecution to the Accused of the nature and cause of the charges against him has been legally insufficient due to the constantly changing “common purposes” of the alleged JCE pleaded by the Prosecution in this case. It adds that “the Accused is not to enter into the minds of the Prosecution and [...] divine exactly what the ‘common purpose’ is that the alleged means pertain to”.<sup>60</sup>

21. The Defence submits that the “common purposes” pleaded in the Prosecution’s Pre-Trial Brief, Opening Statement, and Amended Case Summary, are tantamount to “gaining or maintaining of political power or control over the territory of Sierra Leone [...] in order to exploit the natural resources of the country.”<sup>61</sup> However, according to the Defence, the Prosecution now maintains that the “common purpose” is to “inflict a campaign of terror on the citizens of Sierra Leone.”<sup>62</sup> The Defence submits that the AFRC Appeal Judgement has advanced the underlying claim of the Accused that he has not received adequate notice of the pleading of the JCE in this case because the Prosecution has repeatedly modified different theories of the “common purpose”, pointing to the various iterations of the “common purpose” in the Case Summary, Pre-Trial Brief, Opening Statement, Second Amended Indictment, Amended Case Summary and more general disclosure.<sup>63</sup>

22. Pointing to findings of the AFRC Appeal Judgement that “the determination of whether the Prosecution properly pleaded a crime must be determined on the basis of whether the Prosecution pleaded all the material facts in the Indictment, not whether it adduced evidence [at trial] to support the allegations”, the Defence argues that the Prosecution is required to know its case from the start.<sup>64</sup> On the contrary, the Prosecution has adopted a “fluid and constantly evolving ‘common purpose’” which is inconsistent with the spirit of the AFRC Appeal Judgement which contemplated a consistently pleaded “common purpose”.<sup>65</sup>

23. The Defence concedes that the “basic” and “extended” forms of JCE may be pleaded disjunctively and this, alone, may not serve to invalidate the notice given to an Accused regarding the case to be met.<sup>66</sup>

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<sup>59</sup> Consequential Motion, Conclusion.

<sup>60</sup> Consequential Motion, para. 26.

<sup>61</sup> Consequential Motion, para. 11.

<sup>62</sup> Consequential Motion, para. 19.

<sup>63</sup> Consequential Motion, para. 18.

<sup>64</sup> Consequential Motion, para. 14.

<sup>65</sup> Consequential Motion, para. 20.

<sup>66</sup> Consequential Motion, para. 15.

### C. Prosecution Response

24. The Prosecution opposes the Motion and requests the Trial Chamber to dismiss it.<sup>67</sup>

#### 1. Submission on the Admissibility of the Motion

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

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

#### 2. Submissions on the Merits of the Motion

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

28. The Prosecution argues that the details of the alleged JCE were sufficiently articulated in the Amended Case Summary<sup>74</sup> as a "common plan, design or purpose to inflict a campaign of terror on the citizens of Sierra Leone."<sup>75</sup> The Prosecution further argues that "acts of terrorism", which constitute a violation of Common Article 3 of the Geneva Conventions, is a crime punishable under Article 3(d) of the Statute.<sup>76</sup>

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<sup>67</sup> Response, para. 7.

<sup>68</sup> Response, para. 5.

<sup>69</sup> Response, para. 6, citing AFRC Trial Judgement, paras 24, 25.

<sup>70</sup> Response, para. 6.

<sup>71</sup> Response, para. 7.

<sup>72</sup> Response, paras 7, 13.

<sup>73</sup> Response, para.9.

<sup>74</sup> Amended Case Summary, Annex.

<sup>75</sup> Response, para. 10.

<sup>76</sup> Response para. 10.

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29. The Prosecution rejects the Defence's argument that those who enter into an agreement or understanding to commit international crimes such as acts of terrorism have not formed a JCE so long as their ultimate 'purpose' is not in and of itself criminal.<sup>77</sup> The Prosecution argues that "agreements that have criminal ends and those that plan or employ criminal means," are the same, stating that "[t]he harm or danger from such criminal agreements or understandings is equal whether the crime is considered the ultimate objective or the means agreed upon to achieve that objective."<sup>78</sup>

30. The Prosecution submits that even if the ultimate "objective" or "end" of the plan is not criminal, a JCE exists if there is a common state of mind that a crime within the jurisdiction of the Court be committed, be it an agreed criminal plan, purpose or design.<sup>79</sup>

31. In addition, the Prosecution argues that it alleged not only a common intent to employ criminal means, but also that part of the ultimate objective of the joint criminal enterprise was criminal. The Amended Case Summary states that "the campaign of terror in the JCE was used in part 'to pillage the resources of Sierra Leone, in particular the diamonds.'"<sup>80</sup> The Prosecution submits that "pillage" is a crime under Article 3(f) of the Statute and well defined in international law is not used by the Prosecution as a synonym for "cultivating" as the Defence has argued.<sup>81</sup>

32. The Prosecution submits that it has pleaded two different categories of JCE, the "basic" and the "extended" categories, in the alternative<sup>82</sup> and argues that it is well established in international criminal jurisprudence that it may plead different, mutually-exclusive modes of responsibility in the alternative.<sup>83</sup>

#### D. Consequential Prosecution Response

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

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<sup>77</sup> Response, para. 11.

<sup>78</sup> Response, paras. 11-14.

<sup>79</sup> Response, para. 15.

<sup>80</sup> Response, para. 16.

<sup>81</sup> Response, para. 16.

<sup>82</sup> Response, paras 17-19.

<sup>83</sup> Response, para. 17.

<sup>84</sup> Consequential Response, para. 26.

<sup>85</sup> Consequential Response, paras 2, 3.

<sup>86</sup> Consequential Response, paras 20, 23.

<sup>87</sup> Consequential Response, para. 23.

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

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

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

#### **E. Defence Reply**

##### 1. Submission on Admissibility of Motion

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

##### 2. Submissions on Merits of Motion

37. With respect to the Prosecution’s argument that adequate notice was given to the Defence, the Defence does not dispute that the Prosecution has attempted to advance a JCE theory of liability through a variety of submissions and materials but submits the dispute lies in the legal sufficiency and propriety of the articulated mode of JCE liability, in the specific context of the criminality (rather, the lack thereof) of the alleged “common purpose”.<sup>94</sup> The Defence argues that the crux of the matter is the failure of the Prosecution to plead a crime within the jurisdiction of the Court as the “common purpose” of the JCE.<sup>95</sup> It concludes that the Prosecution has not provided adequate

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<sup>88</sup> Consequential Response, para. 24.

<sup>89</sup> Consequential Response, paras 20, 23.

<sup>90</sup> Consequential Response, para. 21.

<sup>91</sup> Consequential Response, para. 22.

<sup>92</sup> Consequential Response, para. 23.

<sup>93</sup> Reply, para. 4.

<sup>94</sup> Reply, para. 7.

<sup>95</sup> Reply, para. 12.

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

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

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

#### F. Consequential Defence Reply

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

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

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

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<sup>96</sup> Reply, para. 14.

<sup>97</sup> Reply, para. 16.

<sup>98</sup> Reply, para. 16.

<sup>99</sup> Reply, para. 18.

<sup>100</sup> Reply, para. 18.

<sup>101</sup> Consequential Response, paras 10, 13.

<sup>102</sup> Consequential Reply, para. 11.

<sup>103</sup> Consequential Reply, para. 12.

<sup>104</sup> *Ibid.*

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amendments to the Indictment and in other processes outlined in Prosecution Response, paragraphs 4 through 9.<sup>105</sup> The Defence reiterates that the Prosecution's position on the "common purpose" has shifted from "to take and maintain political and physical control over Sierra Leone in order to exploit its natural resources" to "to inflict a campaign of terror on the citizens of Sierra Leone."<sup>106</sup> The Defence acknowledges that the Prosecution is permitted to amend the indictment for clarity's sake, but stresses that the Prosecution may not "mould its case as it goes along."<sup>107</sup>

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

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

### III. APPLICABLE LAW

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

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

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<sup>105</sup> Consequential Reply, para. 14.

<sup>106</sup> Consequential Reply, para. 14.

<sup>107</sup> Consequential Reply, para. 15.

<sup>108</sup> Consequential Reply, para. 17, paraphrasing AFRC Appeal Judgement, para. 80.

<sup>109</sup> Consequential Reply, para. 19.

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

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

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

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

46. Rule 26bis relating to “Chambers” provides:

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

47. Rule 47 relating to “Review of Indictments” provides

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

B. [...]

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

D. [...]

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

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

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

48. Rule 50 relating to “Amendment of Indictment” provides:

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

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

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

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

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

49. Rule 72 relating to “Preliminary Motions” provides:

- A. Preliminary motions by either party shall be brought within 21 days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i).
- B. Preliminary motions by the accused are:
  - (i) Objections based on lack of jurisdiction;
  - (ii) Objections based on defects in the form of the indictment;
- C. [...]

#### IV. DELIBERATIONS

##### A. Preliminary issue: Admissibility of the Defence Motion:

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

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

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

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

<sup>111</sup> AFRC Appeal Judgement, para. 43.

<sup>112</sup> AFRC Appeal Judgement, para. 43.

<sup>113</sup> See for example Rule 72 of the ICTY and ICTR Rules.




53. The initial Defence team was withdrawn on 4 June 2007 and a new team was not in place until early August 2007. The initial Defence team informed the Trial Chamber that it would be filing no preliminary motions<sup>114</sup> but stated in its Defence Pre-Trial Brief that a “notable feature of the Amended Indictment was the deliberate decision to drop the allegation, present in the original indictment, that Mr. Taylor was part of a Joint Criminal Enterprise”.<sup>115</sup>

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

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

56. In addition, the Trial Chamber recalls that an Appeals Chamber may reverse a conviction as a result of a defective indictment<sup>117</sup> and that it is therefore important that any formal defects of an indictment be addressed as early as possible, and if possible before a final trial judgement. We note that the Prosecution, while observing that the Motion was not filed in a timely manner, nevertheless does not oppose a review on the basis of the Trial Chamber’s reasoning in the AFRC judgement.<sup>118</sup> We are of the opinion that it is in the interests of justice to address the issue raised at this stage of the proceedings. The Trial Chamber will therefore entertain the Motion, notwithstanding that it was filed out of time.

#### **B. Pleading Requirements of an Indictment**

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

<sup>114</sup> SCSL-03-01-PT-105.

<sup>115</sup> Defence Pre-Trial Brief, para. 45.

<sup>116</sup> See for example, *Prosecutor v. Taylor*, SCSL-03-01-PT-148, Defence Motion on Adequate Time for the Preparation of Mr. Taylor’s Defence, 15 December 2006, in particular para. 17 in which the Defence stated that the initial Prosecution disclosure consisted of 34,000 pages of material and that it had recently received an additional 154 statements and transcripts and a large amount of other information. See also for example, *Prosecutor v. Taylor*, SCSL-03-01-PT-323, Defence Motion for Adjournment to allow the Defence adequate time and facilities to prepare and other ancillary matters, 31 July 2007, in particular para. 13 in which the Defence notes that in addition to that earlier disclosure it had six motions pending including one with close to 2000 pages of evidential material.

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

<sup>118</sup> Response para. 5.

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

58. The Trial Chamber recalls that an indictment is the primary accusatory instrument<sup>121</sup> and that any other accusatory instruments cannot add charges or material facts that were not pleaded in the indictment.<sup>122</sup> Any assessment of supporting material provided by the Prosecution by the Trial Chamber is an exceptional measure. To do otherwise would allow the Prosecution to circumvent the procedure set out in Rule 50 of the Rules by including material facts in documents supplementary to the Indictment.

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

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

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

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

<sup>119</sup> AFRC Trial Judgement, para. 27.

<sup>120</sup> AFRC Trial Judgement, para. 29.

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

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

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

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

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

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

62. The Appeals Chamber held that:

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

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

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

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

### C. Pleading Requirements for Joint Criminal Enterprise

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

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

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

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

<sup>127</sup> AFRC Appeal Judgement, para. 37 [footnotes omitted].

<sup>128</sup> AFRC Appeal Judgement, para. 138.

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

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

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

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

#### D. Pleading of the JCE in the Second Amended Indictment

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

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

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

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

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

<sup>132</sup> AFRC Appeal Judgement, footnote 146. See also AFRC Trial Judgement, para. 64.

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

<sup>134</sup> *Krnojelac* Decision, para. 16; *Milutinovic* Decision, p. 4.

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

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

<sup>137</sup> AFRC Appeal Judgement, para. 138.

<sup>138</sup> Second Amended Indictment, para. 5 [emphasis added].

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.*<sup>139</sup> [Emphasis added]

c) **Para. 34**, which states,

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

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

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

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

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

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

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

72. Following the direction of the Appeals Chamber that the Indictment must be read as a whole, it is clear that the JCE is alleged to have existed between 30 November 1996 and 18 January 2002.<sup>141</sup>

<sup>139</sup> Second Amended Indictment, para. 33 [emphasis added].

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

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

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

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

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

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

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

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

<sup>142</sup> Second Amended Indictment, paras. 5, 6, 9, 14, 18, 22, 34.

<sup>143</sup> Ibid. para.33.

<sup>144</sup> Ibid. para.34.

<sup>145</sup> *Gacumbitsi v. Prosecutor* 1CTR-2001-64-A 7July 2006 para. 165.

<sup>146</sup> Ibid. Separate Opinion of Judge Shahabuddeen para. 29.

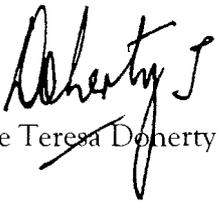
V. DISPOSITION

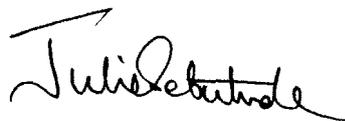
FOR THE ABOVE REASONS by a majority

DISMISSES the Defence Motion

Justice Richard Lussick appends a Dissenting Opinion.

Done at The Hague, The Netherlands, this 27<sup>th</sup> day of February 2009.

  
Justice Teresa Doherty

  
Justice Julia Sebutinde

