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SCSL-03-01-PT
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THE SPECIAL COURT FOR SIERRA LEONE

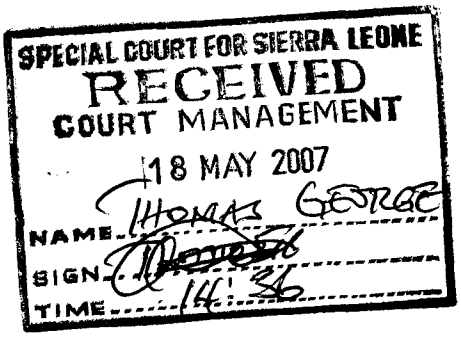
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 18 May 2007

Case No.: SCSL-2003-01-PT



THE PROSECUTOR

–v–

DAHKPANNAH CHARLES GHANKAY TAYLOR

PUBLIC

CORRIGENDUM TO

RULE 73 *bis*

TAYLOR DEFENCE PRE-TRIAL BRIEF

Office of the Prosecution
Mr. Stephen Rapp
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

1. At the Pre-Trial Conference of 7 May 2007, Justice Doherty pointed out an apparent ambiguity, or lack of reference in relation to paragraph 17 of the Taylor Defence Pre-Trial Brief.[1] Paragraph 17 of that brief purportedly stated that "The Trial Chamber had determined that the introduction of prior criminal acts of Mr Taylor would be inadmissible".[2] This, of course, was an error. This phrase should read: "The Trial Chamber had determined that the introduction of prior criminal acts of the Accused would be inadmissible". As is evident from reading paragraph 17 as a whole, the phrase, "the Accused" refers to the Accused in the International Criminal Tribunal for Rwanda (ICTR) case against *Bagosora et al.*

2. The Defence for Mr. Taylor appreciate Justice Doherty's reference to the erroneous paragraph. As stated at the Status conference by counsel, the Defence hereby file a corrigendum to Rule 73*bis* Taylor Defence Pre-Trial Brief. The corrected version is attached to this Motion as Annex A. Paragraph 17 now reads:[3]

> The Appeals Chamber affirmed the Trial Chamber's ruling in *Bagosora*, holding that under Rule 93, pattern evidence may be relevant to serious violations of international humanitarian law, but even where pattern evidence was relevant and probative, the Appeals Chamber held that the Trial Chamber could still decide to exclude the evidence *in the interests of justice* when its admission could lead to *unfairness* in the trial proceedings, such as *when the probative value of the proposed evidence is outweighed by its prejudicial effect*, pursuant to the Chamber's duty to ensure a fair trial.[4] In that case, the Trial Chamber had determined that the introduction of prior criminal acts of the Accused would be inadmissible for the purpose of demonstrating "a general propensity or disposition" to commit the crimes charged.[5]

Respectfully Submitted,

Karim A. A. Khan

Lead Counsel for Mr. Charles Taylor

Dated this 18th Day of May 2007

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[1] *Prosecutor v. Taylor,* SCSL-03-01-PT-229, Rule 73*bis* Taylor Defence Pre-Trial Brief, 26 April 2007.
[2] *Prosecutor v. Taylor*, SCSL-03-01-PT, Pre-Trial Conference Transcripts, 7 May 2007, pgs. 20, 36-37.
[3] Please note that footnote 21 has also been amended. Footnote 21 erroneously stated *ibid* while the Decision it referred to was quoted in footnote 18, not in footnote 20.
[4] *Prosecutor v. Bagosora et al*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, para. 2.
[5] *Prosecutor .v Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 14.

Table of Authorities

Prosecutor v. Taylor, SCSL-03-01-PT-229, Rule 73*bis* Taylor Defence Pre-Trial Brief, 26 April 2007.

Prosecutor v. Taylor, SCSL-03-01-PT, Pre-Trial Conference Transcript, 7 May 2007. Online: http://scsl-server/sc-sl/new/Transcripts/Taylor/TAY07MAY07_MD.pdf.

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I. Introduction

1. The Defence for Charles Taylor ("Defence") file this Defence Pre-Trial Brief in accordance with the "Scheduling Order for a Pre-Trial Conference Pursuant to Rule 73*bis*," dated 2 February 2007,[1] wherein the Trial Chamber ordered that "The Defence shall on or before 26 April 2007 file a statement of admitted facts and law and a Pre-Trial Brief addressing the factual and legal issues."[2] This Defence Pre-Trial Brief is also filed in the context of the Prosecution's "Rule 73*bis* Pre-Trial Conference Materials Pre-Trial Brief," dated 4 April 2007.[3]

2. The Defence recall its "Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief," dated 5 February 2007, in which it respectfully submitted that the Chamber should not set a date for the Defence Pre-Trial Brief "prior to hearing and giving due consideration to any submissions from the parties on that issue".[4] Specifically, the Defence argued that having to file a Defence Pre-Trial Brief just three weeks after the Prosecution filed its Pre-Trial Brief would be insufficient time and would be prejudicial to Mr. Taylor's right to adequately prepare his defence.[5]

3. The Defence respectfully maintain that three weeks has not been enough time, given the myriad demands of this case, to carefully analyze and formulate a response to the Prosecution Pre-Trial Brief, including the summaries of core and backup witnesses, the names of proposed expert witnesses, the nature and substance of exhibits, and the general Prosecution theory.[6] It must be emphasised that various Reports of apparently important Prosecution expert witnesses have not been disclosed to the Defence. Accordingly, and as such, they cannot be commented upon, nor inform the Defence as to the exact nature of the case against Mr. Taylor. Similarly,

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[1] *Prosecutor v. Taylor,* SCSL-03-01-PT-171, Scheduling Order for a Pre-Trial Conference Pursuant to Rule 73 *bis*, 2 February 2007 ("Pre-Trial Brief Order").
[2] Pre-Trial Brief Order, pg.3.
[3] *Prosecutor v. Taylor,* SCSL-03-01-PT-218, Rule 73*bis* Pre-Trial Conference Materials Pre-Trial Brief, 4 April 2007 ("Prosecution Pre-Trial Brief").
[4] *Prosecutor v. Taylor,* SCSL-03-01-PT-172, Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief, 5 February 2007, para. 2 ("Motion to Reconsider Date for Defence Pre-Trial Brief").
[5] Motion to Reconsider Date for Defence Pre-Trial Brief, paras. 8 and 9.
[6] Motion to Reconsider Date for Defence Pre-Trial Brief, para. 8.

the statements of key Prosecution witnesses remain heavily redacted which further hampers the Defence in understanding the detail of the case against Mr. Taylor.

4. Notwithstanding these stated difficulties, the Defence submits the present Defence Pre-Trial Brief in compliance with the Trial Chamber's "Decision on Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief," dated 5 March 2007.[7] A joint filing with the Prosecution on agreed issues of facts and law was filed separately,[8] also in compliance with the order of the Trial Chamber.

II. Burden of Proof

5. The Prosecution has the burden of proving beyond a reasonable doubt all elements of the crimes charged, the underlying acts, and the modes of liability, absent any admissions or statements of agreed facts and/or law.[9] This is consistent with case law.[10] It is therefore self – evident that it is for the Prosecution to prove the charges against Mr. Taylor and not for the Defence to prove the innocence of Mr. Taylor in regard to these charges.

6. At the conclusion of the case, the Accused is entitled to the benefit of the doubt as to whether the offence has been proved".[11] This principle of *in dubio pro reo*, by virtue of which doubt must be resolved in favour of Mr. Taylor[12] requires that a finding of guilt must be "the only conclusion available".[13] The Prosecution has a heavy burden and the high standard of proof necessary emanates from the statutory right of Mr. Taylor to be presumed innocent pursuant to Article 17(3) of the SCSL Statute, as well the principle under Rule 87(A) of the Rules of

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[7] Decision on Date for Defence Pre-Trial Brief, pg. 5.
[8] *Prosecutor v. Taylor,* SCSL-03-01-PT-227, Joint Filing by the Prosecution and Defence Admitted Facts and Law, 26 April 2007 ("Admitted Facts and Law").
[9] Prosecution Pre-Trial Brief, para 1.
[10] *Prosecutor v. Delalic et al*, IT-96-21, *Judgment*, 16 November 1998,, para. 599; *Prosecutor v. Brdjanin*, IT-99-36, *Judgment*, 1 September 2004, para. 22; *Prosecutor v. Kunarac*, IT-96-23&32-1, *Appeals Chamber Judgment*, 12 June 2002, paras. 63 and 65
[11] *Prosecutor v. Delalic et al*, IT-96-21, *Judgment*, 16 November 1998, para. 601.
[12] *Prosecutor v. Brdjanin*, IT-99-36, *Judgment*, 1 September 2004, para. 21; *Prosecutor v. Tadic*, IT-94-1, *Sentencing Judgment*, 11 November 1999, para. 31.
[13] *Celibici Appeals Chamber Judgment*, para. 458 [emphasis added].

Procedure and Evidence that "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

7. The Defence is not required to make any admissions at any stage of proceedings in a criminal trial. This is a corollary to the presumption of innocence. Be that as it may, any decision by the Defence not to expressly or implicitly address or rebut, in the present filing, any aspect of the Prosecution's case theory or evidence, as detailed in the Prosecution Pre Trial Brief and / or in the Amended Indictment,[14] should not be considered to be an acceptance of any fact alleged or law propounded by the Prosecution, or a concession in any respect, unless expressly and unambiguously stated to the contrary.

III. Factual Background

8. The Defence has engaged in a dialogue with the Prosecution and the facts agreed by both parties have been filed separately in a joint filing.[15] It stands to reason, therefore, that all facts not currently agreed by the parties, are in dispute and need to be proved by the Prosecution at trial as far as they are material to the indictment, save to the extent that further facts are agreed by the parties in due course.

IV. Territorial and Temporal Limitations of the Amended Indictment

9. The charges against Mr. Taylor are set out in the Amended Indictment. These charges must fall within the territorial and temporal jurisdiction of the Special Court. The Prosecution Pre-Trial Brief and Pre-Conference materials disclose numerous examples where the Prosecution are apparently relying upon alleged facts pre-dating the indictment period and alleged conduct said to have been committed outside the territory of Sierra Leone. The Defence would urge the Trial Chamber to be vigilant in ensuring that there is no expansion of the territorial or temporal jurisdiction of the Court via the back door under the guise of Rule 93 of the Special Court's Rules of Procedure and Evidence.

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[14] *Prosecutor v. Taylor,* SCSL-03-01-I-75, Amended Indictment, 16 March 2006.
[15] Agreed Facts and Law.

10. Rather than precisely focusing on the temporal jurisdiction of the indictment, the Prosecution seek to cobble together alleged conduct geographically and temporally separated in a bid to establish its case. The Defence submit that the manner in which it seems the Prosecution intend to put its case is impermissible and should, in any event, viewed with circumspection. The Prosecution, for example, state that Mr. Taylor's alleged culpable conduct resulting in the crimes allegedly committed by the RUF, Junta, AFRC/RUF and Liberian fighters, detailed in the Amended Indictment and Prosecution Pre-Trial Brief, occurred "[p]rior to and throughout the conflict in Sierra Leone".[16] The only relevant test, of course, is whether any alleged crimes were committed in the period of the indictment.

11. Similarly, the Prosecution Pre-Trial Brief includes a number of allegations concerning the civil war in Liberia. For example, in paragraph 11 of the Prosecution Pre-Trial Brief, it is alleged that "from the beginning of the conflicts in Liberia and Sierra Leone, both the NPFL and the RUF engaged in ongoing widespread crimes against the civilian populations of those countries."

12. The Defence submits that this claim is wholly improper. The Prosecutor of the Special Court of Sierra Leone has no mandate, authority or jurisdiction to allege crimes anywhere other than in Sierra Leone. By making this assertion, he is acting *ultra vires* his authority. The attempt to rely upon evidence outside the territorial and temporal jurisdiction of the Special Court, in relation to another State's affairs, is wholly unwarranted and unacceptable as a matter of law. With respect, it exposes a fundamental misconception of the Prosecution in the theory it seeks to advance.

13. Similarly, in relation to the use of child soldiers, the Prosecution alleges that the "[t]he RUF brought this practice to Sierra Leone from Liberia, where the NPFL engaged in the same criminal conduct".[17] To substantiate this allegation, and to be probative, the Prosecution will have to produce evidence to establish beyond a reasonable doubt that child soldiers were used

[16] Prosecution Pre-Trial Brief. For examples of this and other overbroad language, see paras. 6, 16, 18, 21, 24, 42, 45, 50, 54, 58, 61, 62, 63, and 64.
[17] Prosecution Pre-Trial Brief, para. 18.

in the Liberian war; that, (contrary to well known reality) that the use of "child soldiers" did not pre-date the Liberian conflict, nor was it practiced throughout Africa and many other regions where civil wars and armed insurrections have taken place; and that the use of child soldiers was not independently adopted in Sierra Leone for reasons which had nothing at all to do with the alleged practices in the Liberian civil war in general or Mr. Taylor in particular. Such a convoluted theory is legally dubious and antithetical, in the respectful submission of the Defence, to a fair, concise and focused trial.

14. The Prosecution is allowed to present evidence of a consistent pattern of conduct only if it falls within the scope of Rule 93(A), which provides that:

> "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible in the interests of justice".

If the Prosecution intends to present evidence of allegations outside the territorial and temporal jurisdiction of the Special Court and outside the scope of the Amended Indictment, the Trial Chamber is invited to consider the parameters already set by the Special Court's sister tribunals.

15. The scope of Rule 93 has been determined by the ICTR case of *Bagosora et al*, where the Prosecution sought to introduce evidence from a period pre-dating the temporal jurisdiction of the Tribunal. The Trial Chamber held that the Prosecution was only allowed to do so if the alleged events were relevant to and probative of, crimes committed during the time-period of the temporal jurisdiction. Even if relevant and probative the Trial Chamber would still exclude the evidence if unduly prejudicial.[18]

16. The Trial Chamber noted three possible instances when evidence of acts occurring prior to the temporal jurisdiction of the Tribunal (1994) might be relevant and admissible. First, it stated that evidence of acts occurring prior to the mandate year may be relevant to an offence which

[18] *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, paras. 8, 16, 17.

continues into the mandate year. Second, the Court considered that evidence of pre-1994 events providing background or context and *which do not form part of the crimes charged*, could be admissible. Finally, the Trial Chamber considered that evidence of pre-1994 events could be admitted as "similar fact evidence". [19]

17. The Appeals Chamber affirmed the Trial Chamber's ruling in *Bagosora*, holding that under Rule 93, pattern evidence may be relevant to serious violations of international humanitarian law, but even where pattern evidence was relevant and probative, the Appeals Chamber held that the Trial Chamber could still decide to exclude the evidence *in the interests of justice* when its admission could lead to *unfairness* in the trial proceedings, such as *when the probative value of the proposed evidence is outweighed by its prejudicial effect*, pursuant to the Chamber's duty to ensure a fair trial.[20] In that case, the Trial Chamber had determined that the introduction of prior criminal acts of the Accused would be inadmissible for the purpose of demonstrating "a general propensity or disposition" to commit the crimes charged.[21]

18. In light of the Trial Chamber's decision in *Bagosora*, confirmed on appeal, it is submitted that the Prosecution can only introduce evidence of alleged prior criminal acts of Mr. Taylor if they point to the existence of a common plan or design. The Defence reserve the right to object to the admission of any such evidence where its prejudicial effect outweighs its probative value. One of the primary considerations for the Trial Chamber, it is suggested, will be the time lapse between the event(s) cited and the beginning of the indictment and whether the alleged previous act or relationship can be said to be probative on a *continuing* criminal common plan during the indictment period.

19. In relation to all the other allegations of criminal conduct prior to the Amended Indictment period, the Defence contend that these are not relevant to the charges in the Amended

[19] *Ibid,* relying on Judge Shahabuddeen's Opinion as discussed in para. 19.
[20] *Prosecutor v. Bagosora et al*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003. para. 2.
[21] *Prosecutor .v Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, para. 14.

Indictment and only go to demonstrate "a general propensity or disposition" to commit the crimes charged.[22]

20. The same reasoning applies to allegations of criminal conduct said to have taken place in regions outside the territorial scope of the Amended Indictment and the Special Court's jurisdiction. Allegations of serious criminal conduct in Liberia in particular have no bearing on the alleged criminal conduct in Sierra Leone, not only because the conflicts occurred in different time frames, but also because they involved a different cast of alleged perpetrators. Evidence of the war in Liberia, therefore, similarly only goes to demonstrate "a general propensity or disposition" to commit the crimes charged, and should not be admitted in the present proceedings.

21. A trial on alleged activities in Liberia, by proxy, would be a violation of Mr. Taylor's right to a fair trial, and a disservice not only to the people of Sierra Leone but indeed to the citizens of Liberia who have the right to make their own decisions on issues of post-conflict justice.

22. Should the Prosecution be permitted to adduce evidence of extra-territorial acts predating the Amended Indictment period, and in countries other than Sierra Leone, the result will be a series of "trials within a trial" of subsidiary issues, such as the use of child soldiers in the Liberian civil war and alleged conduct by the NPFL and other groups, allegedly committed in the course of a conflict that lasted for several years. The Defence cannot emphasise strongly enough that it has not investigated these matters and that it does not have the means and facilities to conduct investigations into these allegations that fall outside the scope of the Amended Indictment or which do not relate to Sierra Leone.

23. In accordance with the right of Mr. Taylor to have adequate time and facilities to prepare a defence pursuant to Article 17(4)(b), the Defence would require a substantial allocation of additional resources and a very significant period of time to prepare a defence for a case that will have changed complexion beyond all recognition to that pleaded in the Amended Indictment. The introduction of evidence relating to crimes allegedly committed in the war in

[22] *Ibid*, para. 14.

Liberia will necessarily prolong the length of the trial and may render predictions that the trial phase of these proceedings can be completed within 18 months wholly redundant. The Defence pre-trial preparation, already subject to difficult, if not impossible, time constraints, will have to be completely re-assessed with regard to the need for more manpower and resources, which the Defence does not have available to it at present, to be deployed to Liberia and the alleged conduct in that civil war.

V. Context: The Conflict and Charges in the Indictment

A. Context: The Overthrow of the Regime of Samuel Doe and Mr Taylor's Election

24. The Prosecution attempt to portray Mr. Taylor as a brutal dictator or leader who participated in a common plan or design formulated, according to some Prosecution witnesses in the late 1980's, with its purpose to use "criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone".[23] In understanding his motivations, agenda and conduct, and in assessing the Prosecution's characterisations of Mr. Taylor, it is perhaps relevant to understand the situation which existed in Liberia before the entry of NPFL forces in Liberia in 1989, as well as the background to Mr. Taylor's landslide victory in the 1997 democratic elections. It will be seen that Mr. Taylor's rise to power did not involve ousting a democratic Government or one based on the rule of law. It involved the Liberian people, with the help of Mr. Taylor, removing a tyrannical and oppressive regime and after that, winning a resounding democratic mandate at the polls, internationally verified as being "free and fair".

25. Samuel K Doe and a group of disgruntled soldiers seized power in 1981 coup against then President Tolbert, during which they "stormed the Executive Mansion in Monrovia, captured President Tolbert in his pyjamas and disembowelled him."[24] The group subsequently detained thirteen of Tolbert's cabinet members, placed them on trial, and sentenced them to death. The cabinet members were then taken to the beach, tied to telephone poles, and executed by a

[23] Prosecution Pre-Trial Brief, paras. 6-7.
[24] Bill Berkeley, *The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa,* Basics Books, 2001, pg. 31. [Annex A]

drunken firing squad.[25] Shortly thereafter, Doe ordered his troops to storm the French Embassy to seize Tolbert's son, who was also murdered.

26. As the highest ranking non-commissioned officer of the group, Samuel K Doe became Chairman of the People's Redemption Council (PRC) that took power after the coup. During the ensuing years of his administration, until well after 1990, "Doe's soldiers committed the most atrocious human rights abuses ever committed in West Africa."[26] In October 1985, Doe staged civilian elections in accordance with his promise to bring an end to military rule. The polls were characterised by electoral "malpractice"[27] and were held "after two political parties had been banned and prevented from running in the election, after a year preceding the poll when opposition leaders had been imprisoned, after a massacre of students at Monrovia University on Doe's orders on 22 August 1984 following agitation by students and academics".[28] Doe's party succeeded in "winning" 51% of the vote and the result was accepted by the United States Government, which continued to provide Doe with substantial foreign aid. US aid quickly increased during Doe's tenure so that "by the time of the 1985 election the US had given Doe $400 million. By the outbreak of war in 1989, this had risen to $500 million".[29]

27. Shortly after the election Doe's former ally and one of the founders of the NPFL, Commanding General Thomas Quiwonkpa, led an armed invasion into Liberia from Nimba County. The plot failed and the aftermath of the coup was described by one commentator thus:

> Quiwonkpa was captured, tortured, castrated, dismembered and parts of his body publicly eaten by Doe's victorious troops in different areas of the city. The plotters who had remained in Freetown fled...A mass slaughter then took place. In reprisal for the coup, Gio and Mano civilians, soldiers, government officials and police officers were rounded up by the Executive Mansion Guard and slaughtered. Civilians who celebrated in the streets of Monrovia when they thought the coup had been successful were later rounded up by Doe's troops and driven to the beaches outside the city and massacred. Truck-loads of bodies sped through the city from

[25] Ibid.
[26] Mark Huband, *The Liberian Civil War*, Routledge, 30 June 1998, pg. 36. [Annex B]
[27] Huband, pg. 37.
[28] Ibid.
[29] Huband, pg. 42.

the grounds of the presidential mansion, from where Doe could observe the slaughter, to mass graves outside Monrovia on the road to Robertsfield airport.

28. It was in this environment that Mr. Taylor emerged as the leader of the NPFL from a group of anti – Doe dissidents forced to flee Liberia and exiled predominantly in West Africa and the United States. These dissidents included the current President of Sierra Leone, Ellen Johnson-Sirleaf, a key member of the NPFL at this time. The NPFL attracted a broad base of support both inside and outside of Liberia not out of coercion, but from a shared and real sense of grievance with the Doe regime and a desire for change. Indeed within seven months of their first incursion into Liberian territory on 24 December 1989, NPFL forces gathered sufficient support to begin their advance on Monrovia.

29. Seven years later, at the conclusion of the Liberian Civil War, the first universally acknowledged free and fair elections in Liberian history took place. 600,000 of the 700,000 registered voters of Liberia finally cast their ballots to elect a president on Saturday, 19 June 1997. The election was overseen by more than 500 members of an international observer team led by former U.S. President Jimmy Carter. Mr. Taylor received 75.3% of the vote while his nearest rival, Ellen Johnson-Sirleaf received only 10% of the vote. Taylor's party, the National Patriotic Party (NPP) won 49 of the 64 seats in the Liberian House of Representatives and 21 of the 26 seats in the Senate. The circumstances of Mr. Taylor's election - his democratic mandate, his re-commitment to the Rule of Law, his appointment of a broad based, multi-ethnic, cross-party cabinet, and a real attempt to unify a war torn State – are in stark contrast to the 1985 elections presided over by Samuel Doe.

B. Context: Internal and External Challenges to Mr. Taylor's Presidency

30. Mr. Taylor was inaugurated on 2 August 1997, at which time Foday Sankoh was in prison in Nigeria, and the AFRC junta was already in power in Freetown. After seven years of a bitter civil war involving five warring factions, divided on tribal, ethnic and political lines the prospects for Liberia were fraught with uncertainty. On the date of his inauguration, Mr. Taylor could not be said to be in complete control of Liberian territory as evidenced, perhaps most visibly, by the continued presence of thousands of ECOMOG peacekeepers.

31. Consequently, Mr. Taylor took charge of a nation facing both external and internal security threats. Internally, it was apparent that many members of the former warring factions who remained within the country had not fully complied with the disarmament process. All of these forces were capable of reigniting the conflict in Liberia. Other participants in the conflict, dismayed at the result of the election, had fled the country and taken refuge outside its borders, including Sierra Leone. From the date of Mr. Taylor's election onwards these forces were engaged in preparing their own plans for further insurrection. An already onerous job of governing, rebuilding and galvanising a war torn state was to be made very much more difficult, and as matters transpired, perhaps impossible.

32. The border area of the Mano River Union states has long been the focal point for rebel groups preparing armed insurrection against their respective governments. Given the difficulties of completely securing the remote borders of a developing country during a time of regional conflict, it is likely that Liberians, Sierra Leoneans, Guineans and others were able to cross their respective borders in the absence of usual border controls. Even today, under the Western- and UN-supported democratically-elected government of Liberian President Ellen Johnson-Sirleaf, the borders between Liberia, Sierra Leone and Guinea are not secure or closed. Speaking in regard to the civil strife currently ongoing in Guinea, Sirleaf has admitted, "If anything happens to Guinea, it could spill over. All our borders are porous."[30] UNMIL, a 15,000 strong presence, also admits that it struggles to effectively secure and protect Liberia's remote borders.[31] Furthermore the porous nature of the border is reflected in the shared linguistic, ethnic and cultural characteristics of the Kissy and other people in the region.

33. In the face of these security threats, from both external and internal forces, the Defence contend that it would have been contrary to the interests of the Government of Liberia to allow military personnel, scarce arms, and ammunition to be diverted, for the purposes of committing international crimes, to a conflict in another country. These resources were required to

[30] BBC News, Guinea MPs terminate martial law, 23 February 2007. Online: http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/6389609.stm.
[31] Global Policy Forum, "UN Investigating Recruitment of Liberian Mercenaries in Côte d'Ivoire", 30 March 2005. Online: Http://www.globalpolicy.org/security/issues/ivory/2005/0330libcombat.htm.

maintain domestic stability in Liberia. The Defence submit that any action taken by the Liberian Government to secure arms for itself was entirely consistent with a long established principle in international law that a state has the right to defend its territorial integrity.

C. Context: Role of Mr. Taylor in Peace Process for Sierra Leone

34. Mr. Taylor played an instrumental role in promoting the peace process in Sierra Leone. In 1998 Mr. Taylor was appointed as Chair of a Committee of Five Heads of State tasked with engaging the RUF in dialogue and bringing peace and security to the region. The following remarks were made by Mr. Taylor on the 2 October 1999, as part of the statements made by the parties to the four days of mediation talks aimed at harmonising relations between the RUF and the AFRC under the auspices of the Government of Liberia, with the support of ECOWAS. Mr. Taylor summarised his position regarding the inter-dependence of the people of Sierra Leone and Liberia for their regional security thus:

> "...the Liberian contribution had thus been based on the strength of their conviction that they are one people with a common destiny, that there cannot be peace and progress in Liberia without corresponding peace and progress in Sierra Leone."[32]

35. Should the Defence be required or otherwise choose to call a Defence after the end of the Prosecution case, it is anticipated that senior RUF witnesses will testify that Mr. Taylor encouraged them to leave the bush by giving them a safe corridor through Liberia to travel. After drafting the Lome Agreement, the RUF leaders left Lome, stopped in the Ivory Coast and then Liberia for a day before heading to Sierra Leone to show a draft copy to the RUF/AFRC commanders in the bush. While in Liberia for a short time, Mr. Taylor provided the RUF leadership with access to a photocopier machine and encouraged them to cooperate with the peace agreement. All these endeavours were consistent with Mr Taylor's mandate and the objectives set out in his statement of 2 October 1999.

36. Other West African Presidents also helped the RUF during the peace process. For instance, the Togolese President provided the jet for most of the RUF leadership to travel to Lome, and he,

[32] Focus on Sierra Leone, online: www. focus-on-sierra-leone.co.uk./Monrovia_Speeches_2oct99.html.

of course, hosted the RUF in his country during the signing of the Lome Peace Agreement. The Nigerian government frequently provided aircraft and other facilities to transport RUF delegates. Mr. Obasanjo, the outgoing President of Nigeria, personally met with RUF representatives, as did other heads of states, to ensure their continuing compliance with the peace process. The role, link, and interaction of other West African leaders with the RUF is clear. That the Prosecution has not indicted such leaders is evidence, in the respectful submission of the Defence, that such conduct and interaction that Mr. Taylor accepts he had with the RUF does not give rise to any international criminal responsibility.

D. Context: Arms Trade in and Military Support to West Africa

37. The Defence contend that an illegal trade in arms is widespread in West Africa. Arms and ammunition are supplied predominantly by non state actors from across the globe and the proliferation of these weapons is such that that any armed group can easily obtain arms without the knowledge and involvement officers at the highest levels of Government. This trade flourishes in the face of international instruments, treaties and conventions. During the conflict, weapons came into Sierra Leone, Liberia and surrounding states, from the non state actors based in United States, Europe, and other countries. Typically, these weapons were then captured and traded among armed factions throughout West Africa. In this context it is overly simplistic, and a distortion of the truth, for the Prosecution to allege, in the absence of compelling evidence, that Mr. Taylor played a role entailing the "greatest responsibility" in regard to supplying arms to the RUF.

38. A 2000 UN Panel of Experts Report on Sierra Leone Diamonds and Arms acknowledges that the RUF acquired weapons from numerous sources and lists at least eight countries that provided arms to the RUF: Burkina Faso, Bulgaria, Cote d'Ivoire, Guinea, Liberia, Libya, the Slovak Republic and Ukraine. Most weapons destined for RUF fighters originated in Eastern Europe, but they also came from Belgium, Germany, the United Kingdom, and the United States.[33]

[33] UN Security Council, S/2000/1195, Report of the Panel of Experts on Sierra Leone Diamonds and Arms (2000), 19 December 2000, paras. 17-18. Online: www.globalsecurity.org/military/library/report/2000/s-2000-1195.pdf.

39. Evidence shows that the RUF typically acquired weapons (especially in the pre-Indictment period) by capturing them from SLA[34] and ECOMOG[35] troops. In 2000, the RUF obtained weapons from captured UNAMSIL units.[36] The RUF also bartered with the Guinean Soldiers along the Sierra Leonean/Guinean border. In exchange for ammunition, the RUF would trade palm oil, food, and goods like tapes, cars, videos, and refrigerators.

40. Various countries also shipped weapons into Sierra Leone in order to support the CDF and the Sierra Leonean government. The CDF acquired weapons from Guinea, Egypt, Nigeria, Romania, Russia, Ukraine, Bulgaria, China, and the United Kingdom.[37] Additionally, the Sierra Leonean government resorted to hiring private military companies such as the Gurkha Security Guards Limited 27 and Executive Outcomes (from South Africa),[38] and Sandline International (from the United Kingdom). It seems likely that weapons initially intended for the CDF or the government also ended up in the hands of the RUF.

V. Defence Submissions Regarding the Specific Allegations

41. The Prosecution contend that Mr. Taylor is allegedly guilty of all eleven counts specified in the Amended indictment. These include being responsible for 5 counts of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, 1 count of Other Serious Violations of International Humanitarian Law, and 5 counts of Crimes Against Humanity, in violation of Articles 2, 3, and 4 of the SCSL Statute, individually or cumulatively charged in the Amended Indictment, dated 16 March 2006.

42. For each of those charges, the Prosecution must prove, beyond reasonable doubt:

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[34] Small Arms Survey, Eric Berman, Re-Armament in Sierra Leone: One Year after the Lome Peace Agreement, Occasional Paper Series No. 1, Geneva (2000), pg. 17 ("Small Arms Survey"). Online: http://www.smallarmssurvey.org/files/sas/publications/o_papers_pdf/2000-op01-sierraleone.pdf.

[35] Gibril Gbanabone, "ECOMOG Sold Weapons to Rebels Arnold Quainoo," Africa News Service, 20 January 1999. Online: http://www.nisat.org/west%20africa/news%20from%20the%20region/ecomog_sold_weapons_to_rebels_ar.htm

[36] Small Arms Survey, pgs. 18-20.

[37] Small Arms Survey, pgs. 21-23.

[38] Dr. Robert Bunker and Steven Marin, Resource Guide of Open Documents Concerning EO, "The Executive Outcomes: Mercenary Corporation OSINT Guide," 1999. Online: http://www.williambowles.info/spysrus/eo.html.

i) that the crimes were actually committed;
ii) that the crimes fulfil all the legal elements – the contextual and specific elements – of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, Other Serious Violations of International Humanitarian Law, or Crimes Against Humanity;
iii) that there was a nexus between the alleged crimes and Mr. Taylor.

43. At this moment in time, the Defence expects this case to be primarily concerned with the nexus between the alleged crimes and Mr. Taylor. The critical question in the case is therefore not so much whether the crimes in Sierra Leone were indeed committed, but whether Mr. Taylor is criminally responsible for them.

44. To establish a nexus between Mr. Taylor, who was residing in Liberia throughout the whole Indictment period, and the crimes allegedly committed in Sierra Leone, the Prosecution rely upon the five modes of participation detailed below, the elements in relation of each of which they need to establish beyond reasonable doubt.

A. Common Plan

45. 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"). 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. Nor can the Prosecution escape its consequences.

46. What is impermissible is for the Prosecution to decide to no longer specifically plead JCE and yet to rely upon its elements via the backdoor. Whilst it is accepted that some case law seems to conflate the doctrine of "common plan and purpose" with JCE, there are important

differences. As far as they differ, the indictment must prevail.[39] Charging of the forms of liability, in informing those accused in sufficient detail the nature of the charge, so as the defence can be prepared, pursuant to the rights to a fair trial, are material facts that must be pleaded in the indictment.[40]

47. The Prosecution have, it seems, used the term "common plan or purpose" but sought to define it, in the Pre-Trial Brief, by legal elements held to be specific to the jurisprudence of JCE, particularly JCE – Type III.[41] The Special Court's jurisprudence suggests that the Pre-Trial Brief's references to elements of joint and criminal enterprise do not cure prejudice to the Accused for lack of pleading in the Indictment.[42]

48. A review of current international criminal jurisprudence on this issue discloses that where joint and criminal enterprise liability is alleged in substance, the Prosecutor must distinguish between the three types of such liability in the indictment itself. The Indictment must state whether the joint and criminal enterprise charged is Basic - Type I and II, or Extended - Type III. The requirements for the latter, Type III (an extended form of JCE), are even more stringent. Even where (unlike the present case) joint and criminal enterprise is specifically pleaded in the indictment:

> "Trial Chambers have refused to rely on an extended form of joint criminal enterprise in the absence of an amendment to the Indictment expressly pleading it."[43]

49. Thus, the pleading requirements of Type III joint criminal enterprise are heightened. The Prosecutor must specify (1) "the purpose of the enterprise", (2) "the identity of the co-

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[39] The indictment is the primary charging instrument pursuant to Article 17 (4) of the Special Court's Statute, and the jurisprudence of international tribunals. *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004, para. 29 *citing* ICTR Statute Articles 17(4), 19(2), 20(4); Rule 47 of the ICTR Rules of Procedure and Evidence; *Semanza,* Judgement (TC), para. 42; *Kupreskic,* Judgement (AC), paras. 88; *Hadzohasanovic et al,* Case No. IT-01-47-PT, Decision on the Form of the Indictment (TC), 7 December 2001, para. 8.

[40] *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 34.

[41] Prosecution Pre-Trial Brief, para. 148.

[42], *Prosecutor v. Krnojelac,* IT-97-25-A, Appeals Chamber Judgment, 17 September 2003, paras. 91-94; *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 39.

[43] *Prosecutor v. Simic,* IT-95-9-T, Judgment, 17 October 2003, para. 146.

participants", and (3) "the nature of the accused's participation in the enterprise".[44] Lastly, as a form of accomplice liability, each count in which joint and criminal enterprise is charged must "refer to the paragraphs describing the relevant conduct of the accused and of the principal perpetrator."[45] The Indictment, needless to state, deficient of any reference to joint and criminal enterprise, does not distinguish or identify the type of joint and criminal enterprise that is charged, and does not meet the heightened pleading requirements for Type III joint and criminal enterprise liability. Further, there is no enumeration of the identity of the alleged co-participants in the joint criminal enterprise. Any elucidation of the joint enterprise and Mr. Taylor's participation is also deficient.

50. It is not, in any event, accepted that the third category of joint criminal enterprise, or extended form of joint criminal enterprise, as identified by the Appeals Chamber in *Tadic,*[46] was a basis of criminal liability that had crystallised into a norm of customary international law from the commencement of the indictment period in 1996. At this time, there was no uniform state practice of criminal liability for crimes arising out of a common plan or purpose that had not been agreed upon as part of any such common plan. Thus, it is submitted that, in such circumstances, no criminal liability should arise even if it was foreseeable that additional crimes might be perpetrated by a party to the joint criminal enterprise and that, notwithstanding this, the accused willingly participated in the joint criminal enterprise. In short, it is submitted that there should be no liability for an accused pursuant to the joint criminal enterprise doctrine unless the accused himself had the *intention* to commit the specific crime alleged.

51. Be that as it may, the Defence maintain that the doctrine of "common plan or purpose" as identified in established international case law should be applied to this case rather than any attempt by the Prosecution to further blur the lines between JCE and what has been understood since Nuremberg as the scope and ambit of "common plan or purpose".

52. Also, in Paragraph 142, the Prosecutor misrepresents the *Tadic* appeals chamber Appeals Decision. While true that the Appeals Chamber requires that there must be a "common plan,

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[44] *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 34.
[45] *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 38.
[46] *Prosecutor v. Tadic,* IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, paras. 185-192

design or purpose which *amounts to* or *involves* the commission of a crime listed in the Statute[,]" such a requirement was merely one element of the *actus reus* of this form of liability, the others being "a plurality of persons", and "participation of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute."[47] The mischaracterisation is clear when paragraph 227 is read in conjunction with paragraph 220 of the *Tadic* Appeals decision. For Type 1 JCE, the co-perpetrators must have a common criminal intent. Even for Type 2 JCE, there must be: "(i) the intention to take part in a joint and criminal enterprise and to further – individually or jointly – the criminal purpose of the enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose."[48]

53. The Prosecutor's additional contention, that "A common plan to control a country by any means necessary, including criminal means, in order to exploit the natural resources of that country may be considered to *amount* to the commission of crimes within the jurisdiction of the court[,]"[49] is also mistaken in law. First, the common plan is one element. Secondly, the intent of the common plan must be criminal, and not merely the implementation. Having access to the oil in the Middle East is not a criminal purpose in itself, and thus controlling resources in another country by non-criminal means does not constitute the requisite criminal intent, unless the plan was to control such resources unlawfully. Thus, if the common plan alleged by the Prosecutor is not criminal in its inception, and it is not alleged that the plan was amended to become a criminal one, the foundation element for JCE is not met.

54. The Prosecutor's alternative suggestion, also in Paragraph 143, also does not hold water. It avoids the issue – the common plan must have a criminal purpose, and that has not been pled in the Pre-Trial Brief, and not merely be a lawful common plan whose commission involves criminal methods.

55. The Prosecutor, in Paragraphs 145 to 148 extends its prior error in law. The "underlying purpose for entering the common plan...", unlike the proposition in Paragraph 145, is

[47] *Prosecutor v. Tadic,* ICTY, Appeals Chamber Judgement, para. 227.
[48] *Prosecutor v. Tadic,* ICTY, Appeals Chamber Judgement, para. 220.
[49] Prosecution Pre-Trial Brief, para. 143.

irrelevant only so far as the motive is concerned. Indeed, a full reading of the paragraph cited demonstrates that:

> "...the Common Plan necessarily has to amount to, or involve, an understanding or an agreement between two or more persons that they will commit a crime within the Statute."

As shown above, the common plan must have a criminal intent.

56. In Paragraph 143, the Prosecutor once again, perhaps inadvertently, diverges from the narrow definition of the jurisprudence. The case cited by the Prosecutor does not refer to Type III common plan or purpose involving events that were a "reasonably foreseeable consequence of the common plan, that is, possible consequence...". The *Brdjanin Appeals Judgement* does not use the modifier "reasonable". There is academic agreement that the "natural and foreseeable consequences" reflects the current standard.

B. Planning

57. The Defence accepts the definition of planning set out in the Rule 98 Decision, namely that one or several persons "contemplate designing the commission of a crime at both the preparatory and execution phases". The Defence notes that the Prosecution quotes this but subsequently adopts the definition without the last phrase "at both the preparatory and execution phases". The Defence submits that these omitted elements are crucial to the definition of planning and invites the Trial Chamber to use the definition as defined in the Rule 98 Decision, not by the Prosecution.

58. Mr. Taylor denies that he planned any of the criminal events in Sierra Leone, and, more specifically, denies all of the allegations set out in paragraphs 37 to 41.

C. Instigating

59. The Defence notes that the Prosecution has included the legal definition of instigation but failed to provide the factual premise on which the allegation of instigation is based.

D. Ordering

60. The Defence accepts the Prosecution's legal definition of ordering, namely that an Accused can be found guilty of ordering a crime where it is proved beyond reasonable doubt that he was in a position of authority and he used that authority "to impel another, who is subject to that authority, to commit an offence".[50]

61. In addition, whilst it is not required that there is a formal superior-subordinate relationship between the accused and the perpetrator, the accused must have given the alleged order in an authoritative capacity vis-à-vis the person who carried out his order.[51] If a formal superior-subordinate relationship between the Accused and the perpetrators has not been established, the Prosecution must demonstrate that the circumstances of the case suggest that the Accused's words of incitement were perceived as orders by the perpetrators.[52] The order must have had a direct and substantial effect on the commission of the offence charged in the indictment.[53]

62. If an authoritative relationship has been demonstrated, there still needs to be evidence that the person who ordered an act or omission had the requisite *mens rea* for the offence to be committed, which means he acted, as a minimum "with the awareness of the substantial likelihood that a crime will be committed in the execution of that order".[54] A mere risk does not suffice to infer criminal liability pursuant to Article 6(1); otherwise, any military commander who issues orders would be criminally liable.[55]

63. Mr. Taylor denies ever having given any orders to any member of the AFRC, RUF or any Liberian fighting in Sierra Leone in the indictment period. He denies having had any

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[50] Prosecution Pre-Trial Brief, para. 158, footnote 219.

51 *Prosecutor v. Semanza*, ICTR-72-20-T, Judgment, 15 May 2003, paras. 361 and 382; *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, Judgment, 17 June 2004, para.282.

[52] *Prosecutor v. Gacumbitsi*, No. ICTR-2001-64-T, Judgment, 17 June 2004, para. 283.

[53] *Kamuhanda v. Prosecutor*, No. ICTR-99-54A-A, Appeals Chamber Judgment, 19 September 2005, para. 75.

[54] *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 42 (emphasis added).

[55] *Ibid*, para. 41.

involvement in the operations that the Prosecution allege against him, which resulted in crimes and suffering in Sierra Leone during the indictment period.[56]

64. He further denies having "ordered" the release of the UN peacekeepers in 2000. He nonetheless, happily concedes that he played a crucial role in their release. Giving advice or even demands are not tantamount to orders. Mr. Taylor also denies having had a position of authority vis-à-vis the persons he allegedly ordered to conduct certain operations.[57]

E. Command Responsibility

65. There seems to be no disagreement between the parties that the Prosecution is required to prove three distinct elements in order to establish liability pursuant to Article 6(3) of the SCSL Statute, being:[58]

i) the existence of a superior-subordinate relationship;
ii) the superior knew or had reason to know that the criminal act had been, or was about to be committed; and
iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

66. The Defence is further not in dispute that a superior-subordinate relationship may be derived from the accused's *de facto* or *de jure* position of superiority.[59] Also, the Defence concedes that the principal question in determining whether Mr. Taylor was in a command position vis-à-vis the RUF, AFRC/RUF and "Liberian fighters" was whether Mr. Taylor had the ability to "effectively control" them.

67. In *Hadzihasanovic and Kubura*, the Trial Chamber summarised the elements to consider in establishing whether there is effective control, as established by jurisprudence, as follows:[60]

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[56] Prosecution Pre-Trial Brief, paras. 37-49.
[57] See below, command responsibility.
[58] *Celebici,* Trial Judgment, at para. 346; *Prosecutor v. Blaskic*, IT-95-14-A, Judgment, 29 July 2004, para. 484; *Prosecutor v. Alekovski*, IT-95-14/1-A, Appeals Chamber Judgment, 24 March 2000, para. 72.
[59] Prosecution Pre-Trial Brief, para. 160.
[60] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Judgment, 15 March 2006, para. 83 (footnotes omitted).

> "the official position of an accused, even if "actual authority, however, will not be determined by looking at formal positions only;" the power to give orders and have them executed; the conduct of combat operations involving the forces in question; the authority to apply disciplinary measures; the authority to promote or remove soldiers, and the participation of the Accused in negotiations regarding the troops in question."

68. Further, in the ICTR case of *Semanza* the Trial Chamber defined "effective control" as follows:[61]

> "Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a simple showing of an accused individual's general influence".

69. Mr. Taylor denies the existence of all three legal ingredients in respect of the RUF, AFRC/RUF and "Liberian fighters".

i) Superior-subordinate relationship

a. Liberian fighters

70. The Defence accepts that there were various groups of Liberian fighters fighting in Sierra Leone, but contends that the Prosecution has failed to clearly define which of these groups allegedly fell under Mr. Taylor's command at any particular time. The term "Liberian fighters", when used in the context of Liberian nationals engaged in the conflict in Sierra Leone, is amorphous and encompasses a large number of individuals allied to different groups often with competing interests. Although their number is unknown, Liberian fighters seem to have fought for all sides and regularly switched sides. President Kabbah affirmed that the Sierra Leonean Army had integrated a Unit called the Special Task Force (STF) which consisted of Liberian fighters belonging to the United Liberation Movement for Democracy in Liberia (ULIMO).[62]

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[61] *Prosecutor v. Semanza*, ICTR-72-20-T, Judgment, 15 May 2003, para 402 (emphasis added).
[62] A Statement by his Excellency the President Alhaji Dr. Ahmad Tejan Kabbah made before the Truth and Reconciliation Commission on Tuesday 5th August, 2003 ("President Kabbah's Statement"), paras 52-63.

71. The only information provided in this regard is set out in the paragraphs of the Prosecution Pre-Trial Brief cited below where the Prosecution state that the following Liberian fighters in Sierra Leone allegedly fell under Mr. Taylor's authority and control.

72. Paragraph 9 of the Prosecution Pre-Trial Brief refers to Mr. Taylor's Liberian subordinates who include: Benjamin Yeaten, Musa Sesay, Grace Minor, Joe Tuah, Roland Duoh, Christopher Varmoh, Momoh Gibba, Duopo Makerzon, Sampson Weah, and Zig Zag Marzah.

73. In paragraph 16, the Prosecution allege that the "the Accused exercised authority and control over Liberian fighters who participated with the RUF, Junta and AFRC/RUF throughout the armed conflict in Sierra Leone."

74. In paragraph 17, the Prosecution states that "[a]ll these organised armed groups, including the NPFL, had established chains of command, established headquarters and geographic areas over which they exercised control". (emphasis added)

75. Paragraph 24 states: "Most of the commanders of the composite force which initiated the conflict in Sierra Leone were members of the NPFL. The Accused was the superior commander over this composite force."

76. From the above it is unclear whether the Prosecution contend that all Liberian fighters in Sierra Leone including those individuals cited and NPFL members who "participated with the RUF, Junta and AFRC/RUF" were allegedly under Mr. Taylor's control. As confirmed by President Kabbah in his testimony before the Truth and Reconciliation Commission,[63] the Special Task Force ("STF") joined the AFRC/RUF forces after the AFRC coup. It is assumed that the Prosecution will not maintain that the STF, said to be sworn enemies of Mr. Taylor, came under the authority and control of Mr. Taylor due to their alliance with the AFRC/Junta.

77. Further, in paragraph 21 of their Pre-Trial Brief, the Prosecution submits:

[63] President Kabbah's Statement, para. 61-62.

> "After the Accused became President in 1997, he also exercised control and authority over organised armed groups and/or government forces and units in Liberia. The Accused exercised de facto authority over the organised armed groups, and de jure and de facto authority over the Liberian forces, to include the Armed Forces of Liberia (AFL), the Liberian National Police (LNP), specialized units within those forces such as the Special Operations Division (SOD), and other special units such as the Special Security Service (SSS), and the Anti-Terrorism Unit (ATU). The Accused used all of the abovementioned organised armed groups and forces as tools to implement and achieve the common plan."

78. It is unclear whether the Prosecution allege that Mr. Taylor sent these "organised armed groups and forces" to Sierra Leone or whether he allegedly used them in Liberia or in any other way. It is submitted that if the allegation is that Mr. Taylor sent these "organised armed groups and forces" to Sierra Leone, the Prosecution should have stated this more clearly. In any event, Mr. Taylor denies having sent any of these "organised armed groups and forces" to Sierra Leone or used them in any other way "to implement and achieve the common plan".

79. Moreover, Mr. Taylor denies that he had any *de facto* authority over unidentified organised armed groups, and the Defence cannot properly prepare without knowing which groups the Accused was supposed to have controlled.

80. In the absence of any further specification, the Defence understands the groups of Liberian fighters allegedly under Mr. Taylor's authority and control to be: the persons specifically mentioned in paragraph 16 of the Prosecution Pre-Trial Brief, the NPFL, the AFL, the LNP, the SOD, the SSS and the ATU. His alleged authority and control over the NPFL covers the period between 30 November 1996 and 2 August 1997 when he became President of Liberia. Thereafter, his alleged authority and control was over the other units in the Liberian forces. The Defence does not accept that Mr. Taylor has been properly charged with having authority and control over any other unidentified group of Liberian fighters.

b. AFRC/RUF

81. The Defence further denies the allegations in paragraphs 26 and 27 of the Prosecution Pre-Trial Brief that Mr. Taylor "exercised individual control and authority over the AFRC/RUF".[64] The Prosecution has not provided details of any relationship between Mr. Taylor and the AFRC and the allegation of an alleged superior-subordinate relationship is entirely unsubstantiated.

82. The Defence further interprets the Prosecution allegation that Mr. Taylor exercised authority and control over the "Junta – in particular the RUF component" as reading that Mr. Taylor merely exercised control over the RUF component of the Junta, not the AFRC.

c. RUF

83. The Prosecution has alleged that, during the period that Foday Sankoh was incarcerated in Nigeria, "Sankoh conveyed an order to his subordinates that they were to take orders from the Accused".[65] This is denied and Mr. Taylor rejects any suggestion that he has ever been in a position to give orders to the RUF fighters.

84. In further support of their allegation that Mr. Taylor exercised authority and control over the RUF, the Prosecution allege that the senior leaders of the RUF regularly deferred to Mr. Taylor on critical decisions. Paragraphs 28 and 46 state:

> "Senior leaders of the RUF, Junta – in particular the RUF component, and AFRC/RUF consulted with the Accused before they took major decisions and travelled to Liberia often to speak with the Accused. When tensions or fighting increased in Sierra Leone, these leaders contacted the Accused to get his direction, advice and counsel."
>
> "When the accused ordered senior level leaders of these groups to travel to Liberia to meet with him they did so. When the accused ordered them to provide personnel to fight with his forces in Liberia, those senior leaders always obeyed those orders. When the AFRC/RUF took UN peacekeepers hostage in 2000, the accused obeyed that order, but indicated that had it not been for the accused's order, he would not have released them."

[64] Prosecution Pre-Trial Brief, para. 26.
[65] Prosecution Pre-Trial Brief, para. 26.

85. Mr. Taylor denies issuing orders to any members of the RUF as alleged. There is a distinction between requesting and ordering. Exerting tremendous pressure on another party who then concedes their position is not tantamount to an order. Similarly, giving direction, advice and counsel is not tantamount to issuing orders. Mr. Taylor accepts that, at the personal request of Former Secretary-General of the United Nations, H.E. Mr. Kofi Annan, he exerted pressure on the RUF in the course of high level negotiations to release the UN peacekeepers. The negotiation process that led to their release was conducted under UN supervision. As a consequence of Mr. Taylor's persistence, the negotiations concluded successfully. The Prosecution is attempting to "spin" or distort the role played by Mr. Taylor in securing, through diplomatic means, the release of the peacekeepers by citing this as evidence that he exercised *de facto* control over the RUF.

86. In addition, the Defence submits that the Prosecution have deliberately set out to mischaracterise Mr. Taylor's ties with the RUF. The Defence concedes that diplomatic contacts between Mr. Taylor and the RUF existed. However, these interactions largely arose out of Mr. Taylor's efforts to move forward the peace negotiations and did not give rise to a superior-subordinate relationship. The legal standard for establishing such a relationship is high and to satisfy the required criteria the Prosecution needs to demonstrate that there was a chain of command. The Defence maintain that the RUF had its own chain of command and its own leaders did not extend to Mr. Taylor. Even if the Prosecution were able to demonstrate that Mr. Taylor happened to had influence over some individual RUF members, it is submitted that this does not give him the status of a superior over RUF personnel in general.

87. In a leading command responsibility Judgment of the ICTY, *Celebici*, the Prosecution contended that because the accused Delalic was in a position to "exercise considerable authority and control",[66] he could be held liable under Article 7(3) ICTY Statute (equivalent of Article 6(3) ICTR Statute), even though he had no real subordinates. The Prosecution asserted that:

[66] *Prosecutor v. Delalic et al,* Trial Judgment, IT-96-21-T, 16 November 1998, para. 609.

> "even if Zejnil Delalic is not characterised as a "superior" of the camp commander and considered to have been in a position to control him and the other perpetrators of offences, he would still have superior responsibility for the crimes committed in the prison-camp by virtue of the authority he exercised in relation to the prison-camp and the Konjic region. In its view, it is clear that he was one of the leading figures of authority in the region at that time, and that his power and influence extended to matters pertaining to the Celebici prison-camp..."

88. The Trial Chamber unanimously rejected such an argument, saying:[67]

> "The view of the Prosecution that a person may, in the absence of a subordinate unit through which the authority is exercised, incur responsibility for the exercise of superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a sine qua non for superior responsibility. The Trial Chamber is unable to agree with the submission of the Prosecution that a chain of command is not a necessary requirement in the exercise of superior authority. The expression "superior" in article 87 of Additional Protocol I is intended to cover "only ... the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter ... is under his control". Actual control of the subordinate is a necessary requirement of the superior-subordinate relationship. This is emphasised in the Commentary to Additional Protocol I."

89. The Trial Chamber accordingly rejected the Prosecution's argument that the Accused can exercise superior authority over non- subordinates that he can substantially influence in a given situation.

90. Moreover, in the *Semanza* case, the Trial Chamber rejected the Prosecution arguments seeking to impute criminal liability pursuant to Article 6(3) of the ICTR Statute as a result of the accused's 20 years as a bourgemestre, and the support and goodwill he enjoyed from the community. The Trial Chamber held: [68]

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[67] *Ibid*, para. 612 (emphasis added).
[68] *Prosecutor v. Semanza*, ICTR-72-20-T, Judgment, 15 May 2003, para 415.

> "The Chamber emphasizes that the Prosecutor's theory, which is similar to the approach taken and rejected in *Musema*, fails to take account of the correct legal standard. A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship involving an accused's effective control over the direct perpetrators. A simple showing of the accused's general influence in the community is insufficient to establish a superior-subordinate relationship."

91. The reasoning in *Semanza* was adopted in the *Cyangugu* Judgment, which was upheld on appeal.[69] Similarly, in acquitting the accused *Halilovic* of command responsibility, the ICTY Trial Chamber relied on reasoning from the Appeals Chamber in *Celebici*, and held that not even substantial influence would result in criminal liability, stating: [70]

> "A degree of control which falls short of the threshold of effective control is insufficient for liability to attach under Article 7(3). ' Substantial influence' over subordinates which does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising command responsibility and, therefore, to impose criminal liability."

92. The Defence therefore submit that, in order for the Prosecution to establish beyond a reasonable doubt that there was a superior-subordinate relationship between Mr. Taylor and any of the fighters in the Sierra Leonean war who were allegedly engaged in crimes, the Prosecution must establish that there was a chain of command between them, in that that Mr. Taylor had authority and control over them. To establish that Mr. Taylor had substantial influence over their decisions does not suffice to qualify him as a "superior" vis-à-vis the fighters on the ground in Sierra Leone.

ii) "knew or had reason to know"

93. As a preliminary note, the Defence submits that, if the Prosecution fails to establish that there is a superior-subordinate relationship, the elements of knowledge and failure to prevent or punish have become irrelevant considerations. However, the Defence makes the following submissions regarding the standard required.

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[69] *Prosecutor v. Ntagerura et al*, ICTR-99-46-T, Judgment, 25 February 2004, para. 628.
[70] *Prosecutor v. Halilovic*, IT-01-48-T, Judgment, 16 November 2005, para. 59.

94. The Prosecution states that "[a] showing that a superior had some general information in his possession, which would put him on notice of *possible* unlawful acts by his subordinates would be sufficient to prove that he 'had reason to know'. It is sufficient if the superior has notice of a "real and reasonably foreseeable risk" that crimes will occur."[71]

95. The Defence submits that the Prosecution's characterisation of the "had reason to know" requirement is incomplete. The Defence wishes to add the following important element, as established in *Celebici*, the leading case on command responsibility:

> "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates." "Neglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish."[72]

96. Also in *Hadzihasanovic and Kubura*, the Trial Chamber confirmed that "had reason to know" is not equivalent to "should have known". Therefore, "a superior cannot be held criminally responsible for neglecting to acquire knowledge of the acts of subordinates, but only for failing to take the necessary and reasonable measures to prevent or to punish."[73] In *Blaskic*, the Appeals Chamber held that a superior may be held responsible for deliberately refraining from finding out, but not for negligently failing to find out.[74]

97. Mr. Taylor accepts he received information regarding the situation in Sierra Leone in his official capacity as the President of a neighbouring country and a member of the ECOWAS Committee of Five. In the course of his official duties, Mr. Taylor obviously received information about the conflict in Sierra Leone, and was aware and sympathetic to the suffering of the people of that neighbouring Republic. However, as far as specific acts were concerned,

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[71] Prosecution Pre-Trial Brief, para. 166.
[72] *Prosecutor v. Delalic et al,* Trial Judgment, IT-96-21-A, 20 February 2001, para. 241; also: *Prosecutor v Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 62.
[73] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Judgment, 15 March 2006, para. 96 (footnotes omitted).
[74] *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 406.

the Prosecution is put to proof that they were committed by subordinates of the Accused and that he "had reason to know" they had committed such crimes. Those allegations are denied.

iii) failure to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof

98. The Prosecution states: "A civilian or a military superior is liable if it is proved that he had the power to prevent or punish [which includes the power to turn over for investigations]."[75] Clearly, a civilian or a military superior cannot be liable unless the Prosecution establishes all the ingredients of liability as a superior, namely: (1) that there is a subordinate-superior relationship; (2) he knew or had reason to know that the superior knew or had reason to know that the criminal act had been, or was about to be committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

99. Mr. Taylor denies that he had the material ability to prevent or punish the commission of the principal crimes. Given the lack of jurisdiction over conduct in a foreign territory not to mention the geographic distance between him and the location where the crimes allegedly occurred, it would not have been possible for him to implement any measure in neighbouring country Sierra Leone.

100. As conceded by the Prosecution, at the very least, from about 1993 or 1994 until about 1996, ULIMO, "was in control of the border areas in Lofa County, cutting off a main supply and access route to Sierra Leone".[76] During this period, when the border between Liberia and Sierra Leone was effectively closed, it would be absurd to consider that Mr. Taylor had any material possibility to prevent any crime or punish any perpetrators in Sierra Leone. Even on the Prosecution's case, it should be accepted that during this period at least the Accused did not have "effective control" over those committing crimes in Sierra Leone.[77]

[75] Prosecution Pre-Trial Brief, para. 161.
[76] Prosecution Pre-Trial Brief, para. 25.
[77] Prosecution Pre-Trial Brief

F. Aiding and Abetting

101. The Defence accepts the legal definition of aiding and abetting given by the Prosecution in paragraphs 151-154 of their Brief. However, where the Prosecution quote *Furundzija*, saying that aiding and abetting "*may* consist of moral support or encouragement of the principals in their commission of the crime", it is important to emphasise the word "may". Whether the circumstances individually or cumulatively amount to aiding and abetting requires a case-by-case consideration. Whether moral support or encouragement is sufficient to amount to aiding and abetting depends on the relationship between the aider and abetter and the principal: "The supporter must be of a certain status for this to be sufficient for criminal responsibility".[78]

102. The Prosecution further omit the very important requirement of the *actus reus* of aiding and abetting, namely "that the support of the aider and abettor has a substantial effect upon the perpetration of the crime".[79]

103. Mr. Taylor is alleged to have aided and abetted the crimes of the RUF, Junta, AFRC/RUF by providing "continuing assistance, including arms, ammunition and other material, manpower, military training, facilities and safe havens in Liberia, strategic and tactical advice, direction and encouragement, and other assistance".[80] Allegedly, Mr. Taylor is said to have received diamonds in return for this assistance.[81]

104. Mr. Taylor denies these allegations. The Defence further submit that these allegations, whether taken individually or cumulatively do not give rise to culpability on the basis of aiding and abetting.

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[78] *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, 10 December 1998, para. 209.
[79] *Prosecutor v. Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para, 48.
[80] Prosecution Pre-Trial Brief, para. 50.
[81] Prosecution Pre-Trial Brief, para. 51.

i) Arms and Ammunition

105. Mr. Taylor refutes any allegation that he was personally involved in any weapons trade to Sierra Leone at any time during the Indictment period. The Prosecution is put to strict proof and must accordingly establish, not only that weapons were delivered to Sierra Leone from Liberia, but also that Mr. Taylor was personally involved in any such illegal weapons trade.

ii) Manpower

106. Mr. Taylor denies providing manpower to the RUF, Junta and AFRC/RUF at any time during the Indictment period. The Prosecution is put to strict proof on this issue.

iii) Military Training

107. The Defence put the Prosecution to strict proof on this issue. The Defence submits that the Prosecution must establish, not only that training sessions were held in Liberia but also that Mr. Taylor was involved in the operation thereof.

iv) Facilities and Safe Havens in Liberia

108. The Defence put the Prosecution to strict proof on this issue. The Defence concedes that Mr. Taylor provided a guest house in Monrovia to the RUF leadership during the peace process in the context of the Lome Peace Accord. He did so pursuant to his role as a Representative of the ECOWAS Committee of Five, a committee which was mandated to try and negotiate a peace settlement between the warring factions in Sierra Leone. In this capacity, Mr. Taylor held diplomatic talks with the RUF, which largely took place in Liberia. During the course of these communications, Mr. Taylor was in regular contact with the Former Secretary-General of the United Nations, H.E. Mr. Kofi Annan, President Kabbah, the other members of the ECOWAS Committee of Five. Mr. Taylor's efforts to bring back peace to Sierra Leone and the several meetings he had with RUF representatives are well documented in UN reports.

iv) Strategic and Tactical Advice, Direction and Encouragement

109. The Defence put the Prosecution to strict proof to establish all allegations in this regard.

v) Other Assistance

110. The Defence put the Prosecution to strict proof on this issue.

VI. Conclusion

111. Mr. Taylor pleaded not guilty to counts 1 – 11 in the Amended Indictment at his first appearance before the SCSL in Freetown on 3 April 2006. He is not guilty of any of the crimes alleged against him. Accordingly he puts the Prosecution to strict proof of its case against him.[82]

Respectfully Submitted,

Karim A. A. Khan
Lead Counsel for Mr. Charles Taylor
Dated this 26th Day of April 2007

[82] At the time of filing this Defence Pre-Trial Brief, the Defence has not had the opportunity of taking final instructions from the client in relation to many issues. The reasons for this have been adequately ventilated in previous filings. (see for example adequate time motion and motion for reconsideration). In addition, many important Prosecution expert reports have not yet been disclosed to the Defence. The Defence therefore reserves the right to add to or amend this Pre-Trial Brief in due course, with the leave of the Trial Chamber.