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SCSL-03-01-T
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SPECIAL COURT FOR SIERRA LEONE

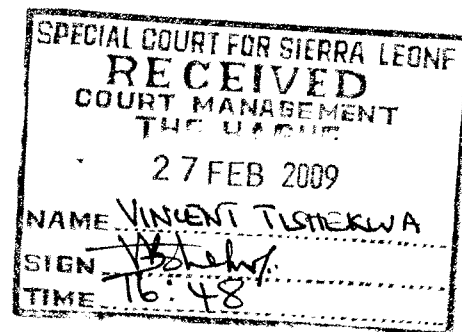
TRIAL CHAMBER II

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

DECISION ON PUBLIC URGENT DEFENCE MOTION REGARDING A FATAL
DEFECT IN THE PROSECUTION'S SECOND AMENDED INDICTMENT RELATING
TO THE PLEADING OF JCE -
DISSENTING OPINION OF JUSTICE RICHARD LUSSICK

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DISSENTING OPINION OF JUSTICE RICHARD LUSSICK

Introduction

1. I have had the opportunity of reading the Majority Decision of my learned colleagues and have to say that I agree with their finding that the Defence has shown good cause for the late filing of the Motion. I dissent, however, from their finding that the joint criminal enterprise responsibility of the Accused has been properly pleaded in the Indictment.

2. I agree with the views expressed in the Majority Decision regarding the applicable law on the pleading requirements for indictments generally and for joint criminal enterprise specifically. Such views are well founded in the international jurisprudence of the *ad hoc* tribunals. Nevertheless, a proper application of those pleading principles leads to the conclusion, in my opinion, that the Indictment has been defectively pleaded with respect to joint criminal enterprise.

Defective Pleading of Joint Criminal Enterprise

3. The initial Indictment in this case was filed on 7 March 2003¹. An Amended Indictment was filed with leave on 17 March 2006. In that indictment, joint criminal enterprise is pleaded in the following terms:

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.*²

¹ Pleading of joint criminal enterprise in the initial Indictment is mentioned *infra* in the “Remedy” section.

² Amended Indictment dated 16 March 2006, filed on 17 March 2006, para. 33 [emphasis added].



4. A Second Amended Indictment - which did not alter the wording of the pleading of joint criminal enterprise contained in the Amended Indictment - was filed on 29 May 2007³. (Hereinafter, unless otherwise indicated, a reference to "Indictment" will be a reference to the Second Amended Indictment, which is the current indictment.)
5. It is notable that the Indictment fails to identify any specific common purpose in respect of which the Accused is alleged to be criminally responsible. Hence, in my view, the Indictment is not sufficiently specific to clearly inform the Accused of the case he is required to meet in relation to joint criminal enterprise and is thus defective.
6. It is well established in international law that an indictment alleging the participation of the accused in a joint criminal enterprise must plead the nature of the common purpose of the joint criminal enterprise as a material fact, otherwise the indictment is defective⁴. The Appeals Chamber has found that "[e]stablished case law on the pleading of joint criminal enterprise requires that an indictment must allege the nature of the enterprise, the time period, the persons involved, and the nature of the accused's participation in the joint criminal enterprise."⁵ The Appeals Chamber has also found that "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".⁶

³ Second Amended Indictment, para 33.

⁴ *Kupreskic* Appeal Judgement, paras 88, 114; *Blaskic* (AC) Judgement, 29 July 2004, para 220; *Kronjelac* (AC) Judgement, 17 September 2003, para 116; *Ntagerura* (AC) Judgement, 7 July 2006, para 24; *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, 28 February 2005, ["Kvočka Appeal Judgement"], paras 28, 42; *Niyitegeka* Appeal Judgement, para. 194; *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; *Prosecutor v. Hadzihasanovic et al*; Case No. IT-01-47-PT, Decision of Form of Indictment, 7 December 2001, para 10; *Gacumbitsi* Appeal Judgement, para. 167; *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36-PT, Decision on Objections by Radoslav Brdanin to the Form of the Amended Indictment, 23 February 2001, para 13; *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; *Cyangugu* Appeal Judgement, para. 23.

⁵ *AFRC Appeal Judgement*, footnote 164.

⁶ *AFRC Appeal Judgement*, para 84.

7. On 3 August 2007 the Prosecution filed an Amended Case Summary, no doubt with the intention compensating for the deficiencies of the Indictment. The Prosecution claims that by virtue of this Amended Case Summary it cannot be said that “the Prosecution has failed to allege a common purpose to commit a crime within the Statute⁷.” The Amended Case Summary provided (*inter alia*) the following details of the alleged common purpose:

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 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.⁸

8. The specific objective of the joint criminal enterprise detailed in the Amended Case Summary is obviously a material fact which should have been pleaded in the Indictment. The Amended Case Summary purports to change the count against the Accused by substituting a common purpose which was not charged in the Indictment. In my opinion, this cannot cure the defect in the Indictment. Material facts must be pleaded in an indictment - not in a case summary - and can only be amended by leave of the Trial Chamber under Rule 50. Since the indictment is the primary accusatory instrument, it is not possible for the Prosecution to cure a defective indictment by amending a case summary⁹.
9. I disagree with the Majority Decision that “[r]eading the Indictment as a whole, (...) the Prosecution has adequately fulfilled the pleading requirements of the alleged Joint Criminal Enterprise in the Indictment.” One cannot argue with the proposition that the Indictment should be read as a whole, but I do not agree that in the present case, reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Indictment is sufficient to fulfil the requirements for pleading joint criminal enterprise.

⁷ Response, para. 10.

⁸ Case Summary Accompanying the Second Amended Indictment (“Amended Case Summary”), para 42.

⁹ *Prosecutor v. Hadzihasanovic et al*; Case No. IT-01-47-PT, Decision of Form of Indictment, 7 December 2001, para 12; *Prosecutor v. Rasevic*, IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004.

10. (i) Para. 5 of the Indictment 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.*¹⁰

(ii) Paras 9, 14, 22, 23, 28, under the heading of the particulars of each count of the Indictment, make reference to “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.”¹¹

(iii) Para. 33 of the Indictment states that:

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.*¹²

11. The plain language of those paragraphs does not, in my opinion, support the Majority finding that paragraph 5 provides that the common plan, design or purpose of the joint criminal enterprise was “to terrorize the civilian population of the Republic of Sierra Leone.” Not only does paragraph 5 fail to specify any purpose for the joint criminal enterprise, it does not mention joint criminal enterprise at all. That is because paragraph 5 is not concerned with joint criminal

¹⁰ Second Amended Indictment, para. 5 [emphasis added].

¹¹ Second Amended Indictment, paras 9, 14, 22, 23, 28 [emphasis added].

¹² Second Amended Indictment, para. 33 [emphasis added].



enterprise but is a count charging acts of terrorism, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II. Bearing in mind that the Amended Case Summary, which particularises “a common, plan, design or purpose to carry out a criminal campaign of terror” was not in existence when the Indictment was filed, there is no more reason for reading paragraph 33 together with paragraph 5 than there is for reading paragraph 33 together with any other paragraph of the Indictment.

12. Furthermore, paragraph 5, when read with paragraph 33, does not clearly identify a common purpose. The campaign “to terrorize the civilian population of the Republic of Sierra Leone” would more likely be the means of achieving a common purpose rather than an end in itself. Indeed, the Amended Case Summary relied upon by the Prosecution alleges an objective different from paragraph 5, namely that the Accused participated in the “criminal campaign of terror, as charged in the Second Amended Indictment *in order to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone*”¹³.
13. Moreover, in view of the difference between the objective stated in paragraph 5 of the Indictment and the objective stated in the Amended Case Summary, it follows that not even the Prosecution would agree with the Majority theory of a common purpose.
14. I do not interpret the Appeals Chamber Decisions in *Norman* and in the *AFRC Appeal Judgement* as meaning that the Appeals Chamber has adopted pleading principles which are any less stringent than those of other international courts nor, in particular, that it has departed from well established pleading principles by deciding that the common purpose of a joint criminal enterprise need not be clearly specified in an Indictment. Such an interpretation would obviously be an infringement of the statutory right of the Accused to be informed clearly of the charges against him so that he may prepare a defence.
15. My final point is that the Accused should not be required to undergo the brain-twisting exercise of reading together paragraphs 5, 9, 14, 22, 23, 28, 33 and 34 of the Indictment in order to fathom what facts are most likely to form the basis for

¹³ See Amended Case Summary, para 42; see also Motion, para 27.



his alleged joint criminal enterprise liability. An indictment which requires an accused to do so is obviously defective in that it fails to clearly inform the accused of the case he is required to meet¹⁴.

Remedy

16. Having found the Indictment to be defective in respect of its pleading of joint criminal enterprise, it is nonetheless clear that the Accused was given ample notice by the Prosecution in its various supporting documents, initial indictment and opening statement that he was to be charged with participation in a joint criminal enterprise, even though the objective of that enterprise was not always expressed in the same way.
17. The initial Indictment, filed on 7 March 2003, stated that “the common plan, purpose or design (joint criminal enterprise)” 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.”¹⁵
18. The Amended Indictment filed on 17 March 2006, and the Second Amended Indictment filed on 29 May 2007, charged the Accused with being criminally responsible for crimes which “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”¹⁶, but no common plan, design or purpose was specified.
19. The initial Case Summary filed on 7 March 2006 provided the following details of the common plan, design or purpose:

42. This shared common plan, design or purpose was to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra

¹⁴ *Kupreskic* Appeal Judgement, paras 88,114; *Kvocka* Appeal Judgement, para 28; *Ntakirutimana* Appeal Judgement, para 470; *Niyitegeka* Appeal Judgement, para 195; *Ntageruwa* Appeal Judgement, para 22.

¹⁵ Indictment, filed on 7 March 2003, para 23.

¹⁶ See paragraph 33 of both documents.



Leone, in particular the diamonds, were to be provided primarily to the ACCUSED and other persons outside Sierra Leone.

43. The Common plan, design or purpose included taking any actions necessary to gain and exercise physical and political control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to those persons engaged in achieving the objectives of the common plan, design or purpose. This common plan, design or purpose amounted to, or involved the commission of, the crimes alleged in the Amended Indictment. The alleged crimes, amounting to or involved within the common plan, design or purpose, were either intended by the ACCUSED, or were a foreseeable consequence of the common plan, design or purpose.

44. The ACCUSED participated in this common plan, design or purpose as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone, in particular diamonds, to destabilize the Government of Sierra Leone in order to facilitate access to such mineral wealth, and to install a government in Sierra Leone that would be well disposed toward, and supportive of, the ACCUSED's interests and objectives in Liberia and the region.

20. The Prosecution's Pre-Trial Brief, filed on 4 April 2007, set out the alleged joint criminal enterprise responsibility of the Accused at some length. The common plan, design or purpose was particularised as follows:

The Emergence of the Common Plan, Design or Purpose (Common Plan)

Prior to the commencement of the armed conflict in Sierra Leone, and throughout the armed conflict, the Accused participated in a common plan, design or purpose to gain and maintain political power and physical control over the territory of Sierra Leone, in particular the diamond mining areas, in order to exploit the natural resources of the country. Implementation of this common plan included overthrowing the government of Sierra Leone in order to facilitate access to its natural resources and to install a government that would be well disposed toward, and supportive of, the Accused's interests and objectives in Liberia and the region.¹⁷

¹⁷ Exs. 1.011; 1.018.



This common plan amounted to or involved the commission of the crimes alleged in the Amended Indictment (Indictment). From its inception, the Accused and the other participants in the common plan used criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone. These criminal means involved the campaign of terror waged against the civilian population of Sierra Leone, including widespread and continuing killings, rapes, beatings and mutilations, enslavement of the civilian population for use as fighters, "bush wives" and forced labour, looting and burning of civilian property. Children were used to carry out this criminal campaign and in active hostilities.¹⁸

The Accused, as leader of the NPFL was instrumental in the creation of this common plan. The Accused and Foday Sankoh, the leader of the RUF (Revolutionary United Front), made common cause to assist each other in their respective countries to achieve the common plan. From the outset, the Accused and his forces worked virtually as one with Sankoh and his RUF forces, and with the organised armed groups and forces that later evolved. To that end, Sankoh and his RUF forces assisted the Accused during the Liberian armed conflict which commenced in 1989.¹⁹

21. The Amended Case Summary, filed on 3 August 2007, alleged joint criminal enterprise in the following terms:

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 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 30 November 1996 through about 18 January 2002, the following crimes were within the common plan, design or purpose: acts of terror

¹⁸ Wits. TF1-020; 071; 139; 227; 334; 336; 366; 532; Ellis. Exs. 1.020; 1.021; 1.067; 1.082; 1.095; 1.152; 1.155; 1.156; 1.157; 1.159; 1.169; 1.170; 1.177; 1.178; 1.184; 1.295.

¹⁹ Wits. TF1-168; 274; 275; 515; 532; 542; Ellis. Exs. 1.058; 1.138; 1.141; 1.157; 1.232; 1.254; 1.261; 1.269.



against civilians in Sierra Leone; conscription, enlistment and use in active hostilities of children under the age of 15 years; enslavement; 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 his awareness that these were foreseeable consequences.

22. The Prosecutor, in his opening statement on 4 June 2007, addressed joint criminal enterprise in this way:

The accused is responsible the development and execution of a plan that caused the death and destruction in Sierra Leone. That plan, formulated by the accused and others, was to take political and physical control of Sierra Leone, in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to facilitate that exploitation....within that overall plan there were, of course, sub-plans and strategies and operations, and the execution of that plan, of course, changed and varied in its tactics due to the unfolding events and the resistance that it faced.²⁰

Further on in his opening statement, the Prosecutor asserted that “the evidence will show that the accused’s plan to control territory in Sierra Leone through a campaign of terror began at least in 1991...”²¹

Later in his address, the Prosecutor reiterated that

A plan was there formulated by the Accused and others to take over political and physical control of Sierra Leone in order to exploit its abundant natural resources and to establish a friendly or subordinate government there to permit—to facilitate this exploitation. This was part of a larger strategy that included helping other militarily in their respective revolutions to take over their respective countries, and the first one was to be Liberia...The agreement made by the accused and Sankoh was to begin...in Liberia with the help of Sankoh’s forces, and Liberia would then be used as a base from which to move into Sierra Leone with the help of the forces of the accused...access to

²⁰ Prosecution Opening Statement, 4 June 2007, p. 30, lines 9-20.

²¹ ²¹ Prosecution Opening Statement, 4 June 2007, p. 34, lines 9-12.

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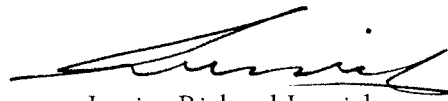
Sierra Leone's abundant resources was a primary objective, but Sierra Leone would also be a source of manpower.²²

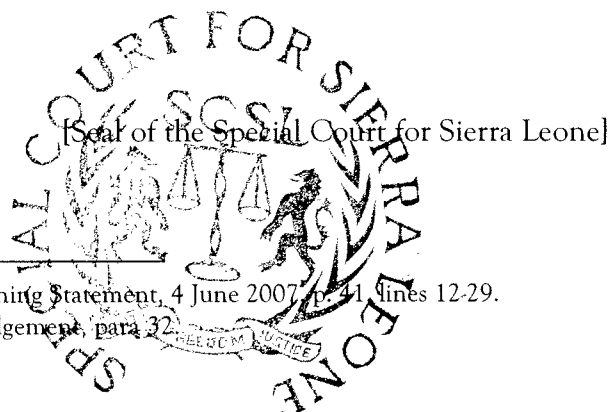
23. Thus, notwithstanding the defective indictment, an appraisal of the above material leaves no doubt that the Accused was put on notice at a very early stage in the case that he was going to have to answer an allegation of participating in a joint criminal enterprise. Although there are some obvious differences in the way the various materials describe the common purpose, such divergences are not so diffuse as to deprive the Accused of a fair opportunity to prepare his defence. Accordingly, I believe the justice of the case would be met by ordering the Prosecution to amend the indictment.²³

Disposition

24. For the foregoing reasons, I would have determined as follows:

- (i) The claim of the Defence that joint criminal enterprise is defectively pleaded in the Second Amended Indictment is upheld.
- (ii) The Defence prayer for severance is denied.
- (iii) The Prosecution is ordered to file within 14 days a further amended indictment which pleads clearly and unambiguously as a material fact the common plan, design or purpose of the joint criminal enterprise in which the Accused is alleged to have participated.


Justice Richard Lussick



²² Prosecution's Opening Statement, 4 June 2007, p. 41, lines 12-29.

²³ Kvočka Appeal Judgement, para 32.