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SCSL-03-01-T
(24678-24685)

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THE SPECIAL COURT FOR SIERRA LEONE

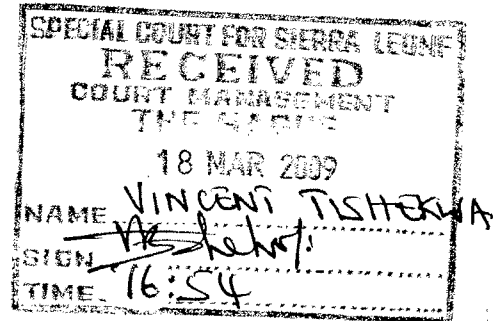
In Trial Chamber II

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

Registrar: Mr. Herman von Hebel

Date: 18 March 2009

Case No.: SCSL-2003-01-T



THE PROSECUTOR

-v-

CHARLES GHANKAY TAYLOR

PUBLIC

**DEFENCE REPLY TO THE PROSECUTION'S RESPONSE TO THE DEFENCE'S APPLICATION
FOR LEAVE TO APPEAL THE 27 FEBRUARY MAJORITY DECISION REGARDING THE
PLEADING OF JCE IN THE SECOND AMENDED INDICTMENT**

Office of the Prosecutor:

Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

Counsel for Charles G. Taylor:

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

I. INTRODUCTION

1. This is the Defence's Reply to the "Prosecution Response to 'Public with Annexes Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE'."¹
2. The procedural history leading up to both the *Application*² and the *Response to the Application* as set out in Paragraph 2 of the *Application* is incorporated herein as if set out fully below and so, too, are all arguments and averments made in the *Application*.³
3. The Defence has considered the *Response to the Application* and is left with the unwavering conviction that it only serves to reinforce why the relief sought by the *Application* should be sustained.

II. ARGUMENTS

A. The Applicable Standard under Rule 73(B): Exceptional Circumstances and Irreparable Prejudice

(i) Exceptional Circumstances

4. The view is expressed in the *Response to the Application* that the Defence has failed to demonstrate the existence of "exceptional circumstances" warranting leave to appeal within the meaning of Rule 73(B).⁴ The basis for that assertion according to the Prosecution is that our Appeals Chamber has already considered the "specific issue of the pleading of JCE" and, as such, "[t]here is no need for the Appeals Chamber to further address these issues in an interlocutory matter [and] therefore no 'exceptional circumstances' arise."⁵ Reference here to prior consideration of "these issues" by the Appeals Chamber undoubtedly is to the AFRC Appeals Judgement.⁶

¹ *Prosecutor v. Taylor*, SCSL-03-01-T-762, "Prosecution Response to 'Public with Annexes Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE'," 13 March 2009 (*Response to the Application*).

² *Prosecutor v. Taylor*, SCSL-03-01-T-754, *Defence Application for Leave to Appeal The Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 2 March 2009 (*Application*).

³ A notable occurrence between the filing of the *Application* on 2 March 2009 and the *Response to the Application* on 13 March 2009 was the filing of *Prosecutor v. Taylor, Prosecutor v. Taylor*, SCSL-03-01-T-761, *Corrigendum: Decision on Public Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE – Dissenting Opinion of Justice Richard Lussick*, 12 March 2009 (*Corrigendum*).

⁴ *Response to the Application*, paras. 17 – 18.

⁵ *Ibid.*, para. 18.

⁶ *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu*, SCSL-04-16-A, *Judgment*, 22 February 2008, filed on 3 March 2008 ("AFRC Appeals Judgement").

5. With respect, the Prosecution's position is untenable and devoid of merit in its entirety, primarily because it ignores the distinguishing procedural, factual, and legal issues which are unique to this case and the JCE issue(s) *sub judice* vis-à-vis those that were considered by the Appeals Chamber in the AFRC appeal. Some of those issues are delineated in Paragraphs 6 and 9 of the Application and need not be expressly repeated herein. There is, however, an additional and equally important unresolved issue which has pervaded the JCE submissions thus far and re-surfaced as a consequence of the *Response to the Application*, and which, in the Defence's view, further confirms the existence of "exceptional circumstances" warranting leave to appeal.
6. That issue and the subsidiary ones which it implicates may thus be stated: (i) are the secondary accusatory documents and/ or pronouncements in this case (e.g., the Case Summary, the Amended Case Summary, the Prosecution's Opening Statement and the Prosecution's Pre-Trial Brief) of any legal significance when evaluating the sufficiency of the notice given to the Accused of the material elements of the JCE? (ii) If they are of legal significance as such, then for what purpose are they significant (i.e., is their degree of significance such that they can serve to cure defects in the pleading of JCE in the Indictment⁷ at bar)? (iii) If they are of any legal significance, is it relevant to the issue of what notice has been given the Accused to consider the consistency, or lack thereof, in the pleading or articulation of the "common purpose" of the JCE in those secondary instruments/ pronouncements? (iv) If they are of any legal significance, is it relevant to the issue of what notice has been given the Accused to consider the consistency, or lack thereof, in the pleading or articulation of the time or period over which the criminal enterprise is alleged to have existed in those secondary instruments/ pronouncements? (v) Is there error to be found, where the Majority of the Trial Chamber concludes, on the one hand, that the Prosecution's intention to rely on JCE liability in this case is evident from such instruments⁸ and fails, on the other hand, to address the inconsistent and constantly-evolving manner in which the objective or "common purpose" of the JCE has been articulated from one secondary instrument to the other?

⁷ Use of "Indictment" herein should be read always as referring to the "Second Amended Indictment."

⁸ Impugned Decision, para. 64.

7. The *Response to the Application* states that, “Assuming, *arguendo*, the particulars complained of should have been in the Indictment instead of in the Amended Case Summary, as discussed below the defect has been cured and the Accused is on notice of the case against him.”⁹ Relying on jurisprudence from the ICTR and ICTY, the Majority’s finding from the language of the Indictment that JCE has been properly pleaded at bar, and on pronouncements in the Dissenting Opinion to the effect that the secondary instruments gave notice to the Accused “that he was going to have to answer an allegation of participating in a [JCE],”¹⁰ the Prosecution expressly argues (and not for the first time)¹¹ that defects in the pleading of JCE in the Indictment can be cured by these secondary instruments/pronouncements.¹² The problem with such a position on the face of the current record is that it diverges and is clearly inconsistent with the approach that has been adopted by the Majority in the Impugned Decision.
8. It is stated clearly in the Impugned Decision that the Indictment is the primary accusatory instrument and other accusatory instruments cannot add charges or *material facts* not pleaded in the Indictment [emphasis added].¹³ Furthermore, the appearance of material facts in a Case Summary cannot serve as a substitute for the pleading of such facts in the Indictment.¹⁴ The Case Summary is acknowledged to primarily be a document that is intended for the confirmation stage of an indictment.¹⁵ Additionally, and of no small significance, is the acknowledgement by the Majority that “a specific and unambiguous indictment is an essential prerequisite to a fair and expeditious trial.”¹⁶ It is thus clear from the Impugned Decision that the ultimate conclusion that JCE has been properly pleaded in this case derived from the Majority’s review of the four corners of the Indictment, and not from any secondary accusatory document or pronouncement.
9. Of note at this juncture is this same Trial Chamber’s view regarding alleged defects in the pleading of JCE in the AFRC trial that, “As with other pleading failures, such a defect may

⁹ *Response to the Application*, para. 18.

¹⁰ Dissenting Opinion, para. 23.

¹¹ See, for example, Consequential Response, paras. 5 -10, esp., paras. 20, 21 and 22

¹² *Response to the Application*, paras. 19 – 22. See, also, Paragraph 23, stating that, “The Defence need only look to the Indictment and the *Amended Case Summary* to inform themselves [*sic*] as to the details of the JCE allegations [emphasis added].”

¹³ Impugned Decision, para. 58.

¹⁴ *Ibid.*, para. 61.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, para. 59.

be cured by the provision of timely, clear, and consistent information, for example in a pre-trial brief,” adding further that “[n]o such timely, clear or consistent information was provided to the Defence and the Defence has specifically objected to the pleading of the JCE in the Indictment.”¹⁷ That view seemingly suggests that defects in the pleading of JCE in an indictment can be cured by “timely, clear, and consistent information” in secondary accusatory documents. Indeed, the Appeals Chamber viewed the issues, as such, when it expressly declined to pronounce on that specific issue in the AFRC Appeals Judgement, stating that, “The Appeals Chamber having concluded that joint criminal enterprise was not defectively pleaded in the Indictment, need not address the Trial Chamber’s finding that the Prosecution failed to cure the defective pleading of JCE.”¹⁸ The Defence submits that this issue is now ripe for consideration by the Appeals Chamber.

10. The fundamental nature of that and other related issues and their currently unresolved status forms the basis for the Defence assertion that “exceptional circumstances” exist, inasmuch as there would be gaps in the jurisprudence of the Court if no pronouncement from the Appeals Chamber regarding the issues (within the context of the current legal, factual, and procedural record) is forthcoming.

(ii) Irreparable Prejudice

11. The *Response to the Application* is wholly deficient in its consideration of the “irreparable prejudice” which the Defence maintains has resulted and would result, as a consequence of the Impugned Decision. In this regard, it states that “The Defence claims to have suffered prejudice are unmeritorious and should be dismissed. The Defence need only look to the Indictment and the Amended Case Summary to inform themselves [*sic*] as to the details of the JCE allegations.”¹⁹ It goes further by adding that, “Tactical or strategic choices by the Defence to ignore the particulars of the JCE in the Amended Case Summary, do not give rise to lack of notice and any prejudice thereby inflicted upon the Accused by the Defence cannot give rise to irreparable prejudice.”²⁰
12. The Defence has already addressed the issue of the confusing legal principles that obtain on the current record regarding the legal significance (or lack thereof) of the secondary

¹⁷ AFRC Trial Judgement, para. 82, omitting citations therein.

¹⁸ AFRC Appeals Judgement, para. 86.

¹⁹ *Response to the Application*, para. 23.

²⁰ *Ibid.*

accusatory instruments in this case. How then can blame lie on the doorsteps of the Defence when the Majority of the Trial Chamber expressly suggests that the proper approach is to consider only the four corners of the Indictment, while the Prosecution has recurrently argued that the Defence should have had recourse to secondary pronouncements and/ or instruments when discerning all material elements of the JCE in this case? There is the additional fact that even those secondary accusatory instruments evidence a pleading regime of the objective or “common purpose” of the JCE that is ever-evolving and far from consistent. Indeed, that fact has clearly been acknowledged by the Dissenting Opinion inasmuch as “the objective of [the JCE] was not always expressed in the same way”²¹ in those instruments and “there are some obvious differences in the way the various materials describe the common purpose.”²²

13. Under these circumstances, the Defence reiterates its position that it has already been prejudiced by, *inter alia*, the uncertainty occasioned by the fourteen-month delay between the filing of the Motion and the rendering of the Impugned Decision, and this prejudice stands to be irreparable because of, among other things, the adverse effect on the Accused’s legal and investigative resources that defending against JCE as a mode of liability in relation to all eleven counts would have on the Accused’s ability to properly defend against the other modes of liability under Articles 6(1) and 6(3) of the Statute.

III. Conclusion

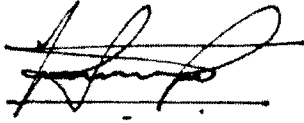
14. For all of the foregoing reasons, the Defence respectfully submits that it has satisfied the conjunctive standard of Rule 73 (B), requiring a demonstration of both exceptional circumstances and irreparable prejudice in order for leave to appeal to be granted.
15. The Defence consequently and respectfully requests that the Trial Chamber grant it leave to appeal the Impugned Decision.

²¹ Dissenting Opinion, para. 16.

²² *Ibid.*, para. 23.

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Respectfully submitted,

A handwritten signature in black ink, appearing to be 'C. Griffiths', written over two horizontal lines.

For Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 18th day of March 2009,
The Hague, The Netherlands

List of Authorities

SCSL

Prosecutor v Taylor

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

Prosecutor v. Taylor, SCSL-03-01-T-762, *Prosecution Response to 'Public with Annexes Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE'* 13 March 2009.

Prosecutor v. Taylor, SCSL-03-01-T-754, *Defence Application for Leave to Appeal The Decision on Urgent Defence Motion regarding a Fatal Defect in the Prosecution's Second Amended Indictment relating to the Pleading of JCE*, 2 March 2009.

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

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

AFRC

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

Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu, SCSL-04-16-A, *Judgment*, 22 February 2008, filed on 3 March 2008 ("AFRC Appeals Judgement").