

# Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone

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## Abstract

It was recognized that it was critical to the process of national reconciliation and the maintenance of peace in Sierra Leone that the Special Court for Sierra Leone (SCSL) be a strong and credible court operating in accordance with international standards of justice, fairness, and due process of law. This article assesses the fulfilment of this mandate through an examination of the fairness of the *RUF* trial as illustrated through two issues: the interpretation of the accused's right to be informed of the nature and cause of the charges and the approach taken by the Trial Chamber and the Appeals Chamber in assessing the evidential links between the accused and the crimes pursuant to the joint criminal enterprise (JCE) mode of liability. First, the article discusses the decisions that led to the omission of 250 charges from the indictment and their introduction into the trial through late evidential disclosures after the commencement of the prosecution case. Second, the article examines the way in which the charges, in a majority of cases, were found to be part of a common criminal purpose without a sufficient nexus being established to the accused or any member of the alleged JCE. The article concludes that the judicial approach to these issues abandoned the safeguards contained in the jurisprudence developed at the International Criminal Tribunal for Rwanda, giving rise to a trial that failed to adhere to international standards of justice, fairness, and due process, leading to manifestly unjust convictions.

## Key words

international criminal law; joint criminal enterprise; membership of a group; right to be informed of charges; Special Court for Sierra Leone

The mandate of the Special Court for Sierra Leone (SCSL) was from conception premised on the completion of fair trials in accordance with international standards of justice. As recognized on 14 August 2000, with the adoption by the UN Security Council of Resolution 1315 as a step towards the creation of the Special Court, it was critical to the process of national reconciliation and the maintenance of peace in

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Sierra Leone that the SCSL be a 'strong and credible court' operating in accordance with 'international standards of justice, fairness and due process of law'.<sup>1</sup> Having begun its trials in 2004, the SCSL could draw on ten years of international criminal jurisprudence from its sister tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Presumably it was this jurisprudence, alongside that reflecting human rights principles as understood in national jurisdictions, which the UN Security Council and the drafters of the court's founding instruments had in mind as defining international standards, reflecting an expectation that the trials would produce just verdicts, where justice was done and seen to be done.

This article assesses the fulfilment of this mandate by examining the trial of ex-members of the Revolutionary United Front (RUF). It focuses on two critical issues: (i) Trial Chamber I's interpretation of an accused's right to be informed of the nature and cause of the charges; and (ii) the approach taken by the Trial Chamber and the Appeals Chamber in assessing the evidential links between the accused and the crimes pursuant to the joint criminal enterprise (JCE) mode of liability. The authors, respectively defence counsel for the first and third accused (Issa Hassan Sesay and Augustine Gbao), conclude that the judicial approach to these issues in the *RUF* trial abandoned the safeguards contained in the jurisprudence developed at the ICTY and the ICTR, giving rise to a trial that failed to adhere to international standards of justice, fairness, and due process, leading to manifestly unjust convictions.

The challenge of trying ex-RUF members alleged to bear the 'greatest responsibility'<sup>2</sup> for crimes committed during the civil war in Sierra Leone ought not to be underestimated, as the rebellion was long and crimes were widespread, and took place in areas with limited contact with the rest of the country, much less the world. Conducting an 11-year campaign from 1991 to 2002 to overthrow a succession of governments, the RUF had deservedly attracted the reputation of a brutal organization preoccupied with committing horrendous crimes against civilians, ranging from senseless murder to sexual violence, mass enslavement, disfiguring physical violence, and the use of child soldiers. Its membership was widely despised and vilified in the national and international media and the perception was that, as a consequence of what was known about the RUF as an organization, the high-ranking commanders had to bear the greatest responsibility for these crimes. The trial of these crimes and individuals in this war-torn and underdeveloped country so soon after the end of the conflict, therefore, presented the most significant logistical and legal challenges for an international or hybrid court.

However, if trials were to be convened of those individuals alleged to be most responsible, it was critical that the SCSL honour its obligation to provide fair trials for all accused. Unfortunately, an examination of the *RUF* trial and the issues that will be dealt with in this article show that both the Trial and Appeals Chambers abandoned international standards of due process, sacrificing the right of the accused

1 UN Doc. S/RES/1315 (2000).

2 Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, United Nations and Sierra Leone, 16 January 2002 (hereinafter SCSL Statute) Art. I.

to a fair trial in an attempt to overcome the challenges and in pursuit of a successful prosecution.

The first section of this article will discuss Trial Chamber I's approach to the right of the accused to be informed of the nature and cause of the charges and will examine the principal decisions that deprived the *RUF* accused of proper notice of a majority of the charges and the evidence in support. The authors conclude that the approach abandoned the cornerstone principles contained in the ICTY and ICTR jurisprudence, effectively removing the fundamental right and depriving the accused of the opportunity to mount an effective defence.

Section 2 will discuss the approach of the *RUF* Trial Chamber and the Appeals Chamber to the evidential links necessary to convict pursuant to the JCE mode of liability that largely removed the prosecution's obligation to prove a link between the accused and the crimes as a basis for the imputation of criminal liability. While the discussion will (inevitably) critique the SCSL's approach to the prosecution's pleading of a JCE without an unambiguously criminal objective, the discussion will focus on the trial and appellate approach to assessing the criminal responsibility of the JCE members for crimes committed by non-JCE members. In many instances the chambers found the accused responsible for crimes without requiring the establishment of a link showing that the non-JCE members were 'used' to commit the crimes by JCE members in pursuit of their shared common purpose.

The authors conclude that the *RUF* trial process, as a result of the approach taken to these critical procedural and evidential safeguards, undermined or in many instances removed any reasonable opportunity to effectively contest the majority of the charges, resulting in convictions that violated the culpability principle, the principle of legality, and the fair trial rights of the accused.

The authors caution that the legitimacy of international criminal trials rests at least in part on the understanding that the critical objectives underpinning international trials – national reconciliation and the maintenance of peace – depend as much on justice being done and being seen to be done as on the final tally of convictions. In the light of this the *RUF* trial is a worthy subject for the examination of the risks inherent in any international criminal process. It stands as a salutary reminder of the challenges presented by international criminal trials *in situ* and the temptation to adapt or remove procedural safeguards to meet these challenges. This is particularly the case when the hopes for a court rest decisively on the successful prosecution of a mere trio of high-profile accused, as they did in the *RUF* trial. It is in these circumstances that a strict adherence to procedural safeguards is essential to ensure that the presumption of innocence and the prosecution's duty to prove guilt beyond reasonable doubt are rigorously maintained.

## I. DENIAL OF THE *RUF* ACCUSED'S RIGHT TO BE INFORMED OF THE CHARGES

### **I.1. International standards: prompt and detailed notice**

The right to be informed promptly and in detail of the nature and cause of the charges is one of the most fundamental procedural rights of a person facing criminal

prosecution. The right is closely linked to, and perhaps a corollary of, the presumption of innocence, requiring that the prosecution inform the accused of the charges, so that he is able to prepare and present his defence.<sup>3</sup> Accordingly, the Statutes of the SCSL, the ICTY, and the ICTR mirror the major human rights instruments in providing for this guarantee, recognizing the fundamental nature of this right to the maintenance of an effective defence and a fair trial.<sup>4</sup>

As is recognized by prevailing international standards, the notification of the charges must be prompt, intelligible, and formulated with adequate precision.<sup>5</sup> The duty to notify is an active, rather than passive, one and remains the prosecution's continuous duty throughout the course of a trial.<sup>6</sup> An accused must be made aware of the cause (the material facts alleged) and their nature (the legal qualification of those acts) of the charges in the indictment.<sup>7</sup> The 'provision of full, *detailed* information to the defendant concerning the charges against him – and consequently the legal characterization that the court might adopt in the matter – is an essential prerequisite for ensuring that the proceedings are fair'.<sup>8</sup>

The modern jurisprudence at the ICTY and the ICTR has moved decidedly away from the minimalist pleading standards adopted in the early cases such as *Tadić*<sup>9</sup> and *Delalić*<sup>10</sup> and towards a more demanding approach. The general principles today dictate that the indictment must be the 'primary accusatory instrument' and plead with 'sufficient detail the essential aspect of the prosecution case'.<sup>11</sup> The fundamental role of the indictment is to identify each of the essential factual ingredients of the offences.<sup>12</sup> This requires the prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven.<sup>13</sup> An accused must be reasonably able to identify the crime and conduct specified in each paragraph of the indictment.<sup>14</sup> The materiality

3 *Babera, Messegue and Jabardo v. Spain*, Series A, No. 146 (App nos. 10588/83; 10589/83; 10590/83) ECHR 6 December 1988 (1989) 11 EHRR 360, para. 77.

4 SCSL Statute, *supra* note 2, Art. 17(4)(a); Updated Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. S/RES/1660(2006), Art. 21(4)(a); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighbouring States, UN Doc. S/RES/955 (1994), Art. 20(4)(a).

5 See, e.g., *Brozicek v. Italy*, (1989) 12 EHRR 371; *Mattoccia v. Italy*, (2003) 36 EHRR 47.

6 *D. Monguya Mbenge et al. v. Zaire*, Communication No. 16/1977 (views adopted on 25 March 1983), in UN Doc. GAOR, A/38/40; *Mattoccia v. Italy*, (App. no. 23969/94) ECHR 25 July 2000, para. 65.

7 *I.H. and others v. Austria*, (App. no. 42780/98) ECHR 20 April 2006, para. 30; *Mattoccia v. Italy*, (App. no. 23969/94) ECHR 25 July 2000, para. 59; and *Kamasinski v. Austria*, (App. no. 9783/82) ECHR 19 December 1989, para. 79.

8 *Soering v. UK*, (App. no. 14038/88) ECHR 7 July 1989, para. 113 (emphasis added); see also, e.g., *Einhorn v. France*, (App. no. 71555/01) ECHR 16 October 2001.

9 *Prosecutor v. Tadić* Appeal Judgement, Case No. IT-94-I-A, 15 July 1999 (hereinafter *Tadić* Appeal Judgement).

10 *Prosecutor v. Delalić et al.*, Decision on the Accused Mučić's Motion for Particulars, Case No. IT-96-21-T, 26 June 1996.

11 *Prosecutor v. Kupreškić et al.*, Appeal Judgement, Case No. IT-95-16-A, 23 October 2001 (hereinafter *Kupreškić* Appeal Judgement), para. 114.

12 *Prosecutor v. Krmolejac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, Case No. IT-97-25-PT, 24 February 1999, para. 12, n. 19.

13 *Kupreškić* Appeal Judgement, *supra* note 11, para. 88.

14 *Prosecutor v. Hadžihasanović*, Decision on Motion of the Accused Hadžihasanović Regarding the Prosecution's Examination of Witnesses on Alleged Violations Not Covered by the Indictment, Case No. IT-01-47-T, 16 March 2004, at 4.

of a fact depends on the nature of the case at hand<sup>15</sup> – that is, the form of participation alleged in the indictment and the proximity of the accused to the underlying crime.<sup>16</sup>

Where the prosecution alleges that the accused carried out the act(s) in question (personal responsibility), the jurisprudence requires the prosecution to set out ‘with the greatest precision’ the identity of the victim, the place and approximate date of the alleged criminal act(s), and the means by which they were committed.<sup>17</sup> In cases where the accused is not alleged to have carried out the acts underlying the crimes charged, but may have planned, instigated, ordered, or otherwise aided and abetted in the planning, preparation, or execution of a crime or where superior responsibility is charged, the jurisprudence of the ICTY and the ICTR allows for a lower standard of specificity.<sup>18</sup> However, in all categories the prosecution has an obligation to identify the ‘particular acts’ or ‘the particular course of conduct’ of the accused which has given rise to the charges in the indictment.<sup>19</sup> The fundamental question in determining whether an indictment is pleaded with sufficient particularity is whether the accused persons have enough detail to prepare their defence.<sup>20</sup> It is, accordingly, not permissible to delay disclosure of the factual components of the offence(s) until the disclosure of the prosecution’s pre-trial brief or the service of the evidence.<sup>21</sup>

Finally, and of particular relevance to the *RUF* trial process, the ICTY and the ICTR pleading standards require that additional material facts ‘factually and/or legally distinct from any already alleged in the indictment’ that create a basis for conviction must be considered to be a new charge and therefore before forming part of the case against the accused must be subject to an application to amend the indictment.<sup>22</sup>

## 1.2. The *RUF* trial and the right to be informed: departure from international standards

### 1.2.1. *The RUF indictment*

The indictments at the SCSL were not intended to accord with the modern pleading standards at the ICTY and the ICTR. A comparison of the indictments with those at the ICTY shows that the degree of particularization of the charges and the

15 *Prosecutor v. Rutaganda*, Appeal Judgement, Case No. ICTR-96-3-A, 26 May 2003 (hereinafter *Rutaganda* Appeal Judgement), para. 301; *Prosecutor v. Ntagerura*, Trial Judgement, Case No. ICTR-99-46-T, 25 February 2004, para. 31.

16 *Kupreškić* Appeal Judgement, *supra* note 11, para. 89; *Prosecutor v. Karemera*, Decision on Defects in the Form of the Indictment, ICTR Trial Chamber III, Case No. ICTR-98-44-R72, 5 August 2005, para. 17.

17 *Prosecutor v. Blaškić* Appeal Judgement, Case No. IT-95-14-A, 29 July 2004 (hereinafter *Blaškić* Appeal Judgement), para. 213; *Kupreškić* Appeal Judgement, *supra* note 11, para. 89.

18 *Blaškić* Appeal Judgement, *supra* note 17, para. 211; *Rutaganda* Appeal Judgement, *supra* note 15, para. 301.

19 *Blaškić* Appeal Judgement, *supra* note 17, para. 213.

20 *Kupreškić* Appeal Judgement, *supra* note 11, para. 88.

21 *Prosecutor v. Brđanin and Talić*, Decision on Objections by Radoslav Brđanin to the Form of the Amended Indictment, Case No. IT-99-36-PT, 23 February 2001, para. 9; see also *Prosecutor v. Zigiranyiraza*, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, Case No. ICTR-2001-73-PT, 30 September 2005, para. 2.

22 *Prosecutor v. Halilović*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No. IT-01-48-PT, 17 December 2004, para. 30; see also *Prosecutor v. Prlić et al.*, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, Case No. IT-04-74-PT, 18 October 2005 (hereinafter *Prlić* Decision), para. 13.

specification of material facts was markedly less than those authorized in the very early cases at the ICTY, such as *Tadić*<sup>23</sup> and *Delalić*.<sup>24</sup> David Crane, the original Chief Prosecutor at the SCSL, described the indictments as a form of ‘notice pleading’,<sup>25</sup> whereby he intentionally provided fewer details than the prevailing standard at the ICTY and the ICTR. Mr Crane proffered the following justification for that departure:

Early on in the prosecution plan, I wanted to change the way persons accused of international crimes are charged. My review of indictments coming out of the other tribunals showed that those indictments were too long, inaccurate, and fraught with potential legal landmines. This had to change. What I finally decided was to make the indictment simple and direct. As a prosecutor in the United States, I firmly believe in the principle that if you plead it, you have to prove it. Thus we did something that had never been done before – notice pleading. The indictments are shorter, tighter, and cleaner, yet give the inditees the degree of notice required for them to understand the crimes they committed, where they committed them, and when . . . I firmly believe that this is the appropriate direction that the drafting of indictments needs to take.<sup>26</sup>

The *RUF* indictment alleged that the three accused, Sesay, Kallon, and Gbao, were responsible pursuant to all forms of responsibility (including participation in crimes pursuant to a JCE) for 18 counts of crimes against humanity, war crimes, and other serious violations of international law in seven different provinces of Sierra Leone over a period of five years.<sup>27</sup> The following is a representative sample of the pleading standards referred to by Mr Crane and characteristic of the *RUF* indictment. Regarding Count 13: enslavement as a crime against humanity, the indictment alleged the following against Sesay, the first accused in the *RUF* trial:

Between about April 1997 and December 1999, ISSA HASSAN SESAY held the position of the Battle Group Commander, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE . . . , the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC [Armed Forces Revolutionary Council], JOHNNY PAUL KOROMA. During the Junta regime, ISSA HASSAN SESAY was a member of the Junta governing body. From early 2000 to about August 2000, ISSA HASSAN SESAY served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.<sup>28</sup>

ISSA HASSAN SESAY, . . . by [his] acts and 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 indictment which crimes . . . [he] . . . planned, instigated, ordered, committed, or in whose planning, preparation, or execution . . . [he] . . . otherwise aided and abetted, or which crimes were within a joint criminal enterprise in which each Accused participated or were a

23 *Prosecutor v. Tadić*, Indictment (amended), Case No. IT-94-I-I, 14 December 1995.

24 *Prosecutor v. Delalić*, Decision on the Accused Mucić's Motion for Particulars, Case No. IT-96-21-T, 26 June 1996.

25 D. Crane, ‘Symposium: International Criminal Tribunals in the 21st Century: Terrorists, Warlords, and Thugs’, (2006) 21 *American University International Law Review* 505; see also T. Cruvellier and M. Wierda, *The Special Court for Sierra Leone: The First Eighteen Months* (2004), International Center for Transitional Justice (ICTJ) Case Study Series, available at [www.ictj.org/images/content/1/0/104.pdf](http://www.ictj.org/images/content/1/0/104.pdf) (visited 20 April 2010), 5.

26 Crane, *supra* note 25.

27 *Prosecutor v. Sesay, Kallon and Gbao*, Corrected Amended Consolidated Indictment, SCSL-04-15-PT, 2 August 2006 (hereinafter *RUF* Indictment).

28 *Ibid.*, paras. 21, 22.

reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.<sup>29</sup>

#### Count 13: Abductions and Forced Labour

At all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour. Forced labour included domestic labour and use as diamond miners. The abductions and forced labour included the following:<sup>30</sup>

Kailahun District: At all times [November 1996 to 2001] relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour.<sup>31</sup>

By their acts or omissions in relation to these events [the accused], pursuant to Article 6.1 . . . are individually responsible for the crimes alleged below:

Count 13: Enslavement, a CRIME AGAINST HUMANITY, punishable under Article 2.c of the Statute.<sup>32</sup>

This form of pleading was replicated throughout the indictment, with each count, as above, consisting of a formulaic legal categorization alongside an equally formulaic iteration that the accused was individually criminally responsible or responsible as a superior under Articles 6(1) and 6(3) of the Court's statute. Crucially, the indictment failed to adhere to the requirement that the material facts of the alleged conduct of the accused (his acts and omissions), or of those alleged to have committed the crimes, be specified, even where a course of conduct is alleged.<sup>33</sup> Instead, the counts consisted of generalized paragraphs listing the crimes committed by the combined forces of two rebel armies (the RUF and AFRC) on specified towns and villages. The material facts particularized failed to explain the proximity of the accused to the underlying crimes, other than describing their *de jure* status in one of the armies. There was nothing to situate the accused in relation to the events, whether through the particularization of behaviour in relation to the respective army or through their approximate location at the time of the generalized criminal events. The indictment failed to describe any detail concerning the manner in which the attacks on the named towns and villages had allegedly taken place – whether through the enunciation of any narrative of the alleged factual events, a description of an identifiable sub-group, an approximation of the numbers participating in the crimes, or the names of *any* direct perpetrators, subordinate commanders, or victims.

As is plain from an examination of the pleading of Count 13 (the example provided above), the outline of mass enslavement alleged to have been committed pursuant to every mode of criminal responsibility over thousands of square kilometres during a period of almost five years, without the particularization of the accused's or his subordinate's acts, could not satisfy the requirement that the indictment allow for the effective preparation of the defence.

29 *Ibid.*, para. 38.

30 *Ibid.*, para. 69.

31 *Ibid.*, para. 74.

32 *Ibid.*, para. 76.

33 *Kupreškić Appeal Judgement*, *supra* note 11, para. 98.

While the prosecution could have remedied some of the deficiencies in the indictment by providing the required specificity in its pre-trial brief, the problem was instead exacerbated. The pre-trial brief contained only a small fraction of the charges pursued and these were particularized as broad, generalized descriptions of alleged criminal conduct by unknown members of the two armies, again without the alleged proximity of the accused to the underlying crimes or their actual conduct being specified, except in a minority of the crimes alleged. For example, the further particularization of the accused's responsibility for crimes under Count 13 in Kailahun (see example above) was limited to the following additional facts: (i) the forced labour of 200 civilians in Pendembu; (ii) the abduction and detention of 500 civilians in Kailahun District; (iii) the forcing of civilians to carry loads; (iv) the forcing of civilians to work on Bockarie and Kallon's rice farms; and (v) the forcing of civilians to carry out domestic labour.<sup>34</sup>

A full appreciation of the extent of the deficiency of the notice to the accused can be obtained from a comparison of the combined notice provided in Count 13 with the convictions entered against the three *RUF* accused in relation to the Kailahun District. In relation to Count 13 – enslavement, as a crime against humanity – the charges found proven included, *inter alia*, enslavement of (i) 300 civilians on two farms in 1996 and 1998 in Giema; (ii) civilians on a farm located between Benduma and Buedu after February 1998; (iii) civilians on a farm from December 1999 to 2001; (iv) civilians on a farm owned by Sesay and one owned by Gbao in Giema from 1996 to 2001; (v) civilians in 1996, 1997, and 2001 in all ten districts of the Luawa Chiefdom in Kailahun District forced to contribute farm products and fish for the rebel army and carry these goods from Giema to Kailahun town; (vi) 500 civilians regularly forced to trade on behalf of the rebels between 1996 and 2001 in Kailahun province; (vii) civilians forced to mine for diamonds from 1998 to 1999 in Giema, Yandawahun, Mafindo (Mafindor), Nyandehun, Jojoima, Yenga, Jabama and Golahun; and (viii) civilians forced to undergo military training at the Bayama training base and at the Bunumbu training base (Camp Lion).<sup>35</sup>

As is clear, a multitude of new and factually distinct charges (including those listed above, such as forced military training and forced fishing) and the material facts (underpinning the charges) were added after the prosecution case began. The new charges – significantly transforming the previously notified case – were notified to the accused through the prosecution's disclosure of evidence.

This pattern was replicated across the 18 counts of the indictment, leading to conviction of the three accused on more than 250 additional charges, none of which had been particularized in the indictment, the prosecution pre-trial brief, or the

34 *Prosecutor v. Sesay, Kallon and Gbao*, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004, Case No. SCSL-04-15-PT, 1 March 2004; see also *Prosecutor v. Sesay, Kallon and Gbao*, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time for Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004, SCSL-04-15-PT, 21 April 2004, para. 8.

35 *Prosecutor v. Sesay, Kallon and Gbao*, Judgement, Doc. No. SCSL-04-15-T-1234, 2 March 2009 (hereinafter *RUF* Trial Judgement), paras. 1417–1443.

prosecution's opening statement.<sup>36</sup> These charges included a variety of modes of liability (including personal or direct commission) and an extensive range of crimes (including acts of terror, collective punishment, unlawful killing, physical violence (including amputations), sexual violence, pillage, and the use of child soldiers) alleged to have been committed in previously notified locations, as well as new towns and villages throughout Sierra Leone. Further, as explained below, this abandonment of international pleading standards – allowing the vast majority of the charges and material facts to be disclosed for the first time in the evidence rather than in the indictment – was compounded by a judicial acceptance that this evidence could be disclosed *at any time* during the two-year prosecution case.

This unprecedented departure from international standards was the result of an erroneous approach to two legal standards: first, the narrow exception to the specificity requirements at the ICTY and the ICTR, allowing non-essential information to be omitted in cases of mass criminality (such as the identity of victims) and, second, the requirement that evidence in support of the charges be disclosed promptly and prior to the commencement of the case. The reinterpretation of these requirements created a process which allowed charges and material facts to be disclosed in supplemental witness statements just before being adduced in the courtroom, without any judicial inquiry into the potential prejudice arising from the late disclosure. These two errors will be discussed below.

#### 1.2.2. *The SCSL's new 'exceptions' to the indictment specificity requirements*

The prosecutorial licence to omit charges and evidence from the indictment was born at an early stage in the *RUF* proceedings. At the pre-trial stage of the proceedings the *RUF* Trial Chamber laid the foundations for the departure from international standards by ruling that the *RUF* indictment<sup>37</sup> was valid as to form, despite the fact that it deprived the defence of an opportunity to conduct effective preparation.<sup>38</sup> In response to defence arguments that the indictment was vague and failed to particularize the charges and material facts adequately, the Trial Chamber reinterpreted the salient jurisprudence from the ICTY and the ICTR, leading to an approach that allowed the prosecution to omit charges and material facts in cases involving 'mass criminality'.

In articulating a narrow, case-by-case exception to specificity requirements of international indictments, the *Ntakirutimana* case at the ICTR stated that 'there *may be* instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as *the identity of the victims and the dates* for the commission of the crimes"<sup>39</sup>. This exception is narrow and allows

36 *Prosecutor v. Sesay, Kallon and Gbao*, Sesay Final Trial Brief, SCSL-04-15-PT, 1 August 2008, at Annexes A1–A3 for comprehensive listing of the pre-trial notice and the additional and amended charges.

37 The indictments of the three accused were subsequently joined.

38 See generally *Prosecutor v. Sesay*, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, Doc. No. SCSL-2003-05-PT, 13 October 2003 (hereinafter *Sesay* Form of the Indictment Decision).

39 *Prosecutor v. Ntakirutimana*, Judgement, ICTR-96-10 & 96-17-T, 21 February 2003 (hereinafter *Ntakirutimana* Trial Judgement), para. 49 (emphasis added); see also *Kupreškić* Appeal Judgement, *supra* note 11, para. 89, and

non-essential information such as the names of victims and the precise date of the crime in incidents of mass criminality to be omitted from the indictment.

Purporting to rely on the Trial Chamber in *Prosecutor v. Ntakirutimana*, the RUF Trial Chamber stated that the 'sheer scale of the alleged crimes made it impracticable to require a high degree of specificity in such matters as the identity of the victims and the time and place of the events'.<sup>40</sup> This blanket articulation and widening of the exception to the specificity requirements was employed to hold the indictment valid as to form, even though its contents provided no meaningful insight into the scale of the distinct criminal events or the impracticability that prevented the prosecution from being able to provide a single name of any perpetrator or victim, the specific location of any crime within a named village or town, or, indeed, any time frame of any crime other than measured in months. Compounding the problem at the final judgment stage, the Trial Chamber, instead of conducting an analysis of the timing of the disclosure of more than 250 additional charges (and an equal number of associated material facts), declined to address the prejudice to the accused, ruling again that the indictment remained valid as to form.<sup>41</sup> The Trial Chamber ruled that in addition to the 'criminogenic setting' of the alleged crimes (the Chamber's presumed exception to the specificity requirements), it had also taken into account 'the particular context in which the RUF trial unfolded', namely 'the fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment'.<sup>42</sup> Endorsing this approach, the Appeals Chamber upheld this further exception, noting that the Trial Chamber had, nonetheless, stated that the indictment must still be sufficiently detailed to allow the accused to prepare his defence fully and that the prosecution 'may not rely on weaknesses of its own investigation to justify its failure to plead material facts in an Indictment' and therefore no error of law arose in taking this additional factor into consideration.<sup>43</sup>

The Appeals Chamber failed to appreciate, however, that to allow the omission of charges and material facts from an indictment on the basis of a 'need' to start the trials in a post-conflict environment is tantamount to an invitation for the prosecution to rely on its own investigative weaknesses. Worse, it sacrifices an accused's defence to those considerations.

Thus neither the Trial Chamber nor the Appeals Chamber dealt with the critical issue: the obvious contradiction between the admonishment that the accused must be able to prepare his defence fully and the prejudice to that entitlement arising from a Kafkaesque situation whereby the majority of the hundreds of charges and material facts remain hidden until part-way through the prosecution case. Neither did either Chamber seek to explain how the civil war in Sierra Leone differed in terms of its 'mass criminality' from the genocide in Rwanda or the war in the

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*Prosecutor v. Sesay, Kallon and Gbao*, Appeal Judgement, Case No. SCSL-04-15-A, 26 October 2009 (hereinafter RUF Appeal Judgement), para. 52.

40 *Sesay* Form of the Indictment Decision, *supra* note 38, para. 7(xi) (emphasis added).

41 RUF Trial Judgement, *supra* note 35, paras. 471, 472.

42 *Ibid.*, para. 330.

43 RUF Appeal Judgement, *supra* note 39, para. 60.

former Yugoslavia, both of which also required investigations in the aftermath of a destructive war. In fact, the first indictment at the ICTY was issued in November 1994, while the conflict was still ongoing.<sup>44</sup> Nevertheless, the international standards employed in these institutions mandate that the prosecution provide the accused with the essential aspects of its case (the charges and the material facts) prior to its commencement, irrespective of the undoubted investigative difficulties.

### 1.2.3. *The RUF test for the admissibility of new evidence*

The notice requirements at the ICTY and the ICTR mandate that evidence in support of the charges is disclosed within a reasonable time, and before the trial begins.<sup>45</sup> Further, an accused is entitled to proceed on the basis that the pre-trial brief contains a count-by-count summary of the evidence and this is the only case which he has to meet in relation to the offence(s) charged. If the prosecution intends to elicit evidence in relation to a particular count additional to that summarized in its pre-trial brief, specific notice must be given to the accused.<sup>46</sup> As determined by the ICTY and the ICTR, this is essential to ensure adequate notice and the validity and legitimacy of the liability assessments required, and to enable the essential task of ensuring that the charges are supported by evidence beyond reasonable doubt before finding the accused guilty of serious violations of international law.<sup>47</sup>

Instead of abiding by these essential prerequisites, Trial Chamber I in the *RUF* trial created an innovative test to permit all new evidence produced by prosecution investigations to be admissible at any time during the prosecution case. The comparative assessment conducted at the ICTY and the ICTR and underpinning the disclosure provisions, designed to assess whether evidence disclosed during trial and sought to be relied on by the prosecution is new, was abandoned. This assessment required the Chamber to conduct an examination of the evidence and the notice provided in the prosecution disclosure, including a comparative analysis of the previous notice provided through the indictment, the pre-trial brief, and previous witness statements. The allegedly new evidence had to be assessed to ascertain the extent to which it altered 'the incriminating quality of the evidence of which the Defence already has notice'.<sup>48</sup> In the event that the evidentiary material was found to be new the Chamber had to determine what period of notice was adequate to give the defence time to prepare.<sup>49</sup> In the event that the new material was determined as constituting a new charge, the prosecution should have been prohibited from relying on it or required to apply to amend the indictment allowing the question

44 Case of Dragan Nikolić. See ICTY website 'ICTY Timeline', available at [www.icty.org/action/timeline/254](http://www.icty.org/action/timeline/254). The initial conflict in Rwanda ended in July 1994 and the first trial started in January 1997: *Prosecutor v. Akayesu*, Indictment, Case No. ICTR-96-4-PT, 12 February 1996.

45 See, e.g., *Prosecutor v. Nyiramasuhuko*, Decision on Defence Motion for Disclosure of Evidence, Case No. ICTR-97-21-T, 1 November 2000, paras. 38–39.

46 *Prosecutor v. Brdanin*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-T, 26 June 2001, para. 62.

47 *Prosecutor v. Brdanin*, Appeal Judgement, Case No. IT-99-36-A, 3 April 2007 (hereinafter *Brdanin* Appeal Judgement), para. 424 (internal citations omitted).

48 See, e.g., *Prosecutor v. Bagosora et al.*, Decision on Admissibility of Evidence of Witness DP, ICTR-98-41-T, 18 November 2003, para. 6.

49 *Ibid.*

of any resulting prejudice to the defence to be assessed before it formed part of the case.<sup>50</sup>

Instead of abiding by these essential safeguards the *RUF* Trial Chamber created a novel admissibility test that allowed all evidence, whether constituting a new charge or new material or merely supplementary facts, to be defined as *not new* and therefore automatically admissible. Purporting to rely on the ICTY and ICTR jurisprudence, Trial Chamber I decided that evidence which constituted a ‘building block constituting an integral part of, and connected with, the same *res gestae* forming the factual substratum of the charges in the Indictment’<sup>51</sup> was ‘not new’.<sup>52</sup> The precise meaning of this test or its jurisprudential origins remained unexplained throughout the *RUF* trial process, although the consequences of dividing ‘charges’ into ‘building blocks’ and the ‘*res gestae* forming the factual substratum’ became abundantly clear. This threshold test had the effect of inviting the prosecution to re-investigate the case and allowed all the resulting charges and material facts (omitted from the indictment) to be incrementally disclosed to the accused, often just days before each of the 90 prosecution witnesses were called to testify. In short, provided that the additional evidence constituted crimes committed in Sierra Leone during the five-year temporal framework of the indictment, the Chamber’s self-fulfilling test deemed it automatically admissible.<sup>53</sup> The implicit invitation of the *RUF* Trial Chamber to the prosecution to remedy their pre-trial investigations, which no doubt had suffered due to a difficult post-conflict environment, was taken up with a degree of enthusiasm leading to the admission of in excess of 250 new charges and vast swathes of fresh evidence in support. Notwithstanding the addition of this volume of new charges, material facts, and evidence (including new allegations of direct and indirect liability for, *inter alia*, unlawful killings, sexual violence, amputations, enslavement, pillage, and the use of child soldiers) and the overwhelming transformation of the original case disclosed prior to the prosecution’s opening, all was deemed admissible. Accordingly, in the *RUF* trial there was no proper notice to the accused of these charges or of the evidence. Neither was there any moment in the case when the allegations stopped and the accused could begin answering in possession of full knowledge of the case to be met.<sup>54</sup>

50 *Prosecutor v. Halilović*, Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment, Case No. IT-01-48-PT, 17 December 2004, para. 30; see also *Prosecutor v. Prlić*, Decision on Prosecution Application for Leave to Amend the Indictment and on Defence Complaints on Form of Proposed Amended Indictment, Case No. IT-04-74-PT, 18 October 2005, para. 13: ‘[i]f a new allegation does not expose an Accused to an additional risk of conviction, then it cannot be considered as a new charge.’

51 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Decision on the Defence Motion for the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, Case No. SCSL-04-15-T, 27 February 2006, para. 10; see also *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041, Case No. SCSL-04-15-T, 20 March 2006, paras. 11, 13.

52 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, Doc. No. SCSL-04-15-T-396, 1 June 2005, paras. 28(iv), 29(vi).

53 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Decision Regarding the Prosecution’s Further Renewed Witness List, Doc. No. SCSL-04-15-T-339, 5 April 2005.

54 *Prosecutor v. Delalić*, Decision on the Prosecution’s Alternative Request to Reopen the Prosecution’s Case, Case No. IT-96-21-T, 19 August 1998, para. 20.

As noted, the Trial Chamber consistently ruled that the evidence was admissible. It defended this decision in part by arguing that the new charges and evidence in support did not ‘significantly alter the incriminatory quality of the evidence’ already disclosed to the defence.<sup>55</sup> This curious claim was maintained by both the prosecution and the Trial Chamber until the three accused attended their sentencing hearing, wherein the more than 250 new charges (and corresponding convictions) formed a principal justification for lengthy sentences of imprisonment.<sup>56</sup> Evidence that the prosecution and the Trial Chamber had at one point argued did not ‘alter the incriminatory quality’ of the evidence suddenly formed the foundation of prosecutorial requests for severe sentences ranging from 40 to 60 years’ imprisonment.

On appeal, the Appeals Chamber declined to interfere with the Trial Chamber’s approach that had led to this obvious unfairness. Instead of addressing the novel pleading and admissibility threshold invented by the Trial Chamber, the Appeals Chamber struck out the defence complaint on a technicality – ruling that a 50-page annex describing more than 250 new charges and evidence was outside the page limit allowed for appeal.<sup>57</sup>

### 1.3. Conclusion: denial of a fair opportunity to defend the charges

The final tally of new charges introduced into the *RUF* case was in excess of 250, with a corresponding number of new material facts underpinning the new and the previously notified charges, as well as reams of new evidence in support, adduced piecemeal throughout a two-year prosecution case. This incremental disclosure was matched by a correspondingly large number of lost opportunities for the accused to mount an effective defence. Given the prosecution and the Trial Chamber’s illogical claim that the material was not new and did not alter the incriminatory quality of the evidence already disclosed, any defence complaint was foreclosed and any remedial action (e.g., the recalling of witnesses) impossible. The right to be informed of the charges through the indictment and the evidence is a fundamental guarantee that enables an accused to prepare his defence under conditions that do not provide the prosecution with an unfair advantage. The approach of the Trial Chamber and the Appeals Chamber in the *RUF* case, by apparent design, handed the prosecution, whose investigation had perhaps been hampered by the immediate post-conflict environment, the opportunity to bolster its case continuously with new charges, material facts, and evidence and mould it around the case as it unfolded in the courtroom. In these conditions an accused cannot have a fair trial, since there is no real opportunity to prepare an effective defence or any reasonable prospect of rebutting the charges.

55 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and Witness TF1-122, Doc. No. SCSL-04-15-T-396, 1 June 2005, paras. 28(iv), 29(vi).

56 See *Prosecutor v. Sesay, Kallon and Gbao*, Sentencing Judgement, Doc. No. SCSL-04-15-T-1251, 8 April 2009.

57 *RUF* Appeal Judgement, *supra* note 39, para. 44; see also *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-A, Sesay Public Corrected Redacted Grounds of Appeal, 15 June 2009, Annexes A1-A3; Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended 16 January 2008, Art. 6(f), which states that ‘[a]ny appendices or authorities do not count towards the page limit’.

## 2. IMPUTATION OF CRIMES TO THE *RUF* ACCUSED: ASSESSING THE EVIDENTIAL LINKS BETWEEN THE ACCUSED AND THE CRIMES PURSUANT TO THE JOINT CRIMINAL ENTERPRISE MODE OF LIABILITY

The approach taken by the SCSL judiciary to the assessment of individual liability and the attribution of responsibility through the JCE mode of liability was critical to the *RUF* judgment and its voluminous convictions. The overwhelming majority of the crimes found proven were those found committed pursuant to the JCE mode of liability, including acts of terror, collective punishments, unlawful killings, sexual and physical violence, pillage, and enslavement. The Trial Chamber found that during the junta regime, high-ranking AFRC (a group of former Sierra Leone military who overthrew the government) and *RUF* members formed a JCE by making a common plan, to begin on 25 May 1997, to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond-mining areas, and that the ‘crimes [within 14 counts in the indictment] were contemplated by the participants of the joint criminal enterprise to be within the common purpose’.<sup>58</sup>

This section will discuss the trial and appellate approach to the assessment of evidence in support of the alleged JCE and the attribution of crimes without proof of the required link between the crime or criminal perpetrator and the accused. This discussion will inevitably address the SCSL’s approach to the pleading of a JCE without a criminal objective, but its principal focus is an examination of the finding of individual criminal responsibility of JCE members for crimes committed by non-JCE members. It will explore how the various JCE holdings on this critical attribution issue led to convictions in flagrant breach of the culpability principle.

### 2.1. Abandonment of the ICTY and ICTR approach to joint criminal enterprise: the attribution to the accused of ‘contemplated’ crimes

The SCSL adopted an unprecedented approach to JCE pleading by approving indictments that failed to articulate a ‘common purpose’ with an essential shared criminal intent at the core of the alleged enterprise. Although JCE doctrine requires that the prosecution plead, as a material fact, a common purpose that ‘amounts to or involves’ a crime within the statute of the Court, none of the Special Court indictments pleaded any crime or criminal intent as a *necessary* part of the common purpose.<sup>59</sup> In the *RUF* case, the purpose was the non-criminal act of participating in a rebellion: ‘to take any actions necessary to gain and exercise political power and control over the

<sup>58</sup> *RUF* Trial Judgment, *supra* note 35, para. 1985.

<sup>59</sup> W. Jordash and P. Van Tuyl, ‘Failure to Carry the Burden of Proof: How Joint Criminal Enterprise Lost Its Way at the Special Court for Sierra Leone’, (2010) 8 *Journal of International Criminal Justice* 591; see also *Prosecutor v. Brima, Kamara and Kanu*, Further Amended Consolidated Indictment, Case No. SCSL-04-16-I, 18 February 2005 (hereinafter *AFRC* Indictment), para. 34; *RUF* Indictment, *supra* note 27, para. 37; *Prosecutor v. Norman, Fofana and Kondewa*, Consolidated Indictment, Case No. SCSL-03-14-I, 5 February 2004 (hereinafter *CDF* Indictment), para. 19; *Prosecutor v. Taylor*, Second Amended Indictment, Case No. SCSL-03-01-I, 29 May 2007 (hereinafter *Original Taylor* Indictment), para. 33.

territory of Sierra Leone, in particular the diamond mining areas'.<sup>60</sup> In the paragraph following the articulation of this non-criminal objective,<sup>61</sup> the indictments stated that '[t]he crimes alleged in this indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were *either* actions within the joint criminal enterprise *or* were a reasonably foreseeable consequence of the joint criminal enterprise'.<sup>62</sup>

The indictment thereby pleaded all crimes as either within or outside the non-criminal objective, rather than as a necessary part of it. The obvious consequence of this approach is that the common purpose pleaded the alleged criminality of the joint enterprise as optional – that is, a common purpose that alternatively *either* involved crimes within the Statute of the Court *or* did not.

Rather than rectify these defective pleadings, the SCSL judiciary adopted a new interpretation of 'common purpose' that appeared to mean that to be found a JCE member required only proof of participation in a rebellion, a non-criminal pursuit under international criminal law. The Appeals Chamber, reversing a finding by the AFRC Trial Chamber that such a pleading failed to articulate an unambiguous criminal purpose, determined that there was no requirement that a JCE alleges, and a trier of fact finds, a 'necessary relationship between the objective of a common purpose and its criminal means'. It is sufficient that the 'latter are contemplated to achieve the former'.<sup>63</sup>

One effect of the pleading and the Appeals Chamber's 'innovation' was that they removed the prosecution's obligation to prove the foundational elements of a JCE, namely whether a plurality acted together in the implementation of a criminal objective.<sup>64</sup> This question concerns the assessment and identification of specific material elements that demonstrate the existence of an objectively punishable criminal act, precisely determined in time and space.<sup>65</sup> This analysis requires that the trier of fact assess whether the crimes were the product of concerted action – that is, pursuant to the alleged plan – or whether there was another explanation for their commission. This is a necessary step to the next question: whether the accused had carried out acts that significantly contributed to the furtherance of this criminal purpose, with the knowledge that his acts or omissions facilitated the crimes committed as part of the enterprise.<sup>66</sup>

60 AFRC Indictment, *supra* note 59, paras. 33-34; RUF Indictment, *supra* note 27, para. 36; Original Taylor Indictment, *supra* note 59, para. 23.

61 M. N. Shaw, *International Law* (2003), 1040, which states that '[w]hether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide. There is no rule against rebellion in international law.'

62 AFRC Indictment, *supra* note 59, para. 35; RUF Indictment, *supra* note 27, para. 37; Original Taylor Indictment, *supra* note 59, para. 24 (emphasis added).

63 RUF Appeal Judgement, *supra* note 39, para. 296, quoting *Prosecutor v. Brima, Kamara and Kanu*, Judgement, Case No. SCSL-04-16-675-A, 22 February 2008, paras. 76, 80 (internal citations omitted).

64 *Brdanin* Appeal Judgement, *supra* note 47, paras. 410, 430.

65 *Prosecutor v. Sagahutu et al.*, Decision on Sagahutu's Preliminary, Provisional Release and Severage Motions, Case No. ICTR-00-56-T, 25 September 2002, para. 39.

66 *Prosecutor v. Kvočka et al.*, Trial Judgement, Case No. IT-98-30/1-T, 2 November 2001, para. 312; *Prosecutor v. Kvočka et al.*, Appeal Judgement, Case No. IT-98-30/1-A, 28 February 2005, paras. 99, 263; *Prosecutor v. Brdanin*, *supra* note 47, para. 427.

Conversely the SCSL's JCE allowed a trier of fact to find the existence of a JCE through the identification of mere concerted action in pursuit of a non-criminal objective (taking power over the country through armed rebellion) while contemplating crimes to achieve this objective. Under this interpretation, the *RUF* accused could be found responsible for crimes as part of a plurality engaged in concerted action in furtherance of the crimes and contributing to them *or* being part of a plurality engaged in furtherance of a rebellion and contributing solely to that non-criminal objective. This meant that a JCE could be found to exist without a nexus between the JCE member's concerted action and a crime – other than the crimes being contemplated by them. Logically, in a bloody civil war awash with crimes, the contemplation nexus – that is, thinking about or being aware of the commission of crimes – is automatically satisfied and impossible to disprove.

In this manifestation of a JCE the trier of fact need not examine concerted action in furtherance of crime (including the pattern of crimes) before being satisfied as to the existence of a JCE and before attributing crimes within the JCE. It is sufficient that a plurality engaged in rebellion was prepared to employ the criminal means if the need arose or, even less, that they thought about them ('contemplated it') but rejected the idea on further contemplation. All crime that the trier of fact considers reasonably foreseeable – that is, contemplated – can be attributed to the shared purpose and to the JCE members.

Further, given Trial Chamber I's explicit presumption in the *RUF* case that JCE members acted with criminal intent in seeking to take power and control over the country of Sierra Leone, the requirement of a finding that they contemplated crimes may have been superfluous, as the finding of JCE liability was a foregone conclusion. As stated by the Trial Chamber,

It indeed goes without saying and the Chamber so concludes that resorting to arms to secure a total redemption and using them to topple a government which the *RUF* characterized as corrupt *necessarily* implies the resolve and determination to shed blood and commit the crimes for which the Accused are indicted.<sup>67</sup>

The Trial Chamber provided no explanation as to the exact meaning of this judicial presumption, and the Appeals Chamber declined to comment on it or rule on its legal validity in the light of the presumption of innocence and the burden of proof. However, given that the Trial Chamber assessed individual liability pursuant to a theory of JCE that required only a showing of action in pursuit of the seizure of power in Sierra Leone while contemplating crimes,<sup>68</sup> the attribution of the crimes to the accused *in the light of such a presumption* must have been little other than a foregone conclusion.

67 *RUF* Trial Judgment, *supra* note 35, para. 2016 (emphasis added).

68 *Ibid.*, para. 1985.

## 2.2. The culpability principle: imputing the crimes of non-JCE members to the accused

To hold an accused responsible for the criminal conduct of another person requires the finding of a link between the accused and the crime as a legal basis for the imputation of criminal liability.<sup>69</sup> As far as the basic form of JCE is concerned (a common criminal purpose shared by a plurality of persons acting in concert), an essential prerequisite is that the crime in question *forms part of the common criminal purpose*.<sup>70</sup>

The ICTY has made it clear that

[T]o hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.<sup>71</sup>

In assessing this connection, the factors indicative of a sufficient link ‘include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime’.<sup>72</sup>

Attributing responsibility for the crimes of a non-JCE member to an accused who is a JCE member creates, therefore, a dual requirement. First, the Trial Chamber must evaluate the evidence to assess whether a JCE member procured a non-JCE member to commit a particular crime. In its most simple construction, if a JCE member explicitly or implicitly requested, ordered, instigated, or otherwise encouraged rebel forces to kill innocent civilians, he cannot escape individual criminal responsibility merely because he did not personally commit the crime. Second, the JCE member must be using that non-JCE member to further the shared criminal purpose of the JCE. JCE members should not be individually criminally responsible for the crimes committed by non-JCE members (having been procured by another JCE member) for personal reasons such as revenge, personal financial gain, or otherwise.<sup>73</sup> If a JCE member procures a non-JCE member to steal money for his family’s personal use, for example, he would not be likely to be acting in furtherance of the JCE’s common criminal objective and the crime therefore ought not to be determined to form part of the common criminal purpose.

As discussed above, in the *RUF* case the three accused – Sesay, Kallon, and Gbao – were found individually criminally responsible *inter alia* as members of a JCE whose objective was ‘to take any action necessary to gain and exercise political power and control over the country of Sierra Leone, in particular the diamond mining areas’.<sup>74</sup> It

69 *Prosecutor v. Brdanin*, *supra* note 47, para. 412.

70 *Ibid.*, para. 418.

71 *Ibid.*, para. 413.

72 *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeal Judgement, 17 March 2009 (hereinafter *Krajišnik* Appeal Judgement), para. 226.

73 Of course, a JCE member may be acting for multiple purposes, in which case the crime could be part of the JCE.

74 *RUF* Trial Judgement, *supra* note 35, para. 1985.

was found that, while this objective was not inherently criminal, it became criminal because the implementation of this goal involved contemplating the commission of crimes.<sup>75</sup> The Chamber found that the crimes for which the *RUF* accused were convicted pursuant to the JCE (counts 1–14 in the indictment) were *within* the JCE and intended to further the common purpose to take power and control over Sierra Leone; thus they were all basic-form JCE crimes.<sup>76</sup>

The vast majority of the several hundred charges which led to individual criminal responsibility pursuant to the JCE were committed by non-JCE members. The evaluation of the relationship between the principal perpetrators of crimes and the JCE members and the circumstances that gave rise to the crime was, therefore, crucial to a fair assessment of the individual culpability of each accused.

### 2.2.1. *The SCSL's departure from international standards*

In deciding whether crimes committed by non-JCE members could be attributed to JCE members, the Trial Chamber explicitly accepted that the jurisprudence (as pronounced in the *Brdanin* case<sup>77</sup>) required the Trial Chamber to find, on a crime-by-crime basis, that one of the JCE members<sup>78</sup> procured the principal perpetrator of a crime to carry out actions in furtherance of the common criminal purpose.

Nonetheless, it is plain that the Trial Chamber and the Appeals Chamber failed to apply this legal requirement. The analysis employed to attribute crimes within the common purpose, or to uphold such findings, was deficient in two distinct ways, each offending the culpability principle and the fair-trial rights of the accused.

### 2.2.2. *Employment of an incorrect evaluative standard*

First, both chambers appeared to misunderstand the analysis required before crimes committed by non-JCE members might be found to be within the common purpose of a JCE and attributed to the accused. The Trial Chamber should have assessed whether each crime was committed at the behest of a JCE member in furtherance of the common criminal purpose. Instead, the Trial Chamber, in a sweeping, catch-all paragraph incorporating the attribution of hundreds of such crimes to the accused, held that

The Chamber is satisfied that the [principal perpetrators of crimes] were used by said members of the joint criminal enterprise to commit crimes that were *either* intended by the members to further the common purpose, *or* were a natural and foreseeable consequence of the implementation of the common purpose.<sup>79</sup>

The Appeals Chamber reiterated the finding without comment or critique, disregarding the convicted person's complaint and this manifest error of law.<sup>80</sup> Having previously found that the criminal means (counts 1–14) were crimes 'within' their

75 *Ibid.*, paras. 1979–1985.

76 *Ibid.*, paras. 1982–1985.

77 *RUF* Trial Judgement, *supra* note 35, para. 263, citing *Brdanin* Appeal Judgement, *supra* note 47, paras. 413, 430.

78 See *RUF* Trial Judgement, *supra* note 35, para. 1990 for a list of JCE members in the *RUF* case.

79 *RUF* Trial Judgement, *supra* note 35, para. 1992 (emphasis added).

80 *RUF* Appeal Judgement, *supra* note 39, paras. 405, 407, 411.

common criminal purpose, and therefore intended by JCE members to further it,<sup>81</sup> the question of the extended form of JCE and the foreseeability of crimes did not arise for the Trial Chamber's consideration. As a consequence of that finding, JCE responsibility for the *RUF* accused was restricted to the crimes found to have been intended by the JCE members to further their common criminal purpose. This legal enunciation evinced a critical misconception that allowed crimes to be attributed to the accused pursuant to the basic form of JCE without any actual showing that they were intended by any JCE member in furtherance of the common criminal purpose, as required by the JCE doctrine, and, instead, on a mere finding of the crime being foreseeable.

As discussed above, the analysis required to assess crimes committed by non-JCE members as within or intended by JCE members to further the common criminal purpose was that outlined in *Brdanin*; the imputation of crimes to a JCE member relies on establishing that the member – when using the principal perpetrator – acted in accordance with the common plan. Putting aside the tortuous logic of the notion of a JCE member using a non-JCE member to commit a crime that is only foreseen, crimes only foreseen by a JCE member cannot be found to form part of the common criminal purpose and, therefore, could not be attributed to the accused pursuant to the basic form. Unintended crimes that are a natural and foreseeable consequence of the implementation of the common purpose are by definition outside the common purpose.

The full ramifications of this judicial misstep are impossible to know – the judgment was largely silent on how the hundreds of specific crimes were *in fact* found to be linked to a JCE member (see below). It is, nonetheless, plain that this misconception had significant consequences, allowing a multitude of the gravest of crimes to be attributed to the accused without being intended by any JCE member, in violation of the culpability principle. For example, the Trial Chamber explicitly attributed all the crimes committed by four non-JCE members (individuals nicknamed Rocky, Rambo, Savage, and Staff Alhaji), undoubtedly among the worst perpetrators of crimes in the civil war, on the cursory basis that they were 'directly subordinate to and used by members of the joint criminal enterprise to commit crimes that were *either* intended by the members to further the common design, *or* which were a reasonably foreseeable consequence of the common purpose'.<sup>82</sup> The crimes attributed to the accused on this basis included, *inter alia*, the execution of about 200 civilians, an act of terror, collective punishment, and murder;<sup>83</sup> the killing by Savage of an unknown number of civilians by burning them alive in a house in March 1998, found to be acts of terror and murder;<sup>84</sup> the killing of 29 civilians in Penduma on the orders of

81 *RUF* Trial Judgement, *supra* note 35, para. 1985.

82 *Ibid.*, para. 2080 (emphasis added).

83 See generally *ibid.*, paras. 1165–69, 1369, 2063; see also *RUF* Appeal Judgement, *supra* note 39, paras. 429–31.

84 *RUF* Trial Judgement, *supra* note 35, paras. 1167, 1273, 2063; see also *RUF* Appeal Judgement, *supra* note 39, paras. 429–435.

AFRC member Staff Alhaji, found to be acts of terror and murder;<sup>85</sup> and the killing of 47 civilians by Savage in February or March 1998, acts of terror and murder.<sup>86</sup>

It follows that if the crimes committed by these individuals were only a reasonably foreseeable consequence of the common purpose, the three *RUF* accused were wrongly convicted of these crimes.

As will be argued in the following subsection, equally problematic was that, other than noting these direct perpetrators' general subordination to one or more JCE members, the Trial Chamber made no findings to link these specific crimes to any action by a JCE member. These showings were required before finding that the JCE member explicitly or implicitly procured the non-JCE member or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime *in furtherance of the common purpose*. Therefore, even in the instances where the Trial Chamber may have purported to apply the first part of its two-pronged disjunctive test (involving a search for intention), it appears not to have grasped the required analysis and findings demanded by the ICTY jurisprudence which it had explicitly adopted.

### 2.2.3. Failure to link crimes to a JCE member

The Appeals Chamber's approach to the convicted persons' complaint on these issues is noteworthy. It upheld the lower chamber's factual findings by holding that, while the latter had failed to provide sufficient findings in linking the crimes to JCE members, the hundreds of crimes were clearly committed in furtherance of the JCE's common criminal purpose. Having ignored the ramifications of the erroneous test employed by the Trial Chamber, the Appeals Chamber enumerated the approach demanded by *Brdanin*,<sup>87</sup> and purported to conduct the missing analysis, providing ostensible connections between the crimes and the JCE's common criminal purpose.<sup>88</sup>

However, as regards the assessments made by the Trial Chamber and the Appeals Chamber of the existence of a sufficient nexus between one of the JCE members and crimes committed by non-JCE members, in many of the findings (involving approximately 510 civilian deaths), all found to be within the common purpose, there was no mention of a JCE member at all.<sup>89</sup> The higher chamber's approach was creative – having appreciated that the Trial Chamber's findings on the specific crimes committed by non-JCE members were made largely without reference to a JCE member – it reframed its analysis. The Appeals Chamber abandoned the essential threshold

85 *RUF* Trial Judgement, *supra* note 35, paras. 1192, 1195, 1196, 1278, 2063; see also *RUF* Appeal Judgment, *supra* note 39, paras. 429–435.

86 *RUF* Trial Judgement, *supra* note 35, paras. 1165, 1274, 2063; see also *RUF* Appeal Judgment, *supra* note 39, paras. 429–435.

87 *RUF* Appeal Judgment, *supra* note 39, para. 414.

88 See, e.g., *ibid.*, paras. 416–418.

89 According to para. 1990 of the *RUF* Trial Chamber judgement, JCE members included Foday Sankoh, Sam Bockarie, Issa Sesay, Morris Kallon, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi, Augustine Gbao, and other unnamed *RUF* commanders, as well as the following AFRC: Johnny Paul Koroma, Gullit, Bazzzy, Five-Five, SAJ Musa, Zagalo, Eddie Kanneh, and others to hold power in Sierra Leone on or shortly after 25 May 1997. See *RUF* Trial Judgement, *supra* note 35, para. 1990.

enquiry, instead restricting its appellate analysis to the question whether the crimes committed were sufficiently widespread or similar to other crimes by JCE members such that all should be considered to be part of the same endeavour.

For example, the Trial Chamber found on more than eight occasions that AFRC and RUF fighters (all non-JCE members) had committed acts of sexual violence in Kono District.<sup>90</sup> While the *existence* of the crimes had not been challenged by the defence, none of these crimes were found to be linked to a named JCE member. The Trial Chamber simply omitted to analyse whether a JCE member procured the perpetrators to commit crimes to further their common criminal purpose. In assessing the correctness of this approach, the Appeals Chamber ruled *inter alia* that the crimes of sexual violence were committed to ‘break the will of the population and ensure their submission to AFRC/RUF control’, and therefore the crimes were within the common purpose which had been found to include such crimes.<sup>91</sup> However, no JCE member was cited as causing or wanting those *specific* crimes to occur. There was nothing in the findings that could be said to have distinguished the crimes as JCE crimes, rather than crimes arising from other criminal enterprises or random criminality by subordinate members of the rebel groups.

An identical approach was taken by the Trial Chamber and the Appeals Chamber to a large portion of the crimes in other districts, including Bo district. In Bo, the Trial Chamber found that eight different criminal acts were committed and were within the common purpose.<sup>92</sup> In six of the eight no JCE member was linked to the crimes.<sup>93</sup> The six included a finding of unnamed AFRC/RUF rebels killing over 200 civilians in Tikonko village, attributed to the accused as members of the JCE. There were no findings made to identify the perpetrators (by name, *de jure* role, or sub-group) or any link to a JCE member established, other than participating in the same rebellion.<sup>94</sup> The Appeals Chamber found that there was sufficient evidence to justify the Trial Chamber’s imputation of the crimes to ‘one or more JCE members’ on the basis of two facts: (i) that the crimes had been committed by (non-JCE) members of the AFRC/RUF rebel group; and (ii) that the killings followed a similar modus operandi and fitted into the ‘widespread and systematic nature of the crimes’ committed by the RUF/AFRC.<sup>95</sup> The Appeals Chamber could not identify the JCE member alleged to

90 This includes unnamed AFRC/RUF rebels raping TF1-218 in Bumpah, *ibid.*, paras. 1206, 1290, 1299, 2063; rape by a man named Staff Alhaji in Tombodu, *ibid.*, paras. 1171, 1288, 1299, 2063; rape of TF1-217’s wife, as well as an unknown number of other women in Penduma by AFRC/RUF rebels, *ibid.*, paras. 1193–95, 1290, 1299, 2063; AFRC/RUF rebels’ rape of an unidentified female in Bomboafuidu, *ibid.*, paras. 1208, 1289, 1290, 1299, 2063; AFRC/RUF rebels forcing 20 people to have sex with each other in Bomboafuidu, *ibid.*, paras. 1207, 1309, 2063; AFRC/RUF rebels using knives to slit genitals in Bomboafuidu, *ibid.*, paras. 1208, 2063; AFRC/RUF rebels raping TF1-195 five times and five other women in Sawao, *ibid.*, paras. 1181, 1185, 1290, 1299, 2063; AFRC/RUF rebels forcibly marrying an unknown number of women at Wendedu, *ibid.*, paras. 1178–1179, 1294, 1297, 1299, 2063.

91 RUF Appeal Judgement, *supra* note 39, para. 440.

92 RUF Trial Judgement, *supra* note 35, paras. 991–1041.

93 RUF Appeal Judgement, *supra* note 39, paras. 417–18. In regard to the other two crimes, the Trial Chamber found that Sam Bockarie, a JCE member, was one of the principal perpetrators. See RUF Trial Judgement, *supra* note 35, paras. 1007, 1023, 1029, 1974.

94 RUF Trial Judgement, *supra* note 35, paras. 995–1005, 1974–1975, 1984, for findings on crimes committed in Tikonko Junction in Bo district.

95 RUF Appeal Judgement, *supra* note 39, paras. 417, 418.

have been involved in the events (or even retrospectively aware of the commission of the crimes) or in any other manner indicate how *those* specific attacks had been procured by a JCE member in furtherance of the common purpose. The crimes were attributed to the JCE with no nexus other than the perpetrators being identified as members of the same two rebel armies, consisting of over ten thousand combatants.

Clearly, pursuant to the culpability principle that allows the attribution of crimes committed by non-JCE members to JCE members and thereafter to the accused, there must be at least one JCE member associated with a particular crime to allow it to be attributed to the JCE. If a connection cannot be established the crime cannot be attributed to the JCE, even if the act could legitimately be linked to the JCE members' common criminal purpose. A shared common criminal objective in itself is not enough to demonstrate that a plurality of persons acted in concert with each other to further that objective. Different groups, for example, may share the same goals and commit similar crimes in furtherance of those goals.<sup>96</sup>

Putting aside the Appeals Chamber's failure to comment on the erroneous test employed by the Trial Chamber, the approach it took to the facts in ascertaining the required evidential links from the Trial Chamber's findings was remarkably similar to a standard implied by the latter's own foreseeability test. It had little in common with the *Brđanin* requirement of a demonstration that a JCE member intentionally used a non-JCE member to commit crimes in furtherance of the common purpose. In the absence of findings focused on named JCE members, the Chamber's almost total reliance on contextual evidence such as that demonstrating a 'permissive environment created by control exercised by AFRC and RUF where fighters could commit crimes with impunity'<sup>97</sup> and the findings that crimes were widespread and systematic,<sup>98</sup> while not wrong in principle, was a fraction of the analysis required. These factors were a poor substitute for a comprehensive and careful analysis (by a trier of fact) that the crimes could be imputed to at least one member of the JCE and that this member – when using the non-JCE member – acted in accordance with the common plan. This test makes it abundantly clear: if a JCE member in the *RUF* case is not shown to be linked to crimes committed by non-JCE members, then the crimes cannot be imputed to the accused pursuant to the JCE.

#### 2.2.4. *Conclusion: punishment for membership of the RUF and the imputation of crimes*

Most of the convictions entered against the three accused as JCE members were based on the actions of others, particularly non-JCE members. As outlined above, in terms of unlawful killings, approximately 510 deaths were attributed to the accused without any showing that the non-JCE members implicated were connected in the *Brđanin/Krajišnik* sense to at least one member of the JCE.

Regarding the hundreds of criminal acts of sexual and physical violence, the overwhelming majority were found to have been perpetrated by non-JCE members.

96 *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Trial Judgement, IT-04-84-T, 3 April 2008, para. 139; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Judgement, 27 September 2006, para. 884.

97 *RUF Appeal Judgement*, *supra* note 39, paras. 421–422.

98 *Ibid.*, paras. 424, 440, 449.

The Appeals Chamber upheld many of these convictions without a *Brdanin/Krajišnik* showing.<sup>99</sup> By failing to apply the correct and complete test, the Chamber held the accused responsible for many of the crimes committed by AFRC and RUF fighters regardless of whether any JCE member could be said to have ‘used’ a non-JCE member to commit a crime in furtherance of the JCE’s common criminal purpose. The *RUF* trial’s judicial failure to connect these crimes to a JCE member is precisely the type of ‘open-ended concept that permits convictions based on guilt by association’,<sup>100</sup> which the Appeals Chamber in *Brdanin*, the leading JCE case at the ICTY and the ICTR, repeatedly emphasized was an unacceptable perversion of the JCE doctrine. Attributing crimes without this essential nexus – a common feature of the *RUF* trial and appellate judgments – is to return guilty verdicts for hundreds of the gravest of crimes in clear contravention of the culpability principle.<sup>101</sup>

Moreover, attributing criminal responsibility to the accused for crimes committed by all members of their group, JCE member or otherwise, in these circumstances, punished them for being an RUF member. Whether the Appeals Chamber believed the RUF to be a criminal organization or not, membership in a criminal organization is not prohibited under international criminal law<sup>102</sup> and to de facto attribute criminal liability for this membership was a flagrant infringement of the principle *nullum crimen sine lege*.

### 3. CONCLUSION: A TRIAL WITHOUT DUE PROCESS

Premised on these fundamental procedural and evidential deficiencies in the trial and appellate processes, the *RUF* trial failed to adhere to international standards of justice, fairness, and due process. The volume of late charges and evidence and the corresponding prejudice are unprecedented in modern international criminal law. While the ICTY and ICTR Appeals Chambers grapple with appellant complaints of a handful of late charges and material facts, the prosecution of the *RUF* accused involved hundreds. There can be no justification for such a process and none was attempted by the SCSL Appeals Chamber. The *RUF* accused had a right to be presumed innocent, and this involves the maintenance of a process that allows a reasonable opportunity to present a defence to every allegation made. A trial in manifest breach of a right to be informed of the charges and evidence ceases to be such a trial, and is rather a process of attrition, with no end to the allegations and the evidence and no real chance of an effective defence. That the SCSL Appeals Chamber struck out the complaint on this matter on a technicality, arguing that the Appellant had breached a page-limit rule (when there were no novel arguments in the annex, its length

<sup>99</sup> *Ibid.*

<sup>100</sup> *Brdanin* Appeal Judgement, *supra* note 47, para. 428.

<sup>101</sup> *Prosecutor v. Sesay, Kallon and Gbao*, Doc. No. SCSL-04-15-A-279, Appeal Brief for Augustine Gbao, 1 June 2009, Annex I, for a full description of the crimes committed by non-JCE members that were left unconnected to a JCE member.

<sup>102</sup> *Prosecutor v. Milutinović et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, Case No. IT-99-37-AR72, 21 May 2003, para. 25.

corresponding to the number of new charges and material facts),<sup>103</sup> is perhaps an eloquent demonstration of the policy objectives at play in the trial and the sacrifice of fairness in pursuit of them.

Equally, imputing criminal liability to JCE members for crimes committed by non-JCE members (part of the same AFRC/RUF rebel group) without providing an evidentiary nexus between the crimes and the non-JCE and JCE member, is a clear demonstration of a breach of the culpability principle and the principle of legality. This is precisely what occurred for hundreds of crimes in the *RUF* case. Such findings hold the three accused responsible for the acts of all the RUF, independently of whether the crimes were committed to further the JCE's common criminal purpose or not and irrespective of whether the accused intended or even foresaw the crimes. It is the attribution of guilt without fault, akin to collective punishment by an international court.

Consequently the *RUF* trial remains a worthy object for study and reflection. It ought to be soberly examined by those entrusted with the law. It is a reminder of the need to hold tight to basic due process principles and to build on – not ignore – the jurisprudential lessons from the ICTY and the ICTR. The types of demonstrably unsafe convictions may well satisfy those focused only on the immediate policy objectives defined by the need to bring accountability in war-torn countries. Nonetheless, it should also be recalled that the long-term legitimacy of international criminal law rests at least in part on the understanding that these critical objectives – national reconciliation and the maintenance of peace – depend as much on justice being done and being seen to be done as they do on the final tally of convictions.

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<sup>103</sup> See *Prosecutor v. Sesay, Kallon and Gbao*, Sesay Final Trial Brief, SCSL-04-15-PT, 1 August 2008, at Annexes A1–A3 for comprehensive listing of the pre-trial notice and the additional and amended charges.