

Failure to Carry the Burden of Proof

How Joint Criminal Enterprise Lost its Way at the Special Court for Sierra Leone

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Abstract

This article contends that a flawed interpretation of joint criminal enterprise (JCE) embraced by the Special Court for Sierra Leone (SCSL) has set a dangerous precedent for international criminal adjudication. Breaking from a trend towards more careful application of the liability doctrine at the International Criminal Tribunal for the former Yugoslavia (ICTY), a series of JCE decisions from the Armed Forces Revolutionary Council, Revolutionary United Front, and Charles Taylor cases betray profound doctrinal confusion and overreaching at the Special Court. The problem began with indictments that failed to satisfy the pleading requirements for a common criminal purpose at the core of each alleged JCE. Since this defect in the JCE pleadings has not been recognized as such by the SCSL Appeals Chamber, the Court has struggled to properly assess the individual liability of each accused, with negative consequences for the clarity and correctness of the JCE jurisprudence. Most recently, in Sesay, Kallon and Gbao, Majorities in the Trial and Appeals Chambers entered and upheld convictions based on an interpretation of 'common purpose' so flawed that it detached the basic and extended forms of JCE from the core mens rea that defines them, thereby expanding the doctrine from a legitimate

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liability theory into a vehicle for guilt by association. This article offers a critical assessment of the SCSL's JCE jurisprudence to date, framing the Court's experience as a concrete cautionary tale of the doctrine misapplied. JCE fails to be a useful tool for assessing individual liability, unless its basic elements are clearly pled in the indictment and rigorously applied by judges. The authors recommend that future international criminal proceedings abandon the SCSL's misconceived approach, and instead take care to adhere to the procedural safeguards articulated in recent ICTY jurisprudence — ensuring that the JCE is pled with an unambiguously criminal common purpose, and that the trier of fact strictly construes each legal element of the doctrine in accordance with the culpability principle, the principle of legality and the fair trial rights of the accused.

1. Introduction

In 2005, not long after the first trials began at the Special Court for Sierra Leone (SCSL), scholars Allison Danner and Jenny Martinez warned, 'the legitimacy of international criminal law as a fair, impartial, and effective system of justice is far from secure. Over-expansive doctrines, unbridled prosecutorial discretion, and unpersuasive judicial decision making may still doom international criminal adjudication.'¹ In the 5 years since, the SCSL has set a dangerous new precedent for international criminal law by embracing a fundamentally flawed interpretation of joint criminal enterprise (JCE). Breaking from a trend towards more careful application of this complex mode of liability at the International Criminal Tribunal for the former Yugoslavia (ICTY), a series of JCE decisions from the *Armed Forces Revolutionary Council (AFRC)*,² *Revolutionary United Front (RUF)*³ and *Taylor*⁴ cases betray profound doctrinal confusion and overreaching at the Special Court.

The problem began when the Special Court 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 pleads, 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 pled any crime as a necessary part of the common purpose, and in the *Taylor* case, the SCSL upheld an indictment that failed to explicitly plead any common purpose at all, criminal or otherwise.⁵ Rather than rectify these

1 A. Marston Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75, at 143.

2 *Prosecutor v. Brima, Kamara, and Kanu* (Case No. SCSL-2004-16).

3 *Prosecutor v. Sesay, Kallon and Gbao* (Case No. SCSL-2004-15).

4 *Prosecutor v. Charles Ghankay Taylor* (Case No. SCSL-2003-01).

5 See Further Amended Consolidated Indictment, *Brima, Kamara and Kanu* (SCSL-04-16-1), 18 February 2005 [hereinafter 'AFRC Indictment'], § 34; Consolidated Indictment, *Sesay, Kallon and Gbao* (SCSL-04-15-1), 2 August 2006 [hereinafter 'RUF Indictment'], §36;

defective pleadings, the SCSL judiciary adopted a new interpretation of 'common purpose' in the *AFRC Appeals Judgment*, without any basis in customary international law.⁶ The Court's re-interpretation abandoned the requirement for a commonly intended criminal objective at the core of the JCE, thereby creating an illegitimate new form of JCE with no clear *mens rea* standard for attaching liability pursuant to the doctrine.

Subsequently applied to the facts of the *RUF* case, this JCE 'innovation' undermined the Court's liability analysis, and produced flawed jurisprudence. Arguably the most shocking consequence was the Appeals Chamber's decision to uphold Augustine Gbao's JCE convictions for crimes that, in the words of one dissenting judge, 'he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend'.⁷ The Gbao convictions confirmed that, by redefining 'common purpose', the Special Court detached the basic and extended forms of JCE from the core *mens rea* that defines them, thereby expanding the doctrine from a legitimate liability theory into a vehicle for guilt by association.

As Justice Shireen Avis Fisher observed in a partially dissenting opinion to the *RUF Appeal*, 'The doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application. International criminal tribunals must take such warnings seriously, and ensure that the strictly construed legal elements of JCE are consistently applied to safeguard against JCE being overreaching or lapsing into guilt by association.'⁸ This article echoes Justice Fisher's warning, framing the Special Court experience with JCE as a concrete cautionary tale of the doctrine misapplied. Unless acknowledged and abandoned, this misconceived strand of jurisprudence will continue to confuse the doctrine, giving rise to criminal adjudication that violates the principle of legality, threatens the rights of the accused and undermines the legitimacy of a fledgling system of international criminal justice.

Consolidated Indictment, *Norman, Fofana and Kondewa* (SCSL-03-14-I), 5 February 2004 [hereinafter 'CDF Indictment'], § 19; Second Amended Indictment, *Taylor* (SCSL-03-01-I), 29 May 2007 [hereinafter 'Amended Taylor Indictment'], § 33. As will be discussed in further detail later in this article, the Prosecution amended the original *Taylor* indictment to omit the common purpose pleading that originally mirrored those in the *RUF* and *AFRC* Indictments. See Indictment, *Taylor* (SCSL-03-01-I), 7 March 2003 [hereinafter 'Original Taylor Indictment'], § 23.

- 6 See Judgment, *Brima, Kamara and Kanu* (SCSL-04-16-A), Appeals Chamber, 22 February 2008 [hereinafter 'AFRC Appeal'], § 80.
- 7 Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, Judgment, *Sesay, Kallon and Gbao* (SCSL-04-15-1-1321), Appeals Chamber, 26 October 2009 [hereinafter 'Fisher Dissent'], § 45.
- 8 *Ibid.*, § 44. For examples of such criticism, see E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Cambridge: Cambridge University Press, 2003), at 4–5; H. Olásolo, 'Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement', 7 *International Criminal Law Review* (2007) 143, at 157.

The article is divided into four parts. Following this introduction, Section 2 briefly reviews the core critical elements of JCE, as established in the ICTY jurisprudence. Section 3 then details the origins and extent of the doctrinal perversion at the Special Court. Using ICTY jurisprudence as a contrasting point of reference, this section explains why the SCSL approach to JCE is both erroneous and functionally impractical as a means of assessing individual criminal liability. The article concludes in Section 4 with reflections on the implications of the SCSL approach to JCE for the ongoing *Taylor* case, and more broadly for the legitimacy of future international criminal adjudication.

The authors contend that the problems encountered by the Special Court are not necessarily inherent to JCE, but are rather the result of a failure to properly apply the doctrine in line with the established jurisprudence and fundamental fair trial standards. To avoid the Special Court's mistakes, international adjudicators must, as the *ad hoc* jurisprudence has emphasized, insist upon strict satisfaction of the established elements of the doctrine, which exist to enable the fair and equitable prosecution of accused persons alleged to be responsible for crimes physically perpetrated by others. JCE fails to be a useful tool for assigning individual liability unless its basic elements are clearly pled in the indictment and rigorously applied by judges. The authors conclude with the recommendation that future international criminal proceedings take heed of the SCSL's misguided approach, and abandon this strand of jurisprudence, or else risk further undermining the legitimacy of international criminal law.

2. Basic Elements of JCE Liability

JCE is a mechanism for assessing the individual liability of those charged with 'committing' crimes under Article 6.1 of the SCSL Statute.⁹ The ICTY Appeals Chamber first recognized JCE as a mode of liability under customary international law in *Tadić*.¹⁰ The Appeals Judgment in *Tadić* articulated three different forms of JCE: basic (JCE I), systematic (JCE II) and extended (JCE III).¹¹ Almost invariably, the *Tadić* JCE framework has been applied, as such, in subsequent international criminal cases.¹² This article only addresses the first and third

9 Art. 6.1 SCSLSt. ('A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.')

10 Judgment, *Tadić* (IT-94-I-A), Appeals Chamber, 15 July 1999 [hereinafter '*Tadić*'], §§ 189–229. On the customary nature of JCE, see also Amicus Curiae Brief of Professor Antonio Cassese and Members of the Journal of International Criminal Justice on Joint Criminal Enterprise Doctrine, *Case of Kaing Guek Eav, alias 'Duch'*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 27 October 2008. Available electronically at <http://www.antoniocassese.it/italiano/reports/Amicus.Curiae.Brief.27.October.2008.pdf> (visited 1 March 2010).

11 *Ibid.*, § 190.

12 Cf. Decision on Confirmation of Charges, *Lubanga* (ICC 01/04-01/06), Pre-Trial Chamber I, 29 January 2007. The approach taken in the *Lubanga* pre-trial decision abandons JCE in favour of a more narrowly tailored liability theory resembling something known in German criminal law as *Mittäterschaft* ('co-perpetration') or *Organisationsherrschaft* — a manner of imputing

forms of JCE, as none of the Special Court indictments pled the systematic form.

To prove liability under basic or extended form JCE, the Prosecution must establish the following three objective elements beyond a reasonable doubt:

- (1) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;¹³
- (2) A plurality of persons acting in concert in pursuit of a common purpose and¹⁴
- (3) Participation by the Accused, in the form of a 'significant contribution' to the common plan, design or purpose.¹⁵

In addition to establishing these objective elements, the prosecution must also prove that the accused possessed the requisite *mens rea* for the crimes charged. The fundamental difference between JCE I and JCE III liabilities is that the former attaches to crimes that fall *within* the common criminal purpose of the JCE,¹⁶ while the latter attaches to crimes that fall *outside* the common criminal purpose.¹⁷ Accordingly, convictions pursuant to JCE I liability require a different *mens rea* than convictions pursuant to JCE III. JCE I liability attaches when the accused (together with the other members of the JCE plurality) intended the commission of a crime or crimes in pursuit of a jointly agreed common criminal plan in which the accused participated.¹⁸ Under this basic form JCE, 'an essential requirement in order to impute to any accused member of the JCE liability for a crime committed by another person is that the crime in question *forms part of the common criminal purpose*'.¹⁹ The trier of fact must be satisfied that the criminal intention of the accused is identical to that of the other JCE participants, and encompasses the entire scope of the common purpose alleged.²⁰ This means the accused 'must intend the full extent of the shared

responsibility to high-level commanders in a criminal organization that requires more direct proof of control and deliberate commission than does the *Tadić* JCE doctrine (for further discussion, see Olásolo, *supra* note 8).

13 *Tadić*, *supra* note 10, § 227.

14 *Ibid.*; See also Judgment, *Krajišnik* (IT-00-39-T), Trial Chamber, 27 September 2006 [hereinafter '*Krajišnik*'], § 884.

15 *Ibid.* ('Participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.'). Later cases elaborated upon the 'participation' requirement, clarifying that, 'although the contribution [to the common plan] need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.' Judgment, *Brđanin* (IT-99-36-A), Appeals Chamber, 3 April 2007 [hereinafter '*Brđanin*'], § 430 (internal citations omitted).

16 *Brđanin*, *supra* note 15, § 418; See also Judgment, *Martić* (IT-95-11-A), Appeals Chamber, 12 June 2007, § 82.

17 See e.g. Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, § 87.

18 See *Brđanin*, *supra* note 15, §§ 365, 430–431; See also Judgment, *Vasiljević* (IT-98-32-A), Appeals Chamber, 25 February 2004, § 101.

19 *Brđanin*, *supra* note 15, § 418 (emphasis in original).

20 *Tadić*, *supra* note 10, § 196.

common criminal purpose, both in terms of the crimes intended and the geographical area covered by the JCE.²¹

The extended form of the doctrine describes further liability that arises when a JCE member is responsible for the commission of additional crimes beyond the scope of the agreed common purpose. Courts assess liability for these crimes pursuant to a different *mens rea*; For JCE III liability to attach, additional crimes outside the common criminal purpose need not have been intended by the accused. Rather, it is sufficient that they were carried out in furtherance of the intended common criminal plan, and were the reasonably foreseeable consequence of that common criminal plan.²² The extended form JCE is predicated, however, upon a preliminary satisfaction of all the elements of a basic form JCE. At the core of *both* JCE I and JCE III, the accused must have had intent to commit the crime or crimes that comprise, or are a necessary part of, the common purpose.²³ This intent is what makes the accused a member of the plurality in the first place.²⁴ An individual who lacks sufficient intent to fall within the plurality cannot incur JCE liability in *any* form for crimes committed in furtherance of the common purpose. Accordingly, 'before arriving at the question of whether the accused may incur JCE liability for reasonably foreseeable crimes committed beyond the scope of the common criminal purpose, a trier of fact must be satisfied beyond reasonable doubt that the accused shared the intent to commit the crimes within the common criminal purpose.'²⁵

ICTY jurisprudence states that the Prosecution must clearly plead these basic elements as material facts in the indictment.²⁶ An indictment alleging responsibility on the part of an accused as a participant in a JCE should, *inter alia*, state the form of JCE alleged.²⁷ Moreover, the contours of the alleged common criminal purpose must be clearly and expressly defined.²⁸ The pleading must identify those engaged in the JCE, to the extent known and at least by reference to the group to which they belong.²⁹ The prosecution must also

21 Fisher Dissent, *supra* note 7, § 11.

22 According to *Tadić*, JCE III arises in cases 'involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.' *Tadić*, *supra* note 10, § 204.

23 *Ibid.*, § 220; See also *Brđanin*, *supra* note 15, § 410 (the issue is whether 'the crime in question forms part of the common purpose').

24 See e.g. *Brđanin*, *supra* note 15, § 418 ('In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE ...').

25 Fisher Dissent, *supra* note 7, § 8.

26 See e.g. Decision on Form of Second Amended Indictment, *Krnjelac* (IT-97-25-T), Trial Chamber, 11 May 2000, § 16.

27 Judgment, *Krnjelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, §138.

28 *Brđanin*, *supra* note 15, §§ 424, 427.

29 Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, *Tolimir* (IT-05-88/2-PT), Trial Chamber, 14 December 2007 [hereinafter '*Tolimir*'], § 46; Judgment, *Simić, Tadić and Zarić* (IT-95-9-T), Trial Chamber, 17 October 2003 [hereinafter '*Simić et al.*'], § 145; Decision on Sreten Lukić's Preliminary Motion on Form of Indictment, *Pavković, Lazarević, Djordjević and Lukić* (IT-03-70-PT), Trial Chamber, 8 July 2005, § 6.

clearly identify the role that the accused is alleged to have played within the JCE.³⁰

These pleading requirements have been recognized to be essential to the proper employment of the JCE mode of liability for two principle reasons: to ensure fairness, and to maintain its utility as a practical tool for assessing the liability of an individual accused. First, as the jurisprudence emphasizes, JCE is a mode of liability and not a crime itself.³¹ As with all modes of liability this requires that the indictment contains a minimum level of information; there is a floor below which the information must not fall if it is to provide adequate notice to the accused.³²

Second, the pleading framework is critical to the maintenance of the doctrine as a practical mode of assessing liability within the international criminal context. Only where all the basic requirements for JCE liability have been established beyond a reasonable doubt can the accused be found to have done more than merely associate with criminal persons: 'He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission.'³³ Hence, the jurisprudence from the ICTY demands that these basic elements and evidentiary principles are expressly reflected in the indictment.³⁴ The trier of fact needs, at a minimum, the specified material facts comprising the framework of the doctrine in the indictment — including a common criminal purpose that unambiguously particularizes the shared criminal intent at the core of the JCE — in order to be able to conduct the required analysis. For this reason, sound pleading of the basic elements is indispensable for the proper assessment of JCE liability.

3. Doctrinal Confusion at the SCSL

A series of JCE decisions from the *AFRC*, *RUF* and *Taylor* cases at the SCSL betray profound doctrinal confusion and overreaching at the Special Court. As will be explained in this section, at the root of the problem is the SCSL's unprecedented approach to pleading the common criminal 'plan, design, or purpose' of each alleged JCE. Departing from a well-established ICTY approach to pleading JCE with an inherently criminal common purpose, the SCSL issued indictments that failed to plead criminal intent as a necessary part of the common purpose,³⁵ and in one case, failed to explicitly plead any common

30 *Simić et al.*, *supra* note 29, § 22; *Tolimir*, *supra* note 29, § 46.

31 Judgment, *Kvočka et al.* (IT-98-30/1), Appeals Chamber, 28 February 2005 [hereinafter '*Kvočka Appeal*'], § 91.

32 See e.g. Decision on Form of Indictment, *Kvočka et al.* (IT-98-30/1), Trial Chamber, 12 April 1999, § 14.

33 *Brđanin*, *supra* note 15, § 431.

34 *Ibid.*, §§ 424, 427.

35 See *AFRC* Indictment, *supra* note 5, § 34; *RUF* Indictment, *supra* note 5, § 36; *CDF* Indictment, *supra* note 5, § 19.

purpose at all, criminal or otherwise.³⁶ Rather than acknowledge that JCE had been defectively pled in the indictments, the SCSL judiciary adopted a new interpretation of 'common purpose', without any basis in customary international law. Abandoning the doctrine's *mens rea* cornerstone, the Court determined that there is no requirement for 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'.³⁷ This section explains what distinguishes the SCSL common purpose construction from other international precedent, and discusses the consequences for the jurisprudence following the Court's unwarranted departure from the basic tenets of the liability doctrine. To date, the *RUF* case is the only trial at the SCSL to have attempted to apply the Appeals Chamber's legal innovation. In this section, the authors highlight certain flawed outcomes from that case, to illustrate the need to abandon the SCSL's misconceived approach to JCE.

A. Established Approach to JCE Pleading at the ICTY

According to *Tadić*, at its core, JCE liability requires the 'existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute'.³⁸ The disjunctive requirement articulated in *Tadić* and adopted in all subsequent JCE cases at the ICTY has given rise to structurally similar pleadings across the various JCE cases at the ad hoc international tribunals; the cases generally allege factual circumstances that, explicitly or otherwise, involve the pursuit of an ultimate, non-criminal (political) objective, which the accused and a group of co-perpetrators seek to achieve through an agreement to commit crime. The doctrine requires that these scenarios are described in the indictment as an inherently criminal plan, design or purpose, and this has defined the nature of JCE pleading at the ICTY. The relative consistency of pleading across cases is at once the product of the similar and overlapping factual scenarios prosecuted at the ICTY, and the logical consequence of a doctrine that demands concerted action in pursuit of a shared crime (or crimes) at its core.

For example, in the JCE trials involving ethnic Serb accused at the ICTY, the cases have generally involved allegations of an ultimate, potentially non-criminal objective, usually pled as a variant of a political campaign designed to permanently remove the non-Serbian population from areas designated as part of a Serbian state.³⁹ Pursuant to the doctrinal demands of JCE,

36 See Amended *Taylor* Indictment, *supra* note 5, § 33.

37 Judgment, *Sesay, Kallon and Gbao* (SCSL-04-15-A), Appeals Chamber, 26 October 2009 [hereinafter '*RUF* Appeal'], § 296, quoting *ARFC* Appeal Judgment [internal citations omitted].

38 *Tadić*, *supra* note 10, § 227.

39 See e.g. Third Amended Indictment, *Karadžić* (IT-95-5), 27 February 2009, § 6; Consolidated Amended Indictment, *Krajišnik* (IT-00-39), 7 March 2002, § 4; Third Amended Joinder Indictment, *Milutinović et al.* (IT-05-87), 21 June 2006, § 19.

however, this plan, design or purpose has been pled as inherently criminal, deriving its essential criminality from the intentional use of force that is pled as a necessary part of that overall objective.⁴⁰ Examples of specific language employed include the *Brđanin* pleading, which alleged:

The purpose of the joint criminal enterprise was the permanent forcible removal of Bosnian Muslim and Bosnian Croat inhabitants from the territory of the planned Serbian state by the commission of the crimes alleged in Counts 1 through 12.⁴¹

Similarly, the indictment in *Martić* pled that:

the purpose of this joint criminal enterprise was the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of the Republic of Croatia ('Croatia'), and large parts of the Republic of Bosnia and Herzegovina ('Bosnia and Herzegovina') in order to make them part of a new Serb-dominated state through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal.⁴²

Logically, on its own, a non-criminal objective cannot satisfy the first element of JCE; it must, necessarily, be pled in conjunction with an inherently criminal plan or design, commonly intended by all members of the alleged JCE, in pursuit of that ultimate non-criminal objective. As illustrated in the examples outlined above, this has been precisely the approach taken at the ICTY. Although the permanent removal of the non-Serbian population is not, by itself, a criminal purpose, the alleged shared intent of the co-perpetrators *to use force* to achieve that objective provides the necessary criminal core of a plan, design or purpose that 'amounts to or involves' a crime within the Statute, thereby satisfying this critical pleading requirement of the JCE doctrine.

B. Unprecedented Approach to JCE Pleading at the Special Court

In 2003, the Special Court departed from the firmly established ICTY approach to pleading, when the Office of the Prosecutor elected to issue indictments particularizing a non-criminal objective, without alleging any criminal means as a necessary part of that objective. For the *RUF*, *AFRC* and original *Taylor* indictments, the 'common plan, purpose or design' pled were identical: 'to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.'⁴³ In the

40 *Ibid.* See also, Sixth Amended Indictment, *Brđanin* (IT-99-66), 9 December 2003 [hereinafter '*Brđanin* Indictment'], § 27(1); Amended Indictment, *Martić* (IT-95-11), 9 September 2003 [hereinafter '*Martić* Indictment'], § 4; Amended Indictment (Bosnia), *Milošević* (IT-02-54), 22 November 2002, § 6.

41 *Brđanin* Indictment, *supra* note 40.

42 *Martić* Indictment, *supra* note 40.

43 See *AFRC* Indictment, *supra* note 5, § 34; *RUF* Indictment, *supra* note 5, § 36; Original *Taylor* Indictment, *supra* note 5, § 23.

paragraph following this articulation of a non-criminal objective,⁴⁴ each of the indictments stated that: ‘The crimes alleged in this indictment, including unlawful killings, abductions, forced labor, 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.’⁴⁵ The consolidated indictment of the CDF accused mirrored the pleading in the other three indictments, alleging that the ‘plan, purpose or design ... of the CDF was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone’, with the various crimes alleged in each count pled in the alternative as either within or outside ‘the joint criminal enterprise.’⁴⁶

In May of 2007, the second amended indictment in the *Taylor* case departed even further from established ICTY pleading practices, by deleting all references to ‘joint criminal enterprise’, and removing the paragraph in the original indictment that described the common purpose of the JCE as a plan to ‘to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.’⁴⁷ The current *Taylor* indictment simply alleges that the accused is responsible, pursuant to Article 6.1 of the Statute for crimes that ‘amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.’⁴⁸ This pleading fails to articulate an objective — criminal or otherwise — at the core of the alleged common purpose, and furthermore, like the other SCSL indictments, fails to plead criminal intent as a necessary part of the common purpose. Instead, the specific alleged crimes are pled in the alternative, as either within or outside some unspecified common purpose.⁴⁹

The distinction between the SCSL pleading construction and the ICTY approach may seem marginal to some, but the differences could not be more consequential. By pleading intended crimes as a necessary part of the non-criminal objective, the ICTY approach produces inherently criminal common purposes, which satisfy the threshold requirement that the common criminal purpose of a JCE ‘amounts to or involves’ a crime within the Statute of the Court. The SCSL approach circumvents this requirement, permitting the prosecutor to plead crimes as alternatively either within or outside the non-criminal objective, rather than as a necessary part of it. The obvious

44 See M.N. Shaw, *International Law* (5th edn., 2003), at 1040 (‘Whether 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.’)

45 See *AFRC* Indictment, *supra* note 5, § 35; *RUF* Indictment, *supra* note 5, § 37; Original *Taylor* Indictment, *supra* note 5, § 24.

46 See *CDF* Indictment, *supra* note 5, §19.

47 See Original *Taylor* Indictment, *supra* note 5, §§ 23–24. Compare with Amended *Taylor* Indictment, *supra* note 5, § 33.

48 Amended *Taylor* Indictment, *supra* note 5, § 33.

49 *Ibid.*

consequence of this approach is that the common purposes failed to articulate any definitive criminal intent, and therefore pled the alleged criminality of the joint enterprise as optional or, alternatively, wholly absent. The second amended *Taylor* indictment took this deviation one step further, failing to describe any specific common purpose at all, let alone particularize criminal means as a necessary part of the shared objective.⁵⁰

Despite the SCSL Appeals Chamber's claims to the contrary, this approach to pleading a common purpose is not 'well-established' at the ad hoc tribunals.⁵¹ It is, in fact, wholly unprecedented. ICTY cases always concern the prosecution of charges through a JCE with an inherently criminal objective, or a non-criminal objective that *necessarily* involves the intent to commit crimes (e.g. the creation of a Serb-dominated state *by forcible removal* of non-Serbs). While it is true that most ICTY indictments allege liability for the crimes within the counts pursuant to the basic and extended form of JCE in the alternative, these cases do not rely on the alternatively pled crimes to establish the objective doctrinal requirement of an agreed criminal purpose. When the common purpose of a JCE is inherently criminal, it is doctrinally acceptable for the prosecutor to plead the crimes constituting the counts as alternatively giving rise to JCE I and JCE III liabilities. Once the core criminal plan or design of the JCE has been clearly articulated, there is no ambiguity as to the agreement and criminal intent the members of the JCE plurality are alleged to share. The Court can assess the membership in the plurality according to whether or not the plurality shared *that* criminal intent (e.g. to further a plan of forced displacement or persecution), and then proceed to determine which of the specific crimes in each count (i.e. murder, rape, etc.) fell within this common criminal plan. Depending on whether those criminal acts fell within the common criminal plan, or, alternatively, were the reasonably foreseeable result of the common criminal plan, the Court will assign liability to members of the JCE plurality pursuant to the basic or extended form of the doctrine.

The Special Court indictments failed to adhere to this essential pleading requirement. The objective of taking actions to seize (or regain) power and control over territory does not qualify as a common criminal plan, purpose or design, without the alleged intended criminal conduct being pled as a necessary part of that objective. The only objectively defined, shared plan alleged in such a scenario is a legitimate association between individuals in pursuit of an objective that violates no international laws but *might*, in its implementation, include crimes. In effect, the SCSL indictments pled that the common purpose of the JCE alternatively *either* involved crimes within the Statute of the Court *or* it did not. This plainly violated the doctrinal requirement that the Prosecutor allege a common purpose that 'amounts to or involves' a crime,

50 Notwithstanding this blatant omission, a 2-1 Trial Chamber majority (affirmed on interlocutory appeal) declined to find the pleading defective. See Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, *Taylor* (SCSL-03-1-T), 27 February 2009 [hereinafter '*Taylor* JCE Decision']. For more detailed discussion of the Court's interpretation of the *Taylor* Indictment, see *infra*.

51 See e.g. *AFRC* Appeal, *supra* note 6, § 85.

and specifically plead the criminal nature or purpose of the JCE as a material fact in the indictment.

C. Judicial Response to Defective JCE Pleading at the SCSL

Trial Chamber II at the SCSL was the first of the two trial chambers to attempt to grapple at the final judgement stage with the conundrums created by the Prosecution's novel approach to 'common purpose' pleading. In the *AFRC* Trial Judgment, the Chamber rejected the common purpose (to 'take any actions necessary to gain and exercise political power over the territory of Sierra Leone, in particular the diamond mining areas') as defectively pled, on the grounds that it was 'not a criminal purpose recognised by the Statute' of the Special Court.⁵² The judges correctly emphasized that the JCE doctrine demands that 'the purpose has to be inherently criminal and the perpetrators, including the accused, have a common state of mind, namely the state of mind that the *statutory crime(s)* forming part of the objective should be carried out'.⁵³ The Chamber rejected the pleading based, in part, on a straightforward and literal interpretation of the indictment, which the Court read as alleging that the common state of mind shared by the co-perpetrators was not an (express or implied) agreement to collectively pursue an inherently criminal plan or design, or even a collective intent to commit one or more of the underlying crimes contained in the various counts, but rather a lawful agreement simply to take power and control over the territory of Sierra Leone.⁵⁴

In defence of its pleading construction, the Prosecution had attempted to argue at trial that the language in the indictment satisfied the JCE doctrine by pleading a common purpose that 'involves' rather than 'amounts to' the commission of a crime.⁵⁵ Trial Chamber II rejected this argument.⁵⁶ Although the reasons proffered by the Chamber in dismissing the Prosecution position — that the evidence did not support a theory of collective intent to commit crimes at the outset of the alleged JCE — were beside the point (as subsequently noted by the Appeals Chamber),⁵⁷ the decision to reject the pleading as defective was nevertheless correct. As noted above, whether purporting to plead a common purpose that 'amounts to' crimes, or 'involves' crimes,⁵⁸ the doctrine demands that indictments describe an inherently criminal intent, shared by co-perpetrators, before a JCE and the accused's participation in its common

52 Judgment, *Brima, Kamara and Kanu* (SCSL-04-16-T), Trial Chamber II, 20 June 2007 [hereinafter 'AFRC Judgment'], § 67.

53 *Ibid.*, § 73 (emphasis in original), citing to *Krajišnik*, *supra* note 14, § 883.

54 See e.g. *RUF* Indictment, *supra* note 5, § 37.

55 *AFRC* Trial Judgment, *supra* note 52, § 74.

56 *Ibid.*, §§ 74–76.

57 *AFRC* Appeal, *supra* note 6, § 84.

58 As others have noted, there is no international criminal jurisprudence on what it means to 'involve' but not 'amount to' crimes. See C. Rose, 'Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes', 7 *Journal of International Criminal Justice* (2009) 353, at 360.

purpose may be found to exist. The *AFRC* indictment, as with all the *SCSL* indictments, was defective because it failed to unambiguously articulate this shared criminal intent within the common purpose of the JCE.

Unfortunately for *SCSL* jurisprudence, the Appeals Chamber overturned the JCE findings in the *AFRC* Trial Judgment on appeal.⁵⁹ The appellate decision accepted that that JCE doctrine requires the pleading and establishment of an inherently criminal plan, design or purpose, and that the objective of gaining and exercising political power and control over the territory of Sierra Leone does not amount to such a crime.⁶⁰ However, the Chamber reasoned 'that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective'.⁶¹ This novel interpretation of JCE gave the Appeals Chamber grounds to resurrect the defective common purpose pleadings in the *SCSL* cases, but it did so at the expense of redefining a core element of the doctrine, without the required basis in customary international law.

As will be detailed in the discussion below, the Appeals Chamber erred in its analysis in two principle ways: First, by introducing the concept of contemplation to common criminal purpose analysis, the Appeals Chamber lowered the *mens rea* that fundamentally defines membership in a JCE. Second, the Court's approach to salient jurisprudence from the ICTY was misconceived, and its legal conclusions were based on unwarranted parallels between the pleading practices at the *SCSL* and those that had been established at the ICTY.

1. *Introducing 'Contemplation' to the Analysis: Lowering the Mens rea Requirement for JCE Membership*

The introduction of 'contemplation' into the first objective element of a JCE was tantamount to lowering the *mens rea* requirement. Collective pursuit of a common purpose with identical criminal intent for crimes within that common purpose is what defines membership in a JCE plurality.⁶² Moreover, shared criminal intent is an essential part of the justification for imputing liability to the accused for crimes physically perpetrated by others. For crimes to legitimately fall within the common purpose and be attributed to an accused pursuant to the basic form of JCE, they must be found to have been intended by the plurality. Under the *SCSL*'s new JCE standard, there is no threshold requirement that a shared criminal plan, design or purpose is intended by the JCE members; it is sufficient that they share a lawful common objective, and each separately 'contemplate' the possibility that crimes might be committed in furtherance of that lawful objective. The accused becomes liable for the

⁵⁹ *AFRC* Appeal, *supra* note 6, §§77 and 78.

⁶⁰ *Ibid.*, §§ 80–82.

⁶¹ *Ibid.*, § 80.

⁶² See e.g. *Brdanin*, *supra* note 15, § 418 ('In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE ...').

acts of his co-perpetrators without the required agreement concerning the commission of a collectively pursued crime. Under this standard, a trier of fact would not even need to be satisfied that the individual contemplation of the accused was the same as that of his alleged co-perpetrators. This plainly violates the culpability principle, and articulates a fourth form of JCE, unrecognized by customary international law.⁶³

2. *Misplaced Reliance on ICTY Precedent*

The SCSL Appeals Chamber relied upon three ICTY cases — *Martić*, *Haradinaj* and *Kvočka* — in purported justification for its JCE decision, arguing that the pleadings in these cases were similar or the same as those at the SCSL.⁶⁴ The Court's reliance on this precedent implied that the ICTY had similarly endorsed common purpose pleadings that failed to allege an inherently criminal common purpose, and that this somehow provided a jurisprudential basis for the SCSL's common criminal purpose construction.⁶⁵ This is incorrect. The pleadings in all three cases are distinguishable from the SCSL approach, and only serve to further illustrate the ICTY practice of requiring an inherently criminal common purpose.

Martić, for example, concerned a high-ranking politician found liable pursuant to JCE, based in part on the classification of certain ostensibly legitimate political functions performed as contributions to the common criminal purpose of the JCE. The Indictment in *Martić* alleged that the common purpose of the JCE was:

the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of the Republic of Croatia ('Croatia'), and large parts of the Republic of Bosnia and Herzegovina ('Bosnia and Herzegovina') in order to make them part of a new Serb-dominated state through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal.⁶⁶

Forcible removal of the non-Serb population is an inherently criminal objective, even when pled in the context of a broader political goal. This is not analogous to the SCSL pleading.

The SCSL Appeals Chamber's reliance on *Haradinaj* as a case with an analogous 'common purpose' pleading was equally misconceived, and fundamentally misrepresented the *Haradinaj* pleading. According to the SCSL Appeals Chamber, the *Haradinaj* Trial Chamber:

accepted that the pleading of joint criminal enterprise was proper notwithstanding the Prosecution pleading a common purpose (namely 'consolidate[ing] the total control of the Kosovo Liberation Army over the KLA operational zone of Dukagjin') which itself does not amount to any crime within the Statute of the ICTY. However, the *Haradinaj* Indictment

63 Customary Law recognizes only three. See *Tadić*, *supra* note 8, § 195.

64 See *AFRC Appeal*, *supra* note 6, §§ 77–79.

65 *Ibid.*, § 80.

66 *Martić* Indictment, *supra* note 40 (emphasis added).

clearly alleges that the joint criminal enterprise involved the commission of crimes such as intimidation, abduction, imprisonment, beating, torture and murder of targeted civilians in violation of Articles 3 and 5 of the ICTY Statute.⁶⁷

This is not an accurate description of the common purpose alleged in *Haradinaj*. The SCSL Appeals Chamber quoted the *Haradinaj* pleading out of context, by truncating the relevant part of the indictment. Notwithstanding the SCSL Appeals Chambers' claims to the contrary, *Haradinaj* pled an inherently criminal common purpose consisting of two crimes — 'unlawful removal' and 'mistreatment of Serb Civilians' — as unambiguously intended and pursued collectively by the members of the JCE plurality. The full *Haradinaj* pleading alleged that the 'common criminal purpose of the JCE was to consolidate total control of the KLA over the KLA Dukagjin Operational Zone by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians and other civilians'.⁶⁸

Further to this clearly pled, inherently criminal common purpose, the indictment charged the accused in the counts of the indictment with responsibility for various crimes against humanity and violations of the laws or customs of war, including murder, persecution, inhumane acts, cruel treatment, unlawful detention and torture, as specific criminal acts that either fell within the common criminal purpose to mistreat and displace civilians (giving rise to JCE I liability) or were a foreseeable consequence of the criminal plan to mistreat and displace civilians (giving rise to JCE III liability).⁶⁹ Unlike the SCSL indictments, the *Haradinaj* JCE did not rely on the alternatively pled crimes in the counts to establish the objective doctrinal requirement of an agreed criminal purpose. By pleading two core crimes — mistreatment and unlawful removal of civilians — as a necessary part of the criminal 'plan design or purpose' of the JCE plurality, *Haradinaj* satisfied the JCE doctrine.

The *Kvočka* case lends no more support to the SCSL pleading construction than the other two cited. In *Kvočka*, the Court judged the common intent that bound together the plurality with reference to the crime of persecution at the Omarska detention camp.⁷⁰ Joint criminal enterprise was actually never pled in the *Kvočka* indictments, and the Appeals Chamber found the indictment defective for failing to plead the material elements of JCE.⁷¹ Nevertheless, the Court assessed the liability of the accused in *Kvočka* pursuant to JCE, after determining that the Prosecution cured this defect through the subsequent provision of 'timely, clear, and consistent information' which detailed the

67 AFRC Appeal, *supra* note 6, § 78.

68 See Fourth Amended Indictment, *Haradinaj* (IT-04-84), 16 October 2007, § 26.

69 *Ibid.*, §§ 25 and 26.

70 See e.g. Judgment, *Kvočka* (IT-98-30/1), Trial Chamber, 2 November 2001 [hereinafter '*Kvočka*'], § 320; See also *Kvočka* Appeal, *supra* note 31, §§ 108–110, 599.

71 *Kvočka* Appeal, *supra* note 31, §§ 41–42.

theory of JCE upon which the prosecution relied at trial.⁷² According to the *Kvočka* Appeal Judgment, the Prosecution 'argued that the common design that united the accused was the creation of a Serbian state within the former Yugoslavia, and that they worked to achieve this goal by participating in the persecution of Muslims and Croats'.⁷³ In other words, the common criminal purpose, once again, entailed a shared *intent to commit a crime*, persecution, as part of a wider goal to rid the Prijedor area of Muslims and Croats, carried out through the commission of the specific criminal acts alleged in each count, such as murder, torture and rape and mental and physical violence and inhumane conditions.⁷⁴

In sum, the Special Court pleading construction is not supported by the ICTY jurisprudence that the SCSL Appeals Chamber relied upon when it altered a core element of the JCE doctrine. There is no JCE precedent that supports the pleading of a non-criminal objective without criminal means alleged as a necessary and intended part of the plan or design.

D. Jurisprudential Consequences

The SCSL decision to replace the notion of shared criminal intent with a new standard of contemplating crimes undermined the Court's liability analysis in the subsequent *RUF* case.⁷⁵ Trial Chamber I's attempt to apply the doctrinal 'innovation' to the *RUF* case gave rise to deeply troubling outcomes. Arguably the most startling of these, was the Trial Chamber's decision to convict former *RUF* commander Augustine Gbao as a member of a JCE plurality, liable for hundreds of crimes pursuant to the basic form of the doctrine, despite the fact that the Court determined he did not share the intent to commit all the crimes within the common purpose of the JCE. In October 2009, the SCSL Appeals Chamber upheld these convictions in a 3-2 majority decision that reaffirmed the depth of the Court's doctrinal misapprehension, and provided a concrete example of the dangers that lie ahead for international criminal

⁷² *Ibid.*, § 43.

⁷³ *Ibid.*, § 46.

⁷⁴ See *Kvočka*, *supra* note 70, § 320.

⁷⁵ See Judgment, *Sesay et al.* (SCSL-04-15), Trial Chamber I, 2 March 2009 [hereinafter '*RUF* Judgment'], § 296. It is worth noting that Trial Chamber I issued its final Judgment in the *CDF* case after the *AFRC* Trial Judgment, but before the *AFRC* Appeal Judgment. That case produced no relevant JCE jurisprudence, however, because the Court simply issued a cursory dismissal of the JCE allegations, on the facts, rather than on the form of pleading. Despite striking similarities to the *RUF* case, including a structurally parallel JCE pleading, and the existence of an armed organization with members found to be involved in the commission of war crimes and other inhumane acts against perceived civilian enemy 'collaborators' (see *CDF* Trial Judgment, §§ 695–700), Trial Chamber I dismissed allegations of JCE liability for the *CDF* accused by repeatedly concluding that 'there is no evidence' to prove the *CDF* accused acted pursuant to 'a common purpose, plan or design to commit criminal acts.' (Judgment, *Norman, Fofana and Kondewa* (SCSL-03-14-T), Trial Chamber I, 2 August 2007, inter alia §§ 732, 770, 803, 814, 850, 865, 907, 914, 939 and 949).

adjudication if this misconceived strand of jurisprudence is adopted by future triers of fact.

In the *RUF* Trial Judgment, a 2-1 Majority reasoned that what mattered for determining Gbao's 'participation' under the basic form of JCE was not whether he shared an identical common criminal purpose with his alleged co-perpetrators, but 'that he intended or that it was foreseeable that he would further the joint criminal enterprise'.⁷⁶ On appeal, a three-judge Majority adopted similar language: 'The Appeals Chamber holds that, so long as Gbao agreed to the Common Criminal Purpose and was, therefore, a member of the JCE as the Trial Chamber found, he is responsible for all crimes that he either intended, or were naturally foreseeable would be committed by members of the JCE or persons under their control.'⁷⁷

In affirming the Trial Chamber's conclusions about Gbao's 'membership' in the JCE, the Appeals Majority redefined JCE plurality: 'Gbao shared the common plan which was 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 Gbao contemplated the commission of crimes.'⁷⁸ Despite having noted in the previous paragraph that the Court understood the common criminal purpose in the *RUF* case to consist of the objective taken together with the criminal means in the counts,⁷⁹ the Appeals Chamber passage summing up Gbao's purported liability plainly indicates that the Justices in the Majority considered that Gbao's criminal liability could be judged by reference Gbao's intent to pursue the objective *alone* (i.e. the non-criminal plan to take over the country).⁸⁰ As such, it would appear that the Majority determined that it was correct to judge Gbao's membership in the plurality based on his pursuit of a legal objective (while 'contemplating' crimes) rather than on a proof beyond a reasonable doubt of his criminal intent.

These findings are irreconcilable with the position taken by both Chambers that all of the crimes in the first 14 Counts of the *RUF* indictment fell *within* the common purpose of the JCE.⁸¹ Since *Tadić* it has been crystal clear that criminal means are either intended within a common purpose, or foreseeable from the common purpose — they cannot be both at once.⁸² Accordingly, this judicial determination definitively foreclosed the possibility of convicting any

⁷⁶ *RUF* Judgment, *supra* note 75, § 1990.

⁷⁷ *RUF* Appeal, *supra* note 37, § 492.

⁷⁸ *Ibid.*, § 486.

⁷⁹ *Ibid.*, § 485 ('The Trial Chamber defined the Common Criminal Purpose of the JCE as consisting of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as the means of achieving that objective.')

⁸⁰ See *RUF* Judgment, *supra* note 75, § 1979; See also Dissenting Opinion of Justice Pierre Boutet, *Sesay et al.* (SCSL-04-15), Trial Chamber I, 2 March 2009, § 220 (where the Judge details his understanding of the Trial Chamber's concept of the criminal purpose as 'not even reflective of a crime which would fall under the jurisdiction of this Court.')

⁸¹ *RUF* Judgment, *supra* note 75, §§ 1979–1985; *RUF* Appeal, *supra* note 37, § 305.

⁸² *Tadić*, *supra* note 10, § 220.

of the *RUF* accused pursuant to a JCE III theory of liability, and obviated the need to conduct *any* foreseeability analysis at all. The fact that majorities in both chambers nonetheless repeatedly invoked foreseeability as a relevant factor for assessing Gbao's membership in a plurality illustrates how the 'contemplation' innovation misled the Court's analysis, and betrays a misapprehension, at both trial and appellate level, of the fundamentals of assessing JCE liability.

In her dissent, the newly appointed Appeals Justice, Shireen Fisher, correctly pointed out that 'participation' in a JCE is not an independent, objective matter of fact, but rather a legal conclusion.⁸³ As such, it requires proof beyond reasonable doubt of the requisite *mens rea* and *actus reus*. As Justice Fisher observed, not only did the Court fail to make findings of fact to support such a conclusion with respect to Gbao, the findings of fact they did make actually precluded the legal conclusion that Gbao was a member of the JCE plurality:

Trial Chamber's finding that Gbao was a 'participant' is unsupported by any reference to the evidence. In fact, it is contradicted by the Trial Chamber's findings on his *mens rea*. In making its detailed findings on Gbao's 'participation' in the Common Criminal Purpose, the Trial Chamber found that Gbao did not intend any of the crimes in Bo, Kenema and Kono Districts as means of achieving the Common Criminal Purpose.... The inescapable conclusion from the finding ... is that Gbao did not share the 'same criminal intention' as the other alleged participants in the Common Criminal Purpose. He cannot, therefore, be found to incur JCE liability.⁸⁴

The Majority approach to Gbao's liability collapsed the distinction between JCE I and JCE III by applying the extended form *mens rea* to crimes that the Court determined fell within the common purpose. The Judgment thereby purported to attach liability to Gbao pursuant to the 'basic form' JCE for merely foreseeing the possible furtherance of a common purpose, when the jurisprudence in fact requires proof of his intention to commit crimes within that common purpose.⁸⁵ In reaching these conclusions, the Majority embraced a new, fourth form of JCE, wherein there need not be a shared common criminal purpose between JCE members.⁸⁶ As Justice Fisher warned:

by holding that Gbao can be liable for crimes within the Common Criminal Purpose that he did not intend and that were only reasonably foreseeable to him... [the Majority] blatantly violates the principle *nullum crimen sine lege* because it imposes criminal responsibility

83 Justice Fisher was appointed to the SCSL Appeals Chamber following the death of Justice A. Raja N. Fernando in November of 2008. Justice Fisher was sworn in on 4 May 2009. The *RUF* Appeal was the first case at the Special Court on which she deliberated.

84 Fisher Dissent, *supra* note 7, §§ 14–16 (internal citations omitted).

85 *RUF* Appeal, *supra* note 37, § 493.

86 *Ibid.* See also Separate Opinion of Justice Emmanuel Ayoola in Respect of Gbao's Sub-Ground 8(J) and 8(K), *Sesay, Kallon and Gbao* (SCSL-04-15), Appeals Chamber, 26 October 2009, § 35.

without legal support in customary international law applicable at the time of the commission of the offence.

The Majority decision, she went on to observe, 'abandoned the safeguards laid down by other tribunals as reflective of customary international law'.⁸⁷ The Gbao convictions illustrate the consequences of abandoning these safeguards: without any basis in customary international law, a man 'stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend'.⁸⁸

4. Conclusion: Lessons Learned and Implications for Future International Criminal Adjudication

Since the ICTY Appeals Chamber first articulated a framework for JCE in *Tadić*, various cases have tested the boundaries of the doctrine as applied to new and more complex factual scenarios. In recent cases at the ICTY, trial and appellate judges have taken care to ensure that the doctrine of JCE does not expand haphazardly, and that it remains within the bounds of basic fair trial standards, the culpability principle and the doctrine of *nullum crimen sine lege*. This recent ad hoc tribunal jurisprudence reflects a greater emphasis on strict adherence to the established legal elements of JCE, and the need to conduct the most rigorous factual analysis in satisfaction of each legal element to avoid JCE becoming an illegitimate mode of liability that fails to assess individual conduct, and lapses into the forbidden territory of guilt by association.

Breaking from this apparent trend towards more careful application of the doctrine at the ICTY, the JCE decisions at the SCSL betray profound doctrinal confusion and overreaching. As discussed herein, it is simply not possible, under the SCSL framework, to make the distinctions critical to avoid condemning those without criminal intent. The Court's version of JCE is incapable of delineating between the collective pursuit of a war, and concerted action in furtherance of a crime. Contributions to a non-criminal objective are deemed contributions to a common criminal purpose, with mere criminal 'contemplation' linking the accused into an alleged criminal enterprise. Contemplation is, at best, synonymous with foreseeability. This is not the same thing as intention, even though it may be a fact from which intent could potentially be inferred. This assessment of liability through the 'contemplation' threshold is the smallest of steps from the attribution of guilt to all participants in a war.

The ambitious expectations placed on international criminal courts to fulfil broad 'transitional justice' goals can undermine foundational criminal justice principles, such as individual culpability. When a doctrine such as JCE is used to prosecute cases of mass atrocity in a court of limited jurisdiction like the

87 Fisher Dissent, *supra* note 7, § 45.

88 *Ibid.*

Special Court, there is a powerful incentive to ‘hold any given defendant responsible for as wide a swath of destruction as possible’.⁸⁹ The widely accepted risk that JCE might therefore degenerate into a method of attributing guilt by association should be warning enough to those entrusted with this formidable prosecutorial weapon to approach its use with circumspection and care, holding tight to basic procedural safeguards and principles of fairness. Consistent with the principle of legality and personal culpability, a Trial Chamber must approach its task concretely and with exactitude — ensuring that the burden of proof remains firmly where it belongs.

As was rightly emphasized in the April 2007 ICTY Appeal Judgment in *Brđanin*, ‘a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt’.⁹⁰ To ensure a fair trial and a just outcome, it is important ‘that the contours of the common criminal purpose have been properly defined in the indictment and are supported by the evidence beyond reasonable doubt’.⁹¹ The Appeals Chamber correctly observed that only by strict satisfaction of the objective and subjective elements could a tribunal reliably safeguard against JCE ‘over-reaching or lapsing into guilt by association’.⁹²

The Special Court approach to common purpose pleading fails to respect these safeguards, removing the essential elements that have to be satisfied to reach legitimate findings of responsibility consistent with the principle of legality and individual culpability. In her RUF dissent, Justice Fisher called upon her fellow international jurists to heed certain lessons learned from the Gbao convictions: ‘The Majority’s decision to uphold these convictions is regrettable. I can only hope that the primary significance of that decision will be as a reminder of the burden resting on triers of fact applying JCE, and as a warning of the unfortunate consequences that ensue when they fail to carry that burden’.⁹³ The authors agree with this statement, but contend that Justice Fisher did not take her admonition far enough. The problems at the SCSL reach beyond the misapplication of the doctrine to the facts of a single case, and the subsequent unfounded conviction of Gbao; at the heart of the flawed Majority Judgment was a fundamental doctrinal misapprehension arising from the *AFRC* Appeal that, when applied to the facts of all the cases at the SCSL and any future case is incapable of meeting the challenge of assessing individual liability, and merits nothing short of total renunciation.

Sometime in 2010, Trial Chamber II will retire to deliberate over the final and most high profile case at the SCSL — that against former Liberian President, Charles Taylor. Regrettably, the Court’s unorthodox and undiscerning approach to JCE has already tainted the *Taylor* case, and will presumably permeate the final Judgement as well. In response to an urgent defence motion regarding

89 Danner and Martinez, *supra* note 1, at 95.

90 *Brđanin*, *supra* note 15, § 428.

91 *Ibid.*, § 424 (internal citations omitted).

92 *Ibid.*, §§ 426, 431.

93 Fisher Dissent, *supra* note 7, § 45.

defects in the indictment,⁹⁴ Trial Chamber II has already upheld the form of the JCE alleged in *Taylor*,⁹⁵ despite the fact that the Second Amended *Taylor* Indictment departed further than other SCSL indictments from well established ICTY pleading standards, by failing to specifically articulate any common purpose at all, criminal or otherwise.⁹⁶

With neither objective nor means definitively pled as part of a common criminal purpose in the *Taylor* indictment, a two-judge Trial Chamber Majority extrapolated a common purpose from a 'holistic' interpretation of nine disparate paragraphs scattered throughout the Second Amended Indictment.⁹⁷ From these paragraphs, Trial Chamber II concluded that the Prosecution must have intended to allege the common purpose, design or plan as a 'campaign to terrorize the civilian population' of Sierra Leone, with the underlying crimes in Counts 2 through 11 being either within or a foreseeable consequence of that campaign.⁹⁸

While the Majority decision would appear to provide the Prosecution in the *Taylor* case with an inherently criminal common purpose at the core of its JCE, this interpretation of the pleading is curious, to say the least, since it is inconsistent with the common purpose described in the Amended Case Summary,⁹⁹ as well as Prosecution submissions in response to the Defence motion, which advanced an entirely different objective, arguing that 'the "common purpose" of the JCE alleged in this trial has always been "to take any actions necessary to gain and exercise control of Sierra Leone, particularly the diamond mining areas."' ¹⁰⁰ Neither the Trial Majority nor the four appellate justices who upheld the decision on interlocutory appeal¹⁰¹ took these inconsistencies into account, which, at a minimum, raised serious issues concerning the adequacy of notice of the charges to the accused.

94 Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, *Taylor* (SCSL-03-01-T-378), 14 December 2007.

95 See *Taylor* JCE Decision, *supra* note 50.

96 See *Taylor*, Second Amended Indictment, § 33. As noted, the indictment simply alleges that the accused is responsible, pursuant to Art. 6.1 of the Statute for crimes that 'amounted to or were involved within a common plan, design or purpose in which the Accused participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.'

97 *Taylor* JCE Decision, *supra* note 50, §§ 69–70 (where the Majority interprets that paragraphs 5, 33, 34, 9, 14, 22, 23 and 48, 'taken together ... fulfil the requirements for pleading JCE.')

98 *Ibid.*, § 71.

99 See Prosecution Notification of Filing of Amended Case Summary, *Taylor* (SCSL-03-01-T-327), 3 August 2007, §§ 42–44, 69–70.

100 *Taylor* JCE Decision, *supra* note 50, § 34 (quoting the 'Prosecution Consequential Response to the Defence Motion', §§ 20, 23). Incidentally, this language articulates the same non-criminal objective the Prosecution chose to delete from the allegations when they amended the original *Taylor* indictment. It remains a mystery why they chose to delete the language, but continued to rely upon the common purpose construction.

101 The interlocutory decision on the *Taylor* JCE motion was issued 1 May 2009 by a four-judge Appeals Chamber. The Chamber was short one member because Justice Fernando passed away in November of 2008, and his replacement, Justice Fisher, was not sworn in until 4 May 2009.

Unsurprisingly, the Majority Justices in Trial Chamber II relied upon the *AFRC* Appeal Judgment to justify adopting such a loose standard for specificity of pleading. In dissent, Justice Richard Lussick rejected this erosion of pleading standards:

I do not interpret the Appeals Chamber decision as meaning that the Appeals Chamber has adopted pleading principles which are any less stringent than those of other international courts nor, in particular, that it has departed from well established pleading principles by deciding that the common purpose of a joint criminal enterprise need not be clearly specified in an Indictment. Such an interpretation would obviously be an infringement on the statutory rights of the Accused to be informed clearly of the charges against him so that he may prepare a defence.¹⁰²

Unwilling to compensate for Prosecution pleading deficiencies, Justice Lussick maintained that an accused person should not be required to undergo the 'brain-twisting exercise' of reading disparate paragraphs of the indictment to 'fathom what liability facts are most likely to form the basis for his alleged joint criminal enterprise. An indictment which requires an accused to do so is obviously defective in that it fails to clearly inform the accused of the case he is required to meet.'¹⁰³ Unfortunately, the Appeals Chamber subsequently confirmed that it was prepared to accept substantially less stringent pleading requirements than those at the ICTY. Ignoring serious concerns raised in the dissent, the Chamber concluded that, '[I]t is clear from a holistic reading of the Second Amended Indictment that the allegations in paragraph 5 complement the allegations in paragraph 33 ... [enough to] sufficiently plead the alleged common purpose of the JCE.'¹⁰⁴

As the authors have attempted to show herein, JCE fails to be a useful tool for assessing individual liability, unless its basic elements are clearly pled in the indictment and rigorously applied by the judiciary at final judgement. The Appeal Chamber's interlocutory ruling in *Taylor* effectively read an inherently criminal common purpose into the indictment, and this may well steer the Court's final liability assessment away from the more flagrant jurisprudential errors in the *RUF* Judgment. However, it remains to be seen whether, even with an inherently criminal common purpose at the core of the JCE, the Court will properly assess Taylor's basic form liability according to his *intent* to commit crimes within the alleged campaign of terror, or illegitimately according to some formulation involving his mere 'contemplation' of the crimes therein. Certainly the temptation to hold *this* particular defendant liable for

102 Dissenting Opinion of Justice Richard Lussick to the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE, *Taylor* (SCSL-03-1-T), Trial Chamber II, 27 February 2009, §14.

103 *Ibid.*, § 15.

104 Decision on 'Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment', *Taylor* (SCSL-03-1-T), Appeals Chamber, 1 May 2009, § 21.

'as wide a swath of destruction as possible' could hardly be stronger, but justice demands the Court adhere to core criminal justice principles, and this requires the strict satisfaction of the core elements of JCE.

There is more at stake than the fairness of a handful of trials arising from the Sierra Leonean civil war. As scholars Danner and Martinez have observed, 'Liability theories that distort the contribution of individual defendants to the crimes that ultimately occurred run the risk, over time, of producing a record of a violent period that fails to capture how and why the crimes occurred The effectiveness of trials to the process of national reconciliation depends, to some extent on the perceived accuracy and fairness of the trials.'¹⁰⁵ Future international criminal proceedings must abandon the SCSL's misconceived approach to JCE and, instead, take care to adhere to the procedural safeguards articulated in recent ICTY jurisprudence — ensuring that the joint criminal enterprise is pled consistently with an unambiguously criminal common purpose, and that the trier of fact strictly construes each legal element of the doctrine in accordance with the culpability principle, the principle of legality and the fair trial rights of the accused. The legitimacy of international criminal law depends upon these principles.

105 Danner and Martinez, *supra* note 1, at 167.