

Sierra Leone, Special Court Ruling in the AFRC Case

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

I. Trial Chamber II

[Source: Special Court for Sierra Leone, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Trial Chamber II, Judgement, 20 June 2007, available on <http://www.rscsl.org/>, footnote omitted]

SPECIAL COURT FOR SIERRA LEONE TRIAL CHAMBER II

[...]

Date: 20 June 2007 **Case No.:** SCSL-04-16-T

PROSECUTOR Against Alex Tamba BRIMA Brima Bazzy KAMARA Santigie Borbor KANU

JUDGEMENT

[...]

I. INTRODUCTION

[...]

D. Summary of the Charges

[...]

1. The crimes underlying the 14 counts of the Indictment are alleged to have taken place in various locations throughout the territory of Sierra Leone within the time period from 25 May 1997 to January 2000.
2. The Accused are charged with acts of terrorism, collective punishment and conscripting or enlisting child soldiers throughout the entire territory of Sierra Leone at all times relevant to the Indictment.

[...]

II. ALLEGED DEFECTS IN THE FORM OF THE INDICTMENT

[...]

3. Objections Relating to Joint Criminal Enterprise (“JCE”)

[...]

(a) Submissions of the Parties

1. The Kamara Defence submits that the common purpose to “take any actions to gain and exercise political power and control over the territory of Sierra Leone,” as such does not amount to a specific crime and is thus too broad to prove the existence of a JCE. The Kamara Defence submits in particular that the Prosecution must “establish the existence of a common plan, design, or purpose *specifically* aimed at committing a criminal act within the [Special Court’s] jurisdiction” and show that an accused “joined with others in a plan aimed at achieving an end that constitutes a crime within the indictment.” By contrast, the Prosecution submits that “[w]hile the aim of defeating the enemy and regaining control of territory is not in itself a criminal aim, if the plan *involves* the commission of crimes against civilians in order to achieve that aim, liability may be invoked under the doctrine of JCE.” The Prosecution further addressed this issue in the closing arguments stating that “if the common purpose was to regain control of the country by any means possible, including the commission of crimes, then although the ultimate aim may not have been a crime within the jurisdiction of the Court, the common purpose involved the commission of crimes.”

[...]

(c) Deliberations

[...]

1. [...] [T]he common purpose alleged [...], that is, 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 is not a criminal purpose recognised by the Statute. The common purpose pleaded in the Indictment does

not contain a crime under the Special Court's jurisdiction. A common purpose "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone" is not an international crime [...].

[...]

1. The principle of the JCE doctrine is to hold an individual accountable for all his actions that fall within, or are a foreseeable consequence of entering into, a criminal agreement. The rationale behind this principle is that a person should not engage in activity that is criminal or foreseeably criminal. Gaining and exercising political power is, however, not inherently a criminal activity.

[...]

IX. APPLICABLE LAW

[...]

C. Law on the Charges

1. Count 1: Acts of Terrorism (Article 3(d) of the Statute)

1. The Prosecution alleges that the Accused committed [...] crimes [...] "as part of a campaign to terrorise the civilian population of the Republic of Sierra Leone, and [which] did terrorise that population." Count 1 thus charges the Accused with acts of terrorism, a violation of Common Article 3 and Additional Protocol II, punishable under Article 3(d) of the Statute.
2. Article 3(d) of the Statute, which is the verbatim reproduction of Article 4(2)(d) of Additional Protocol II, prohibits acts of terrorism. The latter provision is tied to Article 13(2) of Additional Protocol II, which provides that "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."

[...]

1. In the wake of the Second World War, Article 33 of Geneva Convention IV was adopted. It provides that "all measures of intimidation or of terrorism are prohibited." As Article 33 is applicable only to persons in the hands of a party to the conflict, it was subsequently complemented by Article 51 (2) of Additional Protocol I and Articles 4(2)(d) and 13(2) of Additional Protocol II, to include acts of terrorism committed against the civilian population in international and internal armed conflict, respectively.

[...]

1. The Kanu Defence argues that the crime of acts of terrorism does not encompass acts or threats of violence targeted at protected *property* but only protected persons. While the Trial Chamber agrees that it is not the property as such which forms the object of protection from acts of terrorism, the destruction of people's homes or means of livelihood and, in turn, their means of survival, will operate to instil fear and terror. The attacks on, or destruction of, property thus plays an important role in defining the

contours of this crime. What places acts of terrorism apart from other crimes directed against property is the specific intent to spread terror among the population. The acts or threats of violence committed in furtherance of such a purpose are innumerable and may well encompass attacks on property through which the perpetrators intend to terrorise the population.

[...]

2. Count 2: Collective Punishments (Article 3(b) of the Statute)

1. The Indictment alleges that the Accused committed the crimes [...] “to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF [Armed Forces Revolutionary Council/Revolutionary United Front].” Count 2 thus charges the Accused with collective punishments, a violation of Common Article 3 and of Additional Protocol II, punishable under Article 3(b) of the Statute.
2. Article 3(b) of the Statute, which is based on Article 4(2)(b) of Additional Protocol II, prohibits collective punishments. The notion of ‘collective punishments’ goes back to Article 50 of the 1899 Hague Regulations, according to which “[n]o general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.” [...]
3. Upon the inception of the Special Court, the United Nations Secretary General (“Secretary General”) declared that “[v]iolations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognised as customarily entailing the individual criminal responsibility of the accused.”

[...]

1. The prohibition of collective punishments in international humanitarian law is based on one of the most basic tenets of criminal law, the principle of individual responsibility. This principle affirms that responsibility is personal in nature and that no one may be punished for an act he or she has not personally committed.
2. Article 3 of the Statute is a reproduction of Article 4(2) of Additional Protocol II (which includes ‘collective punishments’ – Article 4(2)(b) – among its fundamental guarantees). Article 4(2)(b) of Additional Protocol II is based on Article 33 of the Fourth Geneva Convention, which provides that: “No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” Thus punishments imposed upon protected persons who are not individually responsible for the act which forms the object of the punishment are absolutely prohibited.
3. The first element mentioned above concerns punishments which are not based on individual responsibility but which are inflicted upon persons by wrongfully ascribing collective guilt to them. Such punishments are imposed upon persons for acts which they may or may not have committed. In other words, the punishments are imposed indiscriminately without establishing individual responsibility

through some semblance of due process and without any real attempt to identify the perpetrators, if any. It is in this context that the first element is understood to mean: “A punishment imposed upon protected persons for acts that they have not committed.” The Trial Chamber therefore rejects the submission of the Kanu Defence that the Prosecution is obliged to prove that the victims of the punishment did not actually commit the acts for which they were punished.

4. The Trial Chamber further notes that this crime covers an extensive range of possible ‘punishments’. The ICRC Commentary of Article 75.2(d) of Additional Protocol I advocates an extensive interpretation of the crime of collective punishments, to include not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) [...]. [I]t is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation.

[...]

II. Appeals Chamber

[Source: Special Court for Sierra Leone, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, Appeals Chamber, Judgement, 22 February 2008, available on <http://www.sc-sl.org>, footnote omitted]

SPECIAL COURT FOR SIERRA LEONE APPEALS CHAMBER

Date: 22 February 2008 **Case No.:** SCSL-2004-16-A

PROSECUTOR Against Alex Tamba BRIMA Brima Bazzy KAMARA Santigie Borbor KANU

JUDGEMENT

[...]

III. COMMON GROUNDS OF APPEAL RELATING TO THE INDICTMENT

[...]

C. Prosecution’s Fourth Ground of Appeal and Kanu’s Tenth Ground of Appeal: Joint Criminal Enterprise

[...]

2. Submission of the Parties

[...]

1. [...] The Prosecution argues that the Trial Chamber erred in treating the “ultimate objective of the joint

criminal enterprise as the alleged common criminal purpose itself, and in finding that the Indictment therefore did not plead a joint criminal enterprise that was inherently criminal.” In particular, it submits that the Indictment as a whole alleges a common plan to carry out a campaign of terrorising and collectively punishing the civilian population of Sierra Leone through the commission of crimes within the jurisdiction of the Special Court, in order to achieve the ultimate objective of gaining and exercising political power and control over the territory of Sierra Leone.

2. [...] Kanu submits that “gaining and exercising control over the population of Sierra Leone” is not a crime under international law and that with respect to JCE, an indictment must allege a common purpose which is a crime under international law. [...]

3. Discussion

[...]

1. The *actus reus* for all forms of joint criminal enterprise liability consists of the following three elements:
 - i. a plurality of persons;
 - ii. the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute;
 - iii. participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.
2. The question for determination in this appeal pertains to the requisite nature of the common plan, design or purpose. It can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan.
3. In *Kvočka et al.* the ICTY Appeals Chamber was of the opinion 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.” Whereas creation of a Serbian State within the former Yugoslavia is not a crime within the Statute of the ICTY, the means to achieve the goal, such as persecution, constitute crimes within that statute.

[...]

1. Furthermore, the Appeals Chamber notes that the Rome Statute of the International Criminal Court (“Rome Statute” and “ICC,” respectively) does not require that the joint criminal enterprise has a common purpose that *amounts* to a crime within the ICC’s jurisdiction. Indeed, the Rome Statute departs altogether from the use of the phrase “amounts to” and instead requires that the “criminal activity or criminal purpose ... involves the commission of a crime within the jurisdiction of the Court.” [...]
2. In view of the foregoing, the Appeals Chamber concludes 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.
3. Turning to the present Indictment, in order to determine whether the Prosecution properly pleaded a

joint criminal enterprise, the Indictment should be read as a whole. In particular, the most relevant paragraphs of the Indictment to the pleading of JCE are paragraphs 33-35, which state:

1. “The AFRC, including **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, and the RUF [...] shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. [...]
2. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The 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.
3. **ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU**, by their acts or omissions, are 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 were within a joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.”
4. The ultimate objective alleged in paragraph 33 of the Indictment, namely: 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,” may not of itself amount to a crime within the Statute of the Special Court, nonetheless, paragraph 33 of the Indictment read together with paragraphs 34 and 35 demonstrates the Prosecution’s allegation that the parties to the common enterprise shared a common plan and design to achieve the objective by conduct constituting crimes within the Statute.
5. Paragraph 33 of the Indictment states that the plan was to “take any actions necessary” to gain territorial control and political power. Paragraph 34 of the Indictment states that the actions “included”: controlling the population of Sierra Leone; using members of the population to support the JCE; and specifically enumerated crimes such as “unlawful killings, abductions, forced labour, physical and sexual violence.” Paragraph 35 of the Indictment also indicates that crimes “referred to in Articles 2, 3, and 4 of the Statute . . . were within [the] joint criminal enterprise,” or that those crimes were a reasonably foreseeable consequence of the JCE.
6. The Appeals Chamber holds that the common purpose of the joint criminal enterprise was not defectively pleaded. Although the objective of gaining and exercising political power and control over the territory of Sierra Leone may not be a crime under the Statute, the actions contemplated as a means to achieve that objective are crimes within the Statute. The Trial Chamber took an erroneously narrow view by confining its consideration to paragraph 33 and reading that paragraph in isolation. [...]

Discussion

I. Joint Criminal Enterprise

(Trial Chamber II, paras 57-70; Appeals Chamber, paras 70-84)

1. What does the Trial Chamber consider as the common purpose of the Joint Criminal Enterprise (JCE)? Is it an international crime? What does the Appeals Chamber consider as the common purpose of the JCE? Is it an international crime? Why do the conclusions of the two Chambers differ?
2.
 - a. Assuming that the common purpose of a JCE may involve merely the commission of crimes, what should be prosecuted by the Court? Can the common purpose itself be prosecuted as such? Is it possible to prosecute an act not covered by the Special Court's Statute, insofar as its performance involved the commission of crimes?
 - b. Do you agree with the Appeals Chamber that "the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective"? What does "contemplated" mean in the present case? Would it be possible to prosecute non-criminal acts because the persons involved in the JCE thought about committing crimes?
3.
 - a. Does the fact that crimes were a "foreseeable consequence" of the common purpose render an enterprise criminal *per se*? Does the enterprise to seize power become an international crime *per se* if criminal acts are committed in the process? Would you agree that the act of waging war may then become an international crime because war often involves the commission of crimes? Can the Special Court prosecute acts that are part of *jus ad bellum*?
 - b. Is the commission of war crimes a foreseeable consequence of waging an aggressive war? Of a State using its right to self-defence? Of starting an armed conflict not of an international character?
 - c. What are the risks and advantages of a broad concept of joint criminal enterprise for IHL and international criminal law?

II. Terror and collective punishment

(Trial Chamber II, paras 660-670)

1.
 - a. What does IHL say about acts of terrorism? Are they prohibited in all armed conflicts? Do you agree that Art. 3 common to the Conventions prohibits acts of terrorism (*para. 660*)? (GC IV, Art. 33; P II, Art. 4(2)(d); CIHL, Rule 2)
 - b. (*Para. 664*) What is prohibited by the articles mentioned by the Special Court (GC IV, Art. 33; P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2))? Are "acts of terrorism" and "acts or threats of violence the primary purpose of which is to spread terror among the civilian population" the same? Are all acts the primary purpose of which is to terrorize the population acts of terrorism? (GC IV, Art. 33; P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2); CIHL, Rule 2)
2. Under IHL, are acts of terrorism prohibited only when they target the civilian population? What about acts and threats of violence directed against military objectives the primary purpose of which is to spread terror among the civilian population? (GC IV, Art. 33; P I, Art. 51(2); P II, Arts 4(2)(d) and 13(2); CIHL, Rule 2)
3. Do acts meant to terrorize the population actually have to have that effect in order to be prohibited?

(Trial Chamber II, paras 672-681)

1. What does IHL say about collective punishment? Is it prohibited in all armed conflicts? Do you agree that Art. 3 common to the Conventions prohibits collective punishment (*para. 672*)? (HR, Art. 50; GC IV,

Art. 33; P I, Art. 75(2)(d); P II, Art. 4(2)(b); CIHL, Rule 103)

2.
 - a. (*Paras 678 and 680*) What is the rationale behind the prohibition of collective punishment? Why does collective punishment violate the principle of individual responsibility? When does a sanction against a group of persons become collective punishment prohibited by IHL?
 - b. (*Para. 680*) Do you agree with the Trial Chamber that it does not matter whether the persons punished have actually committed the acts? Will a sanction still amount to collective punishment if it is afterwards proved that the persons sanctioned had committed the acts for which they were punished?
3. (*Para. 681*) Is collective punishment prohibited only when it takes the form of an unlawful sanction, such as destruction or confiscation of property? Or is it also prohibited when it takes the form of a normal judicial sanction? Are all measures affecting the civilian population collectively (such as curfews, restrictions of movement, security measures) prohibited if they affect not just those who have committed an unlawful act? If they are implemented in reaction to an unlawful act? If not, how do you differentiate between prohibited collective punishment and legitimate security measures?
4. Is collective punishment prohibited only when directed against protected persons? Is it prohibited when directed against the civilian population in general? When directed against prisoners of war? (HR, Art. 50; GC III, Art. 87; GC IV, Art. 33; P I, Art. 75(2)(d); P II, Art. 4(2)(b); CIHL, Rule 103)