August 30, 2008

Troubled Indictments at the Special Court for Sierra Leone: The Pleading of Joint Criminal Enterprise and Sex-Based Crimes

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Abstract: This article argues that the indictments at the Special Court for Sierra Leone have pleaded joint criminal enterprise and sex-based crimes in ways that threaten the rights of the accused to notice of the charges against them. While the Taylor Indictment neglects to outline the purpose of the joint criminal enterprise in which the accused allegedly took part, the Prosecution’s recent arguments in this respect have further confused the matter. In addition, the RUF and AFRC Indictments alleged forced marriage without clearly indicating what crime such conduct would violate. Although the Appeals Chamber provided guidance on the issues of joint criminal enterprise and forced marriage in its recent AFRC Appeal Judgment, its pronouncements may be of limited use or applicability to the ongoing RUF and Taylor cases. Ultimately, the Prosecution’s pleading practices have both harmed the rights of the accused and weakened its cases against them.

Introduction

The indictments at the Special Court for Sierra Leone have been controversial to such an extent that questions have inevitably arisen about the adequacy of the notice they have provided to the accused. The AFRC, RUF and Taylor Indictments, in particular, plead joint criminal enterprise (JCE) and sex-based crimes in an unusually confused and sparse manner that opens much room for debate on this seemingly simple issue of notice to the accused.¹ The basic question is whether these indictments, which are so lacking in clarity and specifics, actually inform the accused of the charges against them and allow the accused to prepare an adequate

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defense. This article argues that although the Prosecution’s pleading of joint criminal enterprise and forced marriage technically may not have been defective, these indictments have nonetheless failed to provide the accused with sufficient notice of the nature of the charges against them. Furthermore, the Prosecution’s pleading style has not only undermined the rights of the accused, but has also diminished the efficiency and the efficacy of the Special Court’s prosecution of those who allegedly bear the greatest responsibility for the crimes committed during the armed conflict in Sierra Leone.

This article begins by providing background information on the conflict in Sierra Leone and the establishment of the Special Court (Part I) and by describing the circumstances surrounding the Chief Prosecutor’s issuance of indictments before the Court (Part II). The following section examines the pleading of joint criminal enterprise in the AFRC and Taylor Indictments, particularly in light of the pleading practices at the ad hoc tribunals and the Appeals Chamber’s recent ruling on this issue in the AFRC Appeal Judgment (Part III). Finally, this article analyzes the pleading of forced marriage and other sex-based crimes in the AFRC Indictment, as well as the Appeals Chamber’s ruling in the AFRC Appeal Judgment that forced marriage may constitute the crime against humanity of ‘other inhumane acts’ (Part IV).

I. Background on the Conflict and the Establishment of the Special Court

The armed conflict in Sierra Leone began on 23 March 1991 when forces of the Revolutionary United Front (RUF) crossed from Liberia into Sierra Leone with the objective of overthrowing the government of President Joseph Momoh and the All People’s Congress (APC). Foday Sankoh led these RUF forces into Sierra Leone with the backing of Charles

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Taylor who was then the leader of the rebel group known as the National Patriotic Front of Liberia. While the RUF may have reflected a “prevailing discontent and revolutionary fervor” in Sierra Leone at that time, the RUF soon lost its claim to be a people’s movement, as it proceeded to wage a war of terror against the civilian population.

Although multiparty elections were held in 1996, the election to power of Ahmad Tejan Kabbah and the Sierra Leone People’s Party was marred by violence, and the peace process set in motion by the Abidjan Peace Accord in November 1996 collapsed shortly thereafter. In May 1997 President Kabbah was overthrown in a violent coup and Johnny Paul Koroma was installed as the head of the Armed Forces Revolutionary Council (AFRC) that was comprised of officers and soldiers of the Sierra Leone Army. Koroma began his rule by inviting the RUF to join his government in the capital city of Freetown. While President Kabbah was in exile in neighboring Guinea, his Deputy Minister of Defence, Samuel Hinga Norman, mobilized opposition to the AFRC by the Civil Defence Forces (CDF) which were comprised of the Kamajors and other traditional hunters in Sierra Leone.

In January 1999 AFRC-led forces descended upon Freetown, resulting in large-scale loss of life, amputations, and destruction of property, before they were turned back by Nigerian
ECOMOG troops (Economic Community of West African States Monitoring Group) who also
committed atrocities.\(^9\) The July 1999 Lomé Peace Agreement provided a military resolution of
the conflict, an amnesty for fighters from all factions, and a power-sharing arrangement between
President Kabbah and the RUF.\(^10\) Neither side, however, complied in full with the terms of the
Peace Agreement, and in May 2000 the RUF took approximately 500 UN peacekeepers
hostage.\(^11\) Finally, by January 2002, after UNAMSIL had processed over 45,000 combatants, the
war officially came to an end following eleven years of conflict throughout Sierra Leone.\(^12\)

Following the hostage-taking incident and the resumption of violence in 2000, President
Kabbah requested that the UN Security Council establish a special tribunal for the prosecution of
members of the RUF and its allies.\(^13\) In 2002 the United Nations and the government of Sierra
Leone accordingly reached an agreement establishing the Special Court which would be
composed of both national and international judges who would apply international as well as
Sierra Leonean law.\(^14\) This agreement provided the Special Court with the competence “to
prosecute persons who bear the greatest responsibility for serious violations of international
humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30
November 1996.”\(^15\) The Court began operating in mid-2002, and by March 2003, the Prosecutor
had begun to issue the indictments that form the subject of this article.

\(^9\) Id. at para. 27, 231; The Special Court for Sierra Leone Under Scrutiny, p. 6.
\(^10\) Report of the Sierra Leone Truth and Reconciliation Commission, para. 28; The Special Court for Sierra Leone
Under Scrutiny, p. 7.
\(^11\) The Special Court for Sierra Leone Under Scrutiny, p. 7.
\(^12\) Id.
\(^13\) Report of the Sierra Leone Truth and Reconciliation Commission, para. 68.
\(^14\) Statute of the Special Court for Sierra Leone, Preamble. The Agreement was pursuant to Security Council
Resolution 1315 (2000).
\(^15\) Statute of the Special Court, art. 1(1).
II. The Circumstances Surrounding David Crane’s Indictments

The indictments at the Special Court for Sierra Leone reflect the budgetary and time constraints faced by the Prosecution, the restricted nature of the Court’s mandate, Chief Prosecutor David Crane’s particular view of the conflict in Sierra Leone, and the Court’s unusual requirements for the judicial confirmation of indictments. Altogether, these circumstances contributed to various flaws in the Special Court’s indictments by allowing or encouraging the issuance of exceptionally broad, imprecise indictments that sought to pin responsibility for the crimes committed during the conflict on a relatively small number of individuals.

A. Budgetary and Time Constraints Faced by the Prosecution

The unique budgetary and time pressures faced by the Court as a whole must have weighed especially heavily on the Prosecution when it was preparing its indictments. As a result of growing criticism of the cost and slowness of the ICTY and the ICTR (International Criminal Tribunal for the former Yugoslavia and Rwanda, respectively), the Special Court was designed by the United Nations to have a smaller budget and a narrower scope. The Special Court consequently receives its funding through voluntary contributions from UN member states, rather than from the regular budget of the United Nations. The resulting uncertainty of the Court’s financial situation, which has been a prevailing concern for the Court from its earliest days, certainly heightened the pressure on David Crane to produce results quickly. In addition, at the time of the Court’s creation, the international community not only expected that the

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16 The Special Court for Sierra Leone Under Scrutiny, p. 12.
Special Court would cost substantially less than the *ad hoc* tribunals, but also spoke of the possibility that it might finish its work within an unprecedented three years.\(^{19}\)

In accordance with the expectations of the Court at the time of its creation, the Prosecutor issued remarkably swift indictments. The Prosecutor arrived in Freetown in August 2002, and by March 2003, eight indictments were presented to a judge for confirmation, with four more indictments following in June 2003.\(^{20}\) The Prosecutor’s efficient and speedy issuance of these indictments, however, was not without its pitfalls. The degree to which the investigations were planned before David Crane even came to Sierra Leone may have given rise to a somewhat inflexible list of indictees from the outset of the Prosecution’s investigations.\(^{21}\) The Prosecutor’s speed may also have resulted in the indictments’ unusual breadth and lack of specificity, as well as the need for continued investigations to gather additional evidence after their issuance.\(^{22}\) The broadness of these indictments may, in turn, have resulted in slower trials by allowing for the admission of a wide range of evidence by the Trial Chamber.\(^{23}\) Finally, the speed with which the Prosecution investigated and drafted its indictments may have contributed to a number of other unusual problems and flaws in the indictments that have caused considerable complications at the trial and appeal stages, as will be discussed below.

\(^{19}\) International Center for Transitional Justice, *The Special Court for Sierra Leone: The First Eighteen Months*, March 2004, p. 2 [hereinafter *The Special Court for Sierra Leone: The First Eighteen Months*].

\(^{20}\) *Id.* at p. 4.

\(^{21}\) *The Special Court for Sierra Leone Under Scrutiny*, p. 27.

\(^{22}\) *The Special Court for Sierra Leone: The First Eighteen Months*, p. 4.

B. The Special Court’s Narrow Mandate

After a highly complex conflict that spanned eleven years and involved multiple armed factions, the Chief Prosecutor indicted only thirteen individuals.\textsuperscript{24} The limited number of indictments was, of course, due to the restricted mandate of the Court, which has the power to prosecute “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.”\textsuperscript{25} The Special Court’s narrow mandate represents another manifestation of the Security Council’s concerns about the enormous time and expense required by the ICTY and ICTR.\textsuperscript{26} In contrast to these \textit{ad hoc} tribunals, which have a much broader power to “prosecute persons responsible for serious violations of international humanitarian law,”\textsuperscript{27} the mandate of the Special Court required it “to focus on those who played a leadership role.”\textsuperscript{28}

Consequently, David Crane only indicted those whom he considered to be the most senior leaders of the RUF, AFRC and CDF, in addition to Charles Taylor, the former President of Liberia.\textsuperscript{29} The limited number of indictments has been problematic in good part because of the unknown status of Johnny Paul Koroma, the Chairman of the AFRC, and the deaths of three individuals:

\begin{footnotesize}
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\item \textsuperscript{24} On 7 March 2003 the Prosecutor indicted Charles Taylor, Foday Sankoh, Johnny Paul Koroma, Sam Bockarie, Issa Hassan Sesay, Alex Brima, Morris Kallon and Sam Hinga Norman. The Prosecutor later indicated Augustine Gbao (16 April 2003), Brima Bazzy Kamara (26 May 2003), Moinina Fofana and Allieu Kondewa (24 June 2003) and Santigie Borbor Kanu (15 September 2003). See http://www.sc-sl.org/index.html.
\item \textsuperscript{25} Art. 1(1), Statute of the Special Court for Sierra Leone.
\item \textsuperscript{26} Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, para. 1.
\item \textsuperscript{27} Art. 1, Statutes of the International Criminal Tribunal for the former Yugoslavia and Rwanda [hereinafter ICTY and ICTR, respectively].
\item \textsuperscript{28} Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, para. 1.
\item \textsuperscript{29} The Prosecution’s apparent understanding of the hierarchies of the RUF, AFRC and CDF differs from the Truth and Reconciliation Commission’s findings on this issue, which consist of considerably more lengthy and complex lists of the leadership of these factions. See \textit{Report of the Sierra Leone Truth and Reconciliation Commission}, pp. 48-49, 63-65, 80-83.
\end{itemize}
\end{footnotesize}
of the other most high-ranking accused: Foday Sankoh, the leader of the RUF; Sam Bockarie, the
commander of the RUF during Sankoh’s imprisonment from March 1997 to April 1999; and
Sam Hinga Norman, the National Coordinator of the CDF.\textsuperscript{30} Although the absence of these
particularly high-profile accused reflects bad luck as opposed to poor Prosecutorial decision-
making, the \textit{RUF, AFRC} and \textit{CDF} trials nonetheless lost some of their meaning without these
very critical figures.

The uncontrollable absence of these four accused, however, was further exacerbated by
the Prosecutor’s apparent decision to issue indictments based strictly on his interpretation of the
formal hierarchies of the RUF, AFRC and CDF. In all of these cases the Prosecution appears to
have encountered difficulties gathering sufficient evidence against the accused who were second,
third, fourth or fifth in command. In the \textit{CDF} case, for instance, while ample evidence may have
supported the charges against Norman, the existing evidence against Moinina Fofana (the CDF’s
National Director of War) and Allieu Kondewa (the CDF’s High Priest and Chief Initiator) very
much lacked the same depth and particularity.\textsuperscript{31} The Prosecution may have actually been able to
present stronger evidence against the commanders who operated immediately under Fofana and
Kondewa, such as Albert Nallo, the Deputy National Director of Operations and the Director of
Operations for the Southern Region.\textsuperscript{32} Although the Court’s mandate may be interpreted to
require the Prosecution to issue indictments based solely on the supposed hierarchies of these
factions, the Prosecution weakened its cases by failing to prosecute other relatively high level

\textsuperscript{30} See The Special Court for Sierra Leone, Other Cases, http://www.sc-sl.org/cases-other.html; \textit{Prosecutor v. Fofana and Kallon, SCSL-04-14-T}, Special Court for Sierra Leone, Trial Chamber, Judgment, 2 August 2007, paras 4-8 [hereinafter \textit{CDF Trial Judgment}].

\textsuperscript{31} \textit{CDF Trial Judgment}, paras 337-347.

\textsuperscript{32} See \textit{id.} at paras 278-280, 334-336, 340, 348, 350, 352. Despite Nallo’s culpability, the Prosecution’s decision not to indict him was most likely influenced by the fact that he came to serve as “the single most important witness in the Prosecution evidence on the alleged superior responsibility of the Accused, particularly Fofana.” \textit{id.} at 279.
commanders who arguably also bore the greatest responsibility for the crimes committed during the conflict in Sierra Leone.  

C. David Crane’s Prosecutorial Strategy: Dancing with the Devil

In speech after speech during the early years of the Court, David Crane described his prosecutorial strategy as “dancing with the devil.” He spoke about holding these ‘devils,’ who took the form of “some of the worst war criminals in history,” responsible for “the murder, rape, maiming and mutilation of over five hundred thousand human beings” and the displacement of over a million more throughout the region. David Crane wove a similar theme throughout his opening statements by repeatedly emphasizing the juxtaposition of good and evil: the “towering summit of justice,” “the light of truth,” and “the bright and shiny spectre of the law,” as opposed to “the beast of impunity,” the “jackals of death,” and “destruction and inhumanity.” The Chief Prosecutor also boldly declared that “there can be no impunity even for the death of one person.”

Given the complexity of the conflict in Sierra Leone, as well as the questionable efficacy of international criminal justice, David Crane’s view of the conflict and the role of the Special

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33 According to the ICTJ, “[a]lthough formal figures were never given, it was clear from the outset that the general expectation of the international community, including the UN, was that the Special Court would not go beyond 20 to 30 individual indictments.” The Special Court for Sierra Leone: The First Eighteen Months, p. 4. Given this expectation, the Prosecutor certainly could have chosen to indict more than 13 individuals.


35 Id. at 1-2.


Court lacked much-needed nuance.\textsuperscript{38} His speeches and opening statements failed to acknowledge that although the indictees were at the top of their respective hierarchies, they do not necessarily represent the apex of evil, and they may not bear absolute responsibility, or even the most responsibility, for the atrocities committed during the conflict. By emphasizing the absolutely evil nature of these indicted leaders, David Crane excluded the possibility that other high-level commanders may have borne an equivalent level of responsibility for the crimes committed, and perhaps should have been indicted as well. His quest to end impunity “even for the death of one person” also ignored the problems involved in pinning responsibility for all of the atrocities committed during the entire conflict on such a small number of prominent individuals. The indictments bear the imprint of his view of the Special Court’s role because they attempt to hold the thirteen accused responsible for all of the different types of crimes that were committed by their respective factions in each part of Sierra Leone in which they were active during the conflict. His vision led to indictments with great breadth but little depth.

\textbf{D. The Special Court’s Standard for Judicial Confirmation of Indictments}

The sparseness of the Special Court’s indictments has roots in the notably minimal expectations placed upon the Prosecution. Although the same set of basic principles governs the pleading of indictments before the Special Court and the \textit{ad hoc} tribunals, the requirements for judicial confirmation of indictments differ at the Special Court. At all of these tribunals the accused are entitled to some minimum guarantees, including the right to be informed promptly.

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\textsuperscript{38} According to the International Center for Transitional Justice “his military background and rhetorical style, most apparent during his opening statements . . . alienated some.” \textit{The Special Court for Sierra Leone Under Scrutiny}, p. 21.
and in detail of the nature and cause of the charges against them. The *ad hoc* tribunals further require that the indictment must provide “the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.” The Rules of the Special Court require essentially the same, but also provide that the indictment must be accompanied by a case summary “briefly setting out the allegations he proposed to prove in making his case.”

The distinction between the confirmation processes at the Special Court and the *ad hoc* tribunals stems from the role of the case summary at the Special Court. At the ICTY, if the reviewing judge is “satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment.” At the Special Court, however, the designated Judge must be satisfied that the indictment “charges the suspect with a crime or crimes within the jurisdiction of the Special Court,” and that “the allegations in the Prosecution’s case summary would, if proven, amount to the crime or crimes as particularized in the indictment.” Effectively case summaries, rather than indictments, must make a *prima facie* case at the Special Court. Consequently, the Rules of the Special Court did not require the Prosecutor to plead all of his allegations within the

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39 Art. 17(4), Statute of the Special Court for Sierra Leone; Art. 21(4)(a), Statute of the ICTY; Art. 20(4)(a), Statute of the ICTR.
40 Rule 47(C), Rules of Procedure and Evidence of the ICTY and the ICTR.
41 Rule 47(C), Rules of Procedure and Evidence of the Special Court. The case summaries at the Special Court essentially set forth the allegations that the Prosecution’s evidence will prove. *See, e.g.*, Prosecutor v. Taylor, SCSL-03-01-T, Case Summary Accompanying the Second Amended Indictment, 3 August 2007 [hereinafter Taylor Amended Case Summary].
42 Art. 19, Statute of the ICTY.
43 Rule 47(E), Rules of Procedure and Evidence of the Special Court.
44 *But see* The Special Court for Sierra Leone: The First Eighteen Months, p. 4; *The Special Court for Sierra Leone Under Scrutiny*, p. 22 (stating that “[t]here is a reduced level of judicial review over this process because unlike in indictments before the ICTY and the ICTR, there is no requirement for a case to meet the *prima facie* standard at the confirmation stage.”). By contrast, this article argues that there is a requirement that a case meets a *prima facie* standard at the confirmation stage, but this requirement is applied to the case summary instead of the indictment itself.
four corners of his indictments, thereby allowing for very sparse indictments, though they theoretically represent the primary charging instrument at the Special Court.45

III. The Pleading of Joint Criminal Enterprise

On its face, the Amended Taylor Indictment never specifies the common plan of the joint criminal enterprise in which Taylor allegedly took part.46 This omission is striking given the importance of this form of liability to the Prosecution’s case against Taylor, as well as the recent controversy surrounding the pleading of the common purpose in the AFRC Indictment.47 In light of the relevant jurisprudence and pleading practices of the ICTY, as well as the recent AFRC Appeal Judgment, this section examines whether the Taylor Indictment represents an acceptable variation on the norm, or an impermissible departure from standard pleading practices.

A. Joint Criminal Enterprise at the ICTY

Although the establishment of joint criminal enterprise liability in the 1999 Tadic Appeal Judgment has provoked substantial scholarly controversy,48 the mens rea and actus reus

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45 According to the ICTJ, the indictments “employ an innovation known as ‘notice pleading,’ a brief form of pleading that has been upheld and may set a new practice for international criminal proceedings.” The Special Court for Sierra Leone: The First Eighteen Months, p. 5. See also Prosecutor v. Kupreskic, IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001, para. 114 (noting that “generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspects of the Prosecution case.”).

46 Amended Taylor Indictment, para. 33.

47 As in the trials of many high profile alleged war criminals, joint criminal enterprise comprises an important form of liability in the Taylor case because the Prosecution does not seek to prove that Taylor personally committed any of the alleged atrocities. Also, as will be discussed in detail below, the Trial Chamber in the AFRC case held, at the final judgment stage, that the Indictment defectively pleaded joint criminal enterprise. The Appeals Chamber, however, overturned this decision, but refrained from entering convictions under this form of liability.

elements of JCE liability, as set forth in this Judgment, have formed a highly stable part of the jurisprudence of the ad hoc tribunals.\footnote{Tadic Appeal Judgement, paras 227-228; see also Prosecutor v. Krnojelac, IT-97-25-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgment, 17 September 2003, para. 31; Prosecutor v. Vasiljevic, IT-98-32-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 25 February 2004, para. 100; Prosecutor v. Kvočka, IT-98-30-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 28 February 2004, para. 96.} According to Tadic, the actus reus element, which is relevant for our purposes, requires, in part, the “existence of a common plan, design or purpose which \textit{amounts to or involves} the commission of a crime provided for in the Statute . . . .”\footnote{Tadic Appeal Judgment, para. 227 (emphasis added). According to Tadic, the actus reus element, which is the same for the basic, systemic, and extended forms of joint criminal enterprise, also requires a “plurality of persons” and the [p]articipation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute . . . .” As set forth in Tadic, however, each category of JCE requires a different mens rea. The first category (basic) requires “the intent to perpetrate a certain crime.” \textit{Id.} at para. 228. The second category (systemic) requires “personal knowledge of the system of ill-treatment… as well as the intent to further this common concerted system of ill-treatment.” \textit{Id.} The third category (extended) requires “the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group.” \textit{Id.}} The jurisprudence of the ICTY has also consistently required that indictments pleading joint criminal enterprise set forth certain material facts, including the nature or purpose of the joint criminal enterprise. Despite the still growing body of international criminal jurisprudence that has faithfully applied these pleading requirements, ICTY case law has not expanded upon how an indictment may plead that a common plan, design or purpose amounts to or involves the commission of a crime provided for in the Statute.

Case law on the meaning of the phrase “\textit{amount to or involve}” does not exist because ICTY indictments have largely pleaded common purposes that \textit{amount to} crimes within the Statute of the Tribunal. Because of the structure of most ICTY indictments, the Tribunal’s Chambers have never had cause to address how a common purpose may involve but not amount

\footnote{Prosecutor v. Krnojelac, IT-97-25, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16; Prosecutor v. Hadžihasanović, IT-01-47, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Form of Indictment, 7 December 2001, para. 10; Prosecutor v. Brđanin and Talić, IT-99-36/1, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 48.}
to a crime within the Statute. ICTY Indictments generally plead joint criminal enterprises which consist of two levels: in the first level the common purpose clearly falls within the scope of the Statute, while in the second level, the fulfillment of this common purpose involves the commission of crimes in violation of the Statute. Many ICTY indictments, for example, have charged leaders with participating in joint criminal enterprises aimed at the permanent forcible removal of Bosnian Muslims and Bosnian Croats from the territory of the planned Serbian State, through the commission of the crimes alleged in the indictment.\textsuperscript{52}

Not all ICTY Indictments, however, conform to this general pattern of pleading. The\textit{ Haradinaj} Indictment, for example, alleges a joint criminal enterprise with two levels, but only the second level alleges crimes within the Statute. In its first level, the Indictment alleges that the common purpose of the JCE was to consolidate the total control of the Kosovo Liberation Army over the Dukagjin Operational Zone.\textsuperscript{53} While such consolidation does not amount to a crime within the Statute, the Indictment’s second level further alleges that the accused persons accomplished such consolidation “by the unlawful removal and mistreatment of Serb civilians and by the mistreatment of Kosovar Albanian and Kosovar Roma/Egyptian civilians . . . .”\textsuperscript{54} The Indictment thereby alleges that the accused pursued consolidation over Dukagjin by committing crimes against humanity and violations of the laws or customs of war, including murder,

\textsuperscript{52} \textit{Prosecutor v. Brdanin}, IT-99-36, Sixth Amended Indictment, 9 December 2003, para. 27.1 (“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.”). \textit{See also Prosecutor v. Milosevic}, IT-02-54, Amended Indictment (Bosnia), para. 6 (“The purpose of this joint criminal enterprise was the forcible and permanent removal of the majority of non-Serbs, principally Bosnian Muslims and Bosnian Croats, from large areas of the Republic of Bosnia and Herzegovina… through the commission of crimes which are in violation of Articles 2, 3, 4 and 5 of the Statute of the Tribunal.”); \textit{Prosecutor v. Limaj}, IT-03-66-PT, Second Amended Indictment, para. 7 (The purpose of the joint criminal enterprise “was to target Serb civilians and perceived Albanian collaborators for intimidation, imprisonment, violence, and murder in violation of Articles 3 and 5 of the Statute of the Tribunal.”).


\textsuperscript{54} Id.
persecution, inhumane acts, cruel treatment, unlawful detention, and torture.\textsuperscript{55} The Defence in the \textit{Haradinaj} case did not challenge the form in which the common purpose of the joint criminal enterprise was pleaded and the Trial Chamber’s \textit{Form of the Indictment Decision} accordingly did not pronounce on this issue, although it did find that the Indictment was not defectively pleaded with respect to JCE.\textsuperscript{56}

Finally, ICTY Indictments have also pleaded joint criminal enterprises that consist of three rather than two levels. The \textit{Martic} Indictment, for example, first alleges an overarching objective (a new Serb-dominated state) that does not amount to a crime within the scope of the Statute.\textsuperscript{57} The second level, however, alleges a common purpose of forcible transfer that amounts to a crime (namely, “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 . . . and large parts of the Republic of Bosnia and Herzegovina.”).\textsuperscript{58} Finally, the third level alleges the fulfillment of the common purpose through the commission of crimes in violation of Articles 3 and 5 of the Statute.\textsuperscript{59}

\textbf{B. Joint Criminal Enterprise at the Special Court}

\textbf{1. JCE in the \textit{AFRC} Indictment}

In light of the pleading practices at the ICTY, the \textit{AFRC} Indictment pleaded joint criminal enterprise in a manner that was not totally unprecedented, though it may have been

\textsuperscript{55}\textit{Id.}

\textsuperscript{56}\textit{Prosecutor v. Haradinaj}, IT-04-84, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, 25 October 2006, para. 25.

\textsuperscript{57}\textit{Prosecutor v. Martic}, IT-05-11-PT, Amended Indictment, 9 December 2005, para. 4.

\textsuperscript{58}\textit{Id.}

\textsuperscript{59}\textit{Id.}
unusually convoluted. Compared with ICTY Indictments that generally plead JCE in a single paragraph, the AFRC Indictment did so in three paragraphs:

33. The AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, and the RUF, including ISSA HASSAN SESAY, MORRIS KALLOM and AUGUSTIN GBAO, 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. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

34. 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.

35. ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, by their acts or omissions, are individually criminal 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.  

The Prosecution’s decision to plead joint criminal enterprise in three separate paragraphs was significant because it may have contributed to the Trial Chamber’s reading of paragraph 33 in isolation from paragraph 34. While the former paragraph alleges a common purpose that does not amount to a crime within the Statute, the latter paragraph clearly alleges that the common purpose involved the commission of many such crimes.

In a June 2007 Judgment, Trial Chamber II dismissed joint criminal enterprise liability in a disjointed manner which suggested that it wished to avoid considering this relatively complicated form of liability. In essence the Trial Chamber held that the Prosecution had defectively pleaded joint criminal enterprise in the Indictment because the common purpose of the JCE—“to take any actions necessary to gain and exercise political power and control over the

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60 AFRC Indictment, paras. 33-35. Paragraphs 36-38 of the RUF Indictment plead joint criminal enterprise in nearly identical language.

61 Prosecutor v. Brima, Kamara and Kanu, SCSL- SCSL-04-16-T, Special Court for Sierra Leone, Trial Chamber, Judgment, 20 June 2007, paras 56-85 [hereinafter AFRC Trial Judgment].
The territory of Sierra Leone”—was not an inherently criminal activity.\(^6^2\) The Trial Chamber also found that while paragraphs 33 and 34 of the Indictment should be read as a whole, these two paragraphs did not clarify the criminal purpose upon which the parties agreed at the inception of the enterprise.\(^6^3\) The Trial Chamber also dismissed the possibility that a new common purpose had emerged which involved international crimes.\(^6^4\)

Ultimately, however, the Trial Chamber did not prevail in its determination that joint criminal enterprise was defectively pleaded in the \textit{AFRC} Indictment. In its March 2008 Judgment, the Appeals Chamber overturned the Trial Chamber’s ruling that joint criminal enterprise was defectively pleaded. In so doing, the Appeals Chamber’s holdings on this issue notably departed from ICTY case law on joint criminal enterprise. The Appeals Chamber found 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.”\(^6^5\) The Appeals Chamber held that “the common purpose of the joint criminal enterprise was not defectively pleaded because even though “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.”\(^6^6\) The Appeals Chamber also found that the Trial Chamber erred in reading paragraph 33 in isolation.\(^6^7\)

\(^{62}\) Id. at paras 66-70.  
\(^{63}\) Id. at paras 71-76.  
\(^{64}\) Id. at para. 79.  
\(^{66}\) Id. at para. 84.  
\(^{67}\) Id.
The Appeals Chamber’s ruling on joint criminal enterprise is concerning because of its holdings as well as its omissions. First, in abandoning the *Tadic* language, whereby the common purpose must ‘amount to or involve a crime within the Statute,’ the Appeals Chamber conflated the *mens rea* and *actus reus* requirements for joint criminal enterprise.  

68 The Appeals Chamber’s finding that a common purpose may “*contemplate* crimes within the Statute as the means of achieving its objective,” indicates that in order to meet the required *actus reus*, the accused must hold a particular mental state. Thus, in defining the requirement that the common purpose must be inherently criminal, the Appeals Chamber used language that describes a mental state, even though the common purpose requirement comprises the second element of the *actus reus*.  

69 While the case law of international criminal tribunals too often repeats legal standards verbatim without adding any nuance or context, the Appeals Chamber’s departure from well-established case law on the *actus reus* requirement for joint criminal enterprise could have benefited from further reasoning. 

In addition to the Appeals Chamber’s conflation of the *mens rea* and *actus reus* elements, the standard it sets forth is problematic because the word ‘*contemplate*’ is overbroad. This word potentially encompasses far more than the relatively precise language generally used to describe a required mental state, such as “direct intent” or “awareness of a substantial likelihood.”  

Thus, the Appeals Chamber also neglected to articulate why it chose to adopt new language, and how it is interpreting the word ‘*contemplate*’ in this context. 

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68 See supra at note 50.  
69 The *actus reus* element of JCE requires: “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...” (emphasis removed). *Tadic* Appeal Judgement, para 227.  
70 The *mens rea* of planning, for example, “requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed a in the execution of that plan” (emphasis added). *AFRC* Trial Judgment, para. 766.
Finally, the Appeals Chamber abandoned the Tadic language despite its reliance on a provision of the Rome Statute of the International Criminal Court (ICC) that draws upon the language of the Tadic Appeal Judgment.\footnote{Article 25(3)(d) of the Rome Statute provides that: “... a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person... contributes to the commission or attempted commission of such crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention the group to commit the crime” (emphasis added).} Although the Rome Statute does not explicitly use the phrase “joint criminal enterprise,” it effectively provides for such liability when a person contributes to the commission of a crime by a group of persons acting with a common purpose which involves the commission of a crime within the jurisdiction of the Court.\footnote{Art. 25(3), Rome Statute.} While the Rome Statute abandons the use of the phrase ‘amounts to,’ it still incorporates the Tadic language by requiring that a criminal purpose involve the commission of a crime within the jurisdiction of the Court.\footnote{AFRC Appeal Judgment, para. 79; Art. 25(3), Rome Statute.} According to the Appeals Chamber, this “formulation reflects the consensus reached by all of the States negotiating the Statute of the ICC at the Rome Conference, and therefore is a valuable indication of the views of States and the international community generally on the question of what constitutes a common purpose.”\footnote{AFRC Appeal Judgment, para. 79.} Given this pronouncement, the Appeals Chamber’s departure from the Tadic language is at odds with its simultaneous acknowledgment of the importance of this language in the Rome Statute.

2. JCE in the Taylor Indictment

Although the AFRC Appeal Judgment will provide critical guidance to the RUF Trial Chamber, which will be dealing with an identical pleading of joint criminal enterprise, it will not
necessarily have a direct impact on the Taylor case. The pleading of joint criminal enterprise in the amended Taylor Indictment differs substantially from the construction of JCE in the AFRC and RUF Indictments. Whereas the AFRC Indictment raised questions about whether the common purpose amounted to or involved crimes within the Statute, the Taylor Indictment, at first glance, fails to plead a common purpose at all. In light of the Prosecution’s obligation to provide the accused with notice of the nature and purpose of the alleged joint criminal enterprise, the following traces the relevant alterations of the Taylor Indictment as well as the Prosecution’s changing interpretations of its meaning.

In the original Taylor Indictment, issued on 7 March 2003, the Prosecution alleged a joint criminal enterprise in language that almost mirrored that of the AFRC and RUF Indictments. According to this original Indictment, the AFRC and the RUF shared a common plan 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. In addition, the original Indictment contained one further paragraph alleging that Taylor participated in the JCE “as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of

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75 Prosecutor v. Taylor, SCSL-03-01, Indictment, 7 March 2003, paras. 23-24 [hereinafter Taylor Indictment].

23. The RUF and the AFRC 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. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

24. 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.

76 Taylor Indictment, para. 23.
Sierra Leone.”77 The Prosecution’s pre-trial brief, submitted on 4 April 2007, clarified that Charles Taylor and the other participants pursued their common plan through criminal means that involved waging a campaign of terror against the civilian population of Sierra Leone.78

On 29 May 2007, however, the Prosecution substantially amended and shortened the Indictment such that it now charges joint criminal enterprise in a single paragraph:

33. The ACCUSED, by his acts or omissions, is individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3, and 4 of the Statute as alleged in this Amended Indictment,… which crimes 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.79

This paragraph was also in the original Indictment, but the Prosecution eliminated the other two paragraphs that expressly alleged a joint criminal enterprise. Despite the amended Indictment’s radically different pleading of joint criminal enterprise, during opening arguments on 4 June 2007, the Prosecution continued to allege the same common plan set forth in its original Indictment. The Prosecution argued that Taylor participated in a common plan to achieve and hold political power and physical control over the civilian population of Sierra Leone through criminal means involving a campaign of terror against the civilian population of Sierra Leone.80

Meanwhile, the Prosecution further confused the matter by alleging a different common purpose in its 3 August 2007 Amended Case Summary, which accompanied its amended Indictment of May 2007. This time the Prosecution attempted to tailor its arguments to the contours of its amended Indictment by arguing that Taylor participated in a common plan to “carry out a campaign of terror . . . in order to pillage the resources of Sierra Leone, in particular

77 Id. at para. 25 (“The ACCUSED participated in this joint criminal enterprise as part of his continuing efforts to gain access to the mineral wealth of Sierra Leone and to destabilize the Government of Sierra Leone.”).

78 Prosecutor v. Taylor, SCSL-03-01-PT, 73bis Pre-Trial Brief, 4 April 2007, para. 7.

79 Amended Taylor Indictment, para. 33.

80 Transcript, Opening Arguments, 4 June 2007, p. 32.
the diamonds, and to forcibly control the population and territory of Sierra Leone." The Prosecution’s case summary effectively alleges a joint criminal enterprise that involves three levels. First, the overarching objective of the joint criminal enterprise was to “to pillage the resources of Sierra Leone, in particular the diamonds, and to forcibly control the population and territory of Sierra Leone.” The second level involved a criminal purpose—“a campaign of terror”—that was carried out through the third level, involving the crimes alleged in each count of the Indictment.

Unfortunately the Prosecution’s explanation of the common purpose of the joint criminal enterprise finds little support in the amended Indictment itself. While the Indictment clearly alleges terrorization of the civilian population, its function as the common purpose of a joint criminal enterprise is far from clear. Count 1 of this Indictment, under the heading “Terrorizing the Civilian Population,” alleges that:

5. Members of the Revolutionary United Front (RUF), Armed Forces Revolutionary Council (AFRC), AFRC/RUF Junta or alliance, and/or Liberian fighters, including members and ex-members of the NPFL (Liberian fighters)... acting in concert with... the ACCUSED, burned civilian property, and committed the crimes set forth below in paragraphs 6 through 31 and charges in Counts 2 through 11, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone.

Counts 2 through 11 then charge that members of RUF, AFRC, AFRC/RUF Junta or alliance, and/or Liberian fighters, acting in concert with the ACCUSED, unlawfully killed an unknown number of civilians, committed widespread acts of sexual violence against civilian women and girls, committed widespread acts of physical violence against civilians, routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities, engaged

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81 Taylor Amended Case Summary, para. 42.
82 The Indictment charges terrorizing the civilian population (Count 1), unlawful killings (Counts 2-3), sexual violence (Counts 4-6), physical violence (Counts 7-8), the conscription or enlistment of child soldiers (Count 9), abductions and forced labour (Count 10), and looting (Count 11).
83 Amended Taylor Indictment, paras 5, 33.
in widespread and large scale abductions of civilians and use of civilians as forced labour, and engaged in widespread unlawful taking of civilian property.

Thus, the charge of ‘terrorizing the civilian population’ under Count 1 requires the Prosecution to prove the burning of civilian property as well as the various crimes charged under Counts 2 through 11. While ‘terrorizing the civilian population’ thus functions as an overarching goal which encompasses all of the crimes charged within the Indictment, the Prosecution does not clearly allege that ‘terrorizing the civilian population’ was the common purpose of a joint criminal enterprise. In fact, nothing in the Indictment explicitly links Count 1, alleging terrorization of the civilian population, to paragraph 33, at the end of the Indictment, which implicitly alleges a joint criminal enterprise. Paragraph 33 further muddies the waters by omitting the terms “joint criminal enterprise” and “common plan, design or purpose.”

The lack of clarity with which the Prosecution has pleaded joint criminal enterprise in the Taylor Indictment has unsurprisingly given rise to a degree of controversy in Trial Chamber II. A Taylor motion currently pending before the Trial Chamber essentially argues that the Prosecution has failed to provide Taylor with sufficient notice of the case he has to meet because it has advanced more than one common plan during the critical early phases of the case.\footnote{Prosecutor v. Taylor, SCSL-03-01-T, Consequential Motion in Support of Urgent Defence Motion Regarding a Fatal Defect in the Prosecution’s Second Amended Indictment Relating to the Pleading of JCE, 31 March 2008.} In its response to this Taylor Motion, the Prosecution actually exacerbated these inconsistencies by reverting to the common purpose set forth in its original Indictment. By arguing that the common purpose was “to take any actions necessary to gain and exercise political power and political and physical control over the territory of Sierra Leone, in particular the diamond mining
areas,” the Prosecution response inexplicably departed from its Amended Case Summary, which provides that the common purpose was to wage a campaign of terror.\textsuperscript{85}

The Prosecution’s oscillation from one common purpose to the other not only sends a confused message to the accused, but also ignores the actual form of the Indictment, which may support yet another interpretation of the common purpose. While the \textit{Taylor} Indictment does not allege an overarching common purpose of terrorization or of taking “any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas,” another interpretation of the Indictment remains open to the Prosecution. According to some jurisprudence, the absence of the term “joint criminal enterprise” as well as an explicit common purpose may not necessarily be problematic.\textsuperscript{86} The common purpose alleged in paragraph 33 of the Indictment appears to be simply the violation of Articles 2, 3 and 4 of the Statute (namely, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law).

While the \textit{Taylor} Indictment differs from almost all other Indictments at the ICTY and the ICTR because it does not appear to allege an overarching common purpose, this manner of pleading is not totally unprecedented. The \textit{Simba} Indictment at the ICTR similarly alleged a joint criminal enterprise with an object that was simply the violation of Articles 2 and 3 of the ICTR Statute. The object of the joint criminal enterprise therefore encompassed the four counts of the \textit{Simba} Indictment which charged genocide, complicity in genocide, and extermination and

\textsuperscript{85} \textit{Prosecutor v. Taylor}, SCSL-03-01-T, Prosecution’s Response to the Defence’s Consequential Submission Regarding the Pleading of JCE, 10 April 2008, para. 20.

\textsuperscript{86} \textit{Prosecutor v. Gacumbitsi}, ICTR-01-64-A, International Criminal Tribunal for Rwanda, Appeals Chamber, Judgement, 7 July 2006, para. 165 (holding that the absence of the words “joint criminal enterprise” may not indicate a defect in the indictment because other phrasings may effectively convey the same concept. The “question is not whether particular words have been used, but whether an accused has been meaningfully ‘informed of the nature of the charges’ so as to be able to prepare an effective defence.”).
murder as crimes against humanity. Notably, there was no specific objection to the pleading of JCE in *Simba*. In addition, the ICTR Trial Chamber in effect inferred an overarching common purpose by finding that “the only reasonable inference from the evidence is that a common criminal purpose existed to kill Tutsi” at three different locations.

Ultimately, by oscillating from one common purpose to another, and by failing to anchor its arguments in text of the Indictment, the Prosecution has not only provided the accused with inconsistent and confused information, but it also may have substantially weakened its case against Taylor.

**IV. The Pleading of Sex-Based Crimes**

**A. The Inclusion of Sex-Based Crimes in the Court’s Statute**

Widespread sexual violence, especially forced marriage, formed a very salient part of the conflict in Sierra Leone. AFRC and RUF forces perpetrated forced marriages by systematically abducting women and girls and compelling them to engage in regular sexual intercourse, to perform forced domestic labor, to undergo forced pregnancies, and to rear children. Rebel ‘husbands’ in turn provided food, clothing and protection for their wives from rape by other men. Although the perpetration of forced marriage is not unique to the conflict in Sierra Leone (similar patterns of force marriage also took place during the genocide in Rwanda and the conflict in northern Uganda), such conduct was prosecuted for the first time at the

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89 For information on sexual violence and the perpetration of forced marriage during the conflict in Sierra Leone, see generally Human Rights Watch, “We’ll Kill You if You Cry”: Sexual Violence in the Sierra Leone Conflict, January 2003.

90 *AFRC* Appeal Judgment, para. 190.

91 *Id.*
Special Court.\textsuperscript{92} Because of the novelty of this issue in international criminal law, the Prosecutor of the Special Court was presented with the unusual challenge of determining how forced marriage should be charged in its Indictments.\textsuperscript{93}

Although ‘forced marriage’ itself goes without mention in the Statute of the Special Court, the Prosecutor was imbued with a substantially greater capacity to prosecute sex-based crimes in comparison to the ICTY and the ICTR.\textsuperscript{94} Whereas the Statutes of the \textit{ad hoc} tribunals allow them to prosecute the crime against humanity of rape, the Statute of the Special Court includes the crimes against humanity of rape, as well as sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence.\textsuperscript{95} The Statute also emphasizes that the Court’s personnel should have the capacity to carry out the Court’s mandate with respect to sex-based crimes. In particular, the Prosecution must give due consideration to the appointment of staff experienced in gender related crimes and juvenile justice, “given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds.”\textsuperscript{96}

\begin{footnotesize}

\textsuperscript{93} The ICTJ reports that gender advocates actually criticized the amendment of the AFRC and RUF indictments in January 2004 to include forced marriage on the grounds that it contributes to stigmatizing victims when forced marriage could be “adequately subsumed by existing legal concepts such as enslavement and rape.” \textit{The Special Court for Sierra Leone Under Scrutiny}, p. 27.

\textsuperscript{94} The Special Court’s Statute reflects the expanded list of sex-based crimes in the ICC’s Rome Statute. Art. 7(g) enumerates “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”

\textsuperscript{95} Art. 2(g), Statute of the ICTY; Art. 3(g), Statute of the ICTR; Art. 2(g), Statute of the Special Court Statute. Article 2(g) of the Special Court’s Statute provides that the Special Court shall have the power to prosecute persons who committed rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as part of a widespread or systematic attack against any civilian population.

\textsuperscript{96} Art. 15(5), Statute of the Special Court.
\end{footnotesize}
B. The Prosecution of Forced Marriage in the AFRC Case

In reality, the prosecution of sex-based crimes at the Special Court has fallen short of what the drafters of its Statute envisioned because of both the Prosecution’s pleading practices and the Trial Chambers’ approaches to such crimes. In the AFRC case, the Prosecution alleged forced marriage in a confused manner that later contributed to the Trial Chamber’s avoidance of the new and complicated legal issues raised by such allegations. By contrast, the CDF Indictment failed to charge any sexual crimes at all, and the Trial Chamber subsequently thwarted the Prosecution’s attempts to amend the Indictment to include sex-based crimes, and to introduce evidence of a sexual nature.97

In the AFRC case, the Prosecution charged five distinct sex-based crimes: rape, sexual slavery, ‘any other form of sexual violence,’ the crime against humanity of ‘other inhumane acts,’ and the war crime of ‘outrages upon personal dignity.’98 Although the Prosecution charged these five crimes in four separate counts (sexual slavery and ‘any other form of sexual violence’ were defectively charged in the same count),99 a single set of factual allegations supports these five distinct sex-based crimes.100 While indictments at the ICTY commonly use the same set of factual allegations to support two or more similar but separate counts, such as the crimes of torture and cruel treatment, the indictments at the Special Court took this practice to a new

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97 Prosecutor v. Fofana and Kondewa, SCSL-04-14-A, Special Court for Sierra Leone, Appeals Chamber, Judgment, 28 May 2008, pp. 133-148. For a detailed procedural history of this issue, see id. at paras 411-414.

98 AFRC Indictment, Counts 6-9, respectively charging rape, sexual slavery and ‘any other form of sexual violence,’ ‘other inhumane acts’ and ‘outrages upon personal dignity.’ See also Counts 6-9 of the RUF Indictment, which are identical to Counts 6-9 of the AFRC Indictment.

99 In the AFRC Appeal Judgment, the Appeals Chamber found that the Trial Chamber defectively pleaded sexual slavery and ‘any other form of sexual violence’ in the same count of the Indictment.

100 Paragraphs 52-57 of the AFRC Indictment alleged the commission of sexual violence against civilian women and girls in Kono District, Koinadugu District, Bombali District, Kailahun District, Freetown and the Western Area, and Port Loko District.
In the AFRC Indictment, the Prosecution supported four separate counts with identical allegations that in six different areas throughout Sierra Leone, “[a]n unknown number of women and girls were abducted from various locations within the District and used as sex slaves and/or forced into ‘marriage’ and/or subjected to other forms of sexual violence.” In addition the “‘wives’ were forced to perform a number of conjugal duties under coercion by their ‘husbands.’”

This pleading practice is not only unusual, but also highly problematic. In particular, the Indictment failed to specify whether forced marriage fell under the count charging sexual slavery and ‘any other form of sexual violence’ or whether it fell under the counts charging ‘other inhumane acts’ or ‘ outrages upon personal dignity.’ In addition, the Indictment did not specify whether forced marriage, or some other conduct, constituted ‘other forms of sexual violence.’ The crimes of ‘any other form of sexual violence,’ ‘other inhumane acts’ and ‘ outrages upon personal dignity’ are all residual offences, meaning that they function as ‘catch all’ categories which encompass conduct that does not fall within the enumerated crimes against humanity and war crimes in the Statute. These offences therefore beg for some sort of clarification as to what conduct falls under their ambit.

The Indictment’s lack of specificity on the issue of forced marriage raises questions about whether the Indictment actually provided the accused with sufficient notice of the nature of the

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101 See, e.g., Prosecutor v. Kvocka, IT-98-30/1, Amended Indictment, 21 August 2000 (alleging torture and cruel treatment in Counts 8-10 and 11-13); Prosecutor v. Hadzihasanovic, IT-01-47-PT, Third Amended Indictment, 26 September 2003 (alleging murder and cruel treatment in Counts 1-2, 3-4); Prosecutor v. Vasiljevic, IT-98-32-PT, Amended Indictment, 12 July 2001(alleging murder and inhumane acts in Counts 4-7, 10-13, and 14-17).

102 AFRC Indictment, paras 52-57; see also RUF Indictment, paras 55-60.

103 Id.

104 Prosecutor v. Kordic and Cerkez, IT-95-142-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 17 December 2004, para. 117 (‘other inhumane acts’ as a crime against humanity was “deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”).
charges against them. Without a specific understanding of how the Prosecution was intending to charge the conduct of forced marriage, were the accused in an adequate position to be able to prepare themselves to answer these allegations? Moreover, the Indictment provided the accused with only the barest skeleton of material allegations. It alleged merely that women and girls were forced into marriages in various districts and towns throughout Sierra Leone over the course of many months.\textsuperscript{105} The Indictment also provided no information about specific incidents of forced marriage. The fact that the \textit{RUF} Indictment includes identical allegations further suggests that the Prosecution fell short of its obligation to provide the accused with sufficiently specific material allegations.\textsuperscript{106}

By failing to clarify which factual allegations supported which counts, the Prosecution may have been hedging its bets. Due to the lack of jurisprudence on sexual slavery and forced marriage, and the novelty of these issues at international criminal courts, the Prosecution may have been unsure as to whether the Trial Chamber would consider forced marriage under sexual slavery, ‘any other form of sexual violence,’ ‘other inhumane acts’ or ‘outrages upon personal dignity.’ By never specifying which charge encompassed the allegations of forced marriage, the Prosecution was essentially keeping the options open. Unfortunately, the Prosecution’s approach to this issue backfired. Had the Prosecution addressed this issue in its pre-trials briefs or its opening statement at the \textit{AFRC} trial, or even during the trial itself, perhaps this lack of clarity would not have become as problematic as it did.

\textsuperscript{105} The Indictment alleged that “[w]idespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists, and forced ‘marriages.’” \textit{AFRC} Indictment, para. 51. The Indictment also alleged that in Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area, and Port Loko District “members of the AFRC/RUF raped hundreds of women and girls at various locations” and that “[a]n unknown number of women and girls were abducted from various locations within [these Districts] and used as sex slaves and/or forced into ‘marriages’ and/or subjected to other forms of sexual violence. The ‘wives’ were forced to perform a number of conjugal duties under coercion by their ‘husbands.’” \textit{Id.} at 51-57.

\textsuperscript{106} \textit{RUF} Indictment, paras 55-60.
C. Rulings on Forced Marriage by the Trial and Appeals Chambers

The Prosecution’s unusual pleading style, coupled with its failure to clarify what factual allegations supported which counts, permitted the Trial Chamber to dodge the issue of forced marriage. The Trial Chamber found that the evidence of forced marriage was completely subsumed by the crime of sexual slavery, and that no lacuna in the law necessitated a separate crime of forced marriage as an ‘other inhumane act.’\(^{107}\) Notably, the Trial Chamber held that logic required it to interpret the offence of ‘other inhumane acts’ as applying only to acts of a non-sexual nature because the Statute already contained an exhaustive category of sexual crimes.\(^{108}\) In addition, the Trial Chamber found that the evidence did not point to “even one instance of a woman or girl having had a bogus marriage forced upon her in circumstances which did not amount to sexual slavery.”\(^{109}\) Moreover, had there been such evidence, it would not have amounted to an ‘other inhumane act’ because it would not have been of a similar gravity to the other enumerated crimes against humanity, as is required for conduct which qualifies as an ‘other inhumane act.’ Finally, although the Trial Chamber found that forced marriage was subsumed by the crime of sexual slavery, it ultimately considered evidence of sexual slavery under ‘ outrages upon personal dignity’ due to its dismissal of the count charging sexual slavery because it was defectively pleaded.\(^{110}\)

The Trial Chamber’s holdings undoubtedly caught the Prosecution by surprise, especially in light of its earlier decision, at the motions for acquittal stage, that evidence of forced marriages

\(^{107}\) *AFRC* Trial Judgment, para. 713.
\(^{108}\) *Id.* at para. 697.
\(^{109}\) *Id.* at para. 710.
\(^{110}\) *Id.* at para. 713.
fell within the offence of ‘other inhumane acts.’\textsuperscript{111} Although the Prosecution successfully persuaded the Appeals Chamber to overturn the Trial Chamber’s findings on forced marriage, the Appeal Judgment’s treatment of the issue of forced marriage may be of little jurisprudential value. The Appeals Chamber made three noteworthy findings. First, the Appeals Chamber held that the exhaustive listing of sexual crimes in Article 2(g) of the Statute does not foreclose the possibility of charging ‘other inhumane acts’ that have a sexual or gender-based component under Article 2(i).\textsuperscript{112} Second, the Appeals Chamber found that forced marriage is not subsumed by the crime of sexual slavery.\textsuperscript{113} Although forced marriage, like sexual slavery, involves non-consensual sex and a deprivation of liberty, it also has distinguishing features such as a “forced conjugal association” that, unlike sexual slavery, involves exclusivity between ‘husband’ and ‘wife.’\textsuperscript{114} Finally, the Appeals Chamber found that instances of forced marriage during the conflict in Sierra Leone were of a similar gravity to the other crimes against humanity enumerated in the Statute of the Court.\textsuperscript{115}

Despite these three findings, the Appeals Chamber’s ruling on forced marriage does not contribute as much as it could to the development of international criminal law on this issue because the Appeals Chamber failed to define ‘forced marriage.’ While we now know that forced marriage may qualify as an ‘other inhumane act,’ we still lack a definition of exactly what sort of conduct constitutes forced marriage. This omission is in stark contrast to the ICTY’s approach to ‘other inhumane acts,’ in so far as ICTY Trial Chambers clearly define the conduct,\textsuperscript{116}

\textsuperscript{111} Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-T, Special Court for Sierra Leone, Trial Chamber, Decisions on Defence Motions for Judgment of Acquittal Pursuant to Rule 98, 31 March 2006, para. 165; AFRC Trial Judgment, para. 704.

\textsuperscript{112} AFRC Appeal Judgment, para. 186.

\textsuperscript{113} Id. at para. 195.

\textsuperscript{114} Id. at para. 195.

\textsuperscript{115} Id. at para. 200.
such as forcible transfer, which constitutes an ‘other inhumane act.’\textsuperscript{116} The Appeals Chamber’s failure to define forced marriage as an ‘other inhumane act’ may compromise the ability of the RUF accused to understand the nature of the charges against them. Because of this omission, the Appeals Chamber also provides little guidance to the Trial Chamber in the \textit{RUF} case, as well as to other international criminal tribunals, such as the International Criminal Court, which may face similar issues concerning forced marriage in the future. While the Appeals Chamber provides detailed descriptions of conduct constituting forced marriage in the context of the Sierra Leone armed conflict, these descriptions may be of little use to other tribunals that could face the issue of forced marriage in very different contexts.\textsuperscript{117}

Furthermore, the Appeals Chamber’s failure to enter convictions for forced marriage as an ‘other inhumane act’ also diminishes the significance of its ruling on this issue. The Appeals Chamber acknowledged its awareness that entering convictions for forced marriage as an ‘other inhumane act’ would reflect the full culpability of the accused for crimes against humanity as well as the war crime of ‘outrages upon personal dignity.’\textsuperscript{118} In addition, the Appeals Chamber would have been able to base its convictions on the evidence of sexual slavery and forced marriage which the Trial Chamber relied upon in entering convictions for ‘outrages upon personal dignity.’\textsuperscript{119} Nevertheless, the Appeals Chamber did not enter cumulative convictions for ‘other inhumane acts’ and ‘outrages upon person dignity’ because of its determination that society’s disapproval of forced marriage would be adequately reflected by its ruling that it


\textsuperscript{117} \textit{AFRC} Appeal Judgment, paras 187-196.

\textsuperscript{118} \textit{Id.} at para. 202.

\textsuperscript{119} \textit{Id.}
constitutes the crime against humanity of ‘other inhumane acts.’ Because the Appeals Chamber declined to enter convictions for forced marriage, the Judgment does not provide what might have been useful guidance on the application of the crime forced marriage as an ‘other inhumane act.’ Altogether, by failing to define forced marriage and to enter convictions accordingly, the Appeals Chamber missed an unusual opportunity to make a strong pronouncement on a very topical issue in international criminal law.

Despite these weaknesses in the Appeals Chamber’s ruling on force marriage, the AFRC Appeal Judgment will at least provide Trial Chamber I with critical guidance on this issue in the RUF case. Given the similarity of the AFRC and RUF Indictments in this respect, evidence of forced marriages could very well form the basis for convictions under ‘other inhumane acts’ in the RUF case, although we have very little indication of how Trial Chamber I will be likely to deal with this issue because the CDF case did not encompass sexual crimes.

**Conclusion**

Because of the massive scale of the crimes prosecuted by tribunals such as the Special Court, the degree of specificity required in indictments is understandably not as high as that required by domestic courts which do not try large-scale atrocities committed throughout entire countries over the course of many years. Nevertheless, the indictments at the Special Court still demanded for a degree of clarity and particularity which was absent from the Prosecution’s pleading of joint criminal enterprise and forced marriage, two particularly salient aspects of the

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120 Id.

121 *Prosecutor v. Kvočka*, IT-98-30/1, International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17.
Prosecution’s case against the accused. The Special Court’s narrow mandate, which permitted it to prosecute only those who bore the greatest responsibility, heightened the importance of carefully chosen indictees and well-crafted indictments. The Special Court’s troubles in these regards may resonate in the future at the International Criminal Court, which also has restricted scope, as well as a similar capacity to prosecute sex-based crimes and joint criminal enterprises which involve but do not amount to crimes within the Court’s Statute. The AFRC Appeal Judgment presented an unusual opportunity for the Appeals Chamber of the Special Court to provide guidance to the Trial Chambers of the Court, and to other tribunals, concerning acceptable pleading practices. Although the Appeals Chamber clarified that joint criminal enterprises may merely involve crimes, and that forced marriage may constitute an ‘other inhumane act’ as a crime against humanity, much room still exists for the development of the jurisprudence on these issues.