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SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-PT

Before: Judge Bankole Thompson, Presiding
Judge Benjamin Mutanga Itoe
Judge Pierre Boutet

Registrar: Robin Vincent

Date filed: March 22, 2004

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

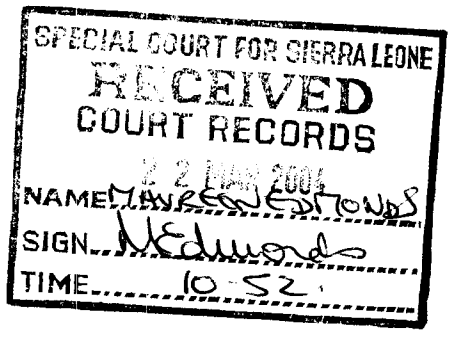
KANU – DEFENSE PRE-TRIAL BRIEF AND NOTIFICATION OF DEFENSES PURSUANT TO RULE 67(A)(ii)(a) AND (b)

Office of the Prosecutor:

Luc Coté
Robert Petit
Paul Flynn
Abdul Tejan-Cole
Boi Tia-Stevens
Christopher Santora
Sharan Parmar
Sigall Horovitz

Defense Counsel:

Geert-Jan Alexander Knoops, Lead Counsel
Carry J. Knoops, Co-Counsel
J.O.D. Cole, Co-Counsel
A.E. Manly-Spain, Co-Counsel



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I INTRODUCTION

1. Pursuant to the Trial Chamber's "Order for Filing Pre-Trial Briefs (under Rules 54 and 73*bis*)" of February 13, 2004, as well as the "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73*bis*) of 13 February 2004," ("**Prosecution's Pre-Trial Brief**") filed on March 5, 2004, the Defense herewith files its Pre-Trial Brief. This Brief also serves as a notification of certain defenses pursuant to and enshrined in Rule 67(A)(ii)(a) and (b) of the Rules of Procedure and Evidence ("**Rules**").

2. At the Status Conference of March 8, 2004, the Defense drew attention to the non-compliance on part of the Prosecution with respect to Rule 66(A)(i) of the Rules.[1] As the disclosure of witness statements on part of the Prosecution is still ongoing, the Defense should reserve its right to additionally file arguments in support of its Pre-Trial Brief. It is under this condition, that the Defense is able to file this Brief.[2] This Brief addresses the main topics and arguments the Defense seeks to raise at trial, without being able to elaborate exhaustively the contents and scope of the Defense-arguments and strategy.

II EQUALITY OF ARMS: A CORNERSTONE PRINCIPLE FOR PRE-TRIAL PROCEEDINGS

3. Pre-trial proceedings should be profoundly governed by the principle of equality of arms, the underlying rationale of which is developed by other international courts such as the European Court of Human Rights. The case law of this Court has set forth that based on this principle, the Accused may not be put at a serious procedural disadvantage with regard to the Prosecutor. Notably, this principle applies to the Accused only and human rights treaties do not extend this principle to the position of the Prosecutor.[3]

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[1] See also Defense notes for Status Conference March 8, 2004, p. 1 – 3.
[2] See for the issue of non-compliance with Rule 66(A)(i), the (Additional) Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i), filed on March 18 and 19, 2004.
[3] See Cassese o.c. at 395 – 396.

4. It is in this light that this Pre-Trial Brief should be read. Fairness and equality of arms forms therefore the cornerstone of these proceedings before the Special Court for Sierra Leone (hereinafter "**SCSL**").

5. Crucial exponent hereof and clear derivative of this principle of equality of arms is the regulation of the discovery and disclosure process. Framed on the mentioned principle, it is meant to regulate in detail the safeguards as to ensure and effective and fair defense.[4] The system as enshrined by Rules 66(A) – 68 of the RPE (SCSL) are also to be read and interpreted in this light.[5]

6. At the outset of this Pre-Trial Brief it should be observed, though, that until now this rationale of and compliance with the mentioned disclosure and discovery-system at the SCSL has not been strictly met by the Prosecutor,[6] as a consequence of which this Brief necessarily is drafted as a preliminary one.

7. As observed by legal scholars, the principles under discussion and at issue here (i.e. fairness and equality of arms) play a crucial role as they dictate the manner in which international criminal proceedings must unfold.[7] The way these principles are vindicated by the SCSL may ultimately be decisive as to its judicial heritage and future perception of the People.

III DISPUTED FACTS AND CHARGES

8. As to the issue of disputed facts and charges by the Accused, this Brief will first address the Prosecution Request to Admit before assessing its evidentiary cornerstone, i.e. the concept of joint criminal enterprise.

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[4] See Cassese, o.c. at 396.
[5] *Ibid.*, as to the ICTY-ICTY RPE.
[6] See Sections of this Brief ad III, V and VI below.
[7] Cassese, o.c. at 389 – 390.

(i) Prosecution Request to Admit

9. On March 4, 2004, the Prosecution filed a Request to Admit. In addition to the Response to this Request filed by the Defense on March 19, 2004,[8] this section of the Defense Pre-Trial Brief is meant as an additional response to this Prosecution's Request to Admit as referred to in para. 4 of the aforementioned Request.[9]

10. The Defense disputes the correctness of the stipulations of the Prosecution mentioned under paras. 53 and 55 – 59. Contrary to the Defense's Response to Prosecution Request to Admit, filed on March 19, 2004, stipulation no. 54 should partially be denied as the Accused was born at Wilber Force Village (Sharon Street) in the Western area of Freetown.

11. With regard to the stipulations 1 – 34, the Defense is not able to address all of them, due to the incompleteness of the Prosecution's disclosure. The latter observation is evidenced both by the fact that the Prosecution is still filing witness statements, and the redaction of crucial parts of several statements. By way of preliminary remark, stipulations 4, 5, 6, 7 – 13 of the Prosecution's Request to Admit should be contested. It is disputable whether the AFRC was an armed faction as such; rather it is asserted that the AFRC was an exponent of the Government. Therefore, in the humble view of the Defense, the AFRC cannot be viewed as an army or armed faction as such, but rather it may be perceived as a governmental body. In the humble opinion of the Defense, this distinction may have considerable factual and legal ramifications for the determination of the validity of the Consolidated Indictment and the Prosecution's theory as set forth in its Pre-Trial Brief in general terms.

[8] Defense's Response to Prosecution Request to Admit, filed on March 19, 2004.
[9] See p. 410 of the Registry's numbering of the AFRC file.

12. Furthermore, as to the qualification of the conflict within which the alleged crimes took place, the Defense respectfully draws the attention to the statement made by the President of Sierra Leone at the opening ceremony of the Special Court on March 10, 2004, saying that: "*Mr President of the Special Court, what happened in Sierra Leone was not just an internal issue. It was not, as some erroneously described it, a civil war. It was, as I have always maintained, a war of aggression aided, abetted and fuelled by networks of ruthless merchants of illegal diamonds and illegal arms. By virtue of their acts, they were merchants of death and destruction. We were relieved when the Security Council subsequently acknowledged the international and regional dimensions of the conflict and determined that the situation was a threat to international peace and security. Therefore the suffering of the people of Sierra Leone became a matter of concern to people everywhere, to humanity as a whole*"[10] (attached as **exhibit 1**). Thus, apparently the governmental officials of Sierra Leone perceive the conflict at issue not as a civil conflict as such. Criminal offences, to amount to war crimes, must have a link with an international or internal armed conflict.[11] At trial, special attention will be paid by the Defense to this issue and argument.

(ii) The Concept of Joint Criminal Enterprise

(a) Explicit Option for One of the Three Categories

13. The Defense wishes to address now the heart of the Consolidated Indictment, namely the assumption of the Prosecution that a joint criminal enterprise existed, within which the alleged crimes were committed. It should be remarked that this concept was disputed by the Defense during the hearing of the Prosecution's Motion for Joinder in December 2003, emphasizing that a common purpose or plan was clearly absent in the instant case.

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[10] See para. 8 of this statement (emphasis added), which can be found at http://www.sc-sl.org/kabbah031004.html.
[11] Cassese o.c., at 49.

14. According to the Consolidated Indictment (Annex 2 to the Prosecution's Pre-Trial Brief, paras. 32 – 35), the Prosecution primarily frames the charges within the context of alleged participation in a joint criminal enterprise, and, alternatively, it bases these charges on the doctrine of superior responsibility (para. 36 of the Consolidated Indictment).

15. In paras. 208 – 210 of the Prosecution's Pre-Trial Brief, reference is merely made to the general requisite elements and categories of joint criminal enterprise, without specifying though the applicability of the categories and elements of joint criminal enterprise to the case of Mr. Kanu. Under Chapter D of the Prosecution's Pre-Trial Brief, its theory is summerized, again without indicating whether and to what extent the concept of joint criminal enterprise is applicable in the instant case. Hence, the Prosecution fails to specifically indicate which category should allegedly apply in this case. Para 121 of the Prosecution's Pre-Trial Brief does mention that the crimes "*alleged in this Pre-Trial Brief (...) were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.*" Yet, this reference does not explicitly opt for one of the three categories of joint criminal enterprise. In contrast, the case law of the ICTY relies upon the obligation of the Prosecutor to opt for the exact category it will pursue at trial, such option facilitates respect for the principle of legal certainty and fair trial rights of the Accused.

16. In *Prosecution* v. *Krnojelac*, the Trial Chamber held the following:

> "*A person participates in that joint criminal enterprise either:*
>
> *(i) by participating directly in the commission of the agreed crime itself (as a principal offender);*
>
> *(ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or*

(iii) *by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.*"[12]

17. The Consolidated Indictment in the instant case merely asserts that the crimes alleged "*were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.*" Thus, the Consolidated Indictment may be interpreted as enhancing both the first and second category of joint criminal enterprise as set forth in the *Tadic* Appeals Chamber Judgment,[13] and therefore in the humble opinion of the Defense, does not comply with the case law as elaborated on in the preceding paragraphs of this Brief.

18. It should be stressed that in the ICTY Trial Chamber Decision on the Form of Second Amended Indictment in *Prosecutor* v. *Krnojelac*, the Trial Chamber held that, in order to be properly informed of the essence of the case, and as well as to properly enable the Defense to prepare its case, the Accused must be informed in the Indictment of "*the nature of the participation by the accused in that enterprise.*"[14] From this Decision, it can be derived that the Prosecution bears the obligation to expressly opt already in the (Consolidated) Indictment for any of the three categories joint criminal enterprise concept, at least opt for either the basic form of joint criminal enterprise (first category) or the extended one (third category).

19. Therefore, the Defense respectfully reserves its right to additionally dispute the invoked concept and theory of joint criminal enterprise, once the Prosecution has

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[12] *Prosecutor* v. *Krnojelac*, ICTY Trial Chamber Judgment, March 15, 2002, Case No. IT-97-25-T, para. 81.
[13] *Prosecutor* v. *Tadic*, ICTY Appeals Chamber Judgment, Case No. IT-94-1-A, July 15, 1999, para. 220.
[14] *Prosecutor* v. *Krnojelac*, ICTY Trial Chamber Decision on Form of Second Amended Indictment, May 11, 2000, Case No. IT-97025-T, para. 16 under (d).

complied with its obligation to make an explicit choice for either of the three categories as set forth above.

(b) Response to Prosecution's Theory

20. Based on the available disclosed materials, the following preliminary observations are to be made as to the Prosecution's theory insofar as it is framed on the doctrine of joint criminal enterprise:

21. In the event crimes are allegedly committed by a plurality of persons, both the *actus reus* and the element of *mens rea* on part of all participants in these crimes should be proven beyond reasonable doubt. The Defense respectfully refutes the existence of both elements on part of Mr. Kanu.

22. Recently, the Appeals Chamber of the ICTY in *Prosecutor* v. *Vasiljevic* in its judgment of February 25, 2004,[15] refined the difference between co-perpetration in a joint criminal enterprise and aiding and abetting as to such an enterprise.

23. It is worth mentioning the relevant paragraphs of the Appeal Chamber:

> *94. Article 7(1) of the Statute sets out certain forms of individual criminal responsibility which apply to the crimes falling within the International Tribunal's jurisdiction. It reads as follows:*
>
> ***Article 7***
> ***Individual criminal responsibility***
>
> *1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.*
>
> *95. This provision lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. Article 7(1) of the Statute does not make explicit reference to "joint criminal enterprise." However, the Appeals Chamber has previously held that participation in a joint criminal enterprise is a form of liability*

[15] Prosecutor v. Mitar Vasiljevic, Case No.: IT-98-32-A, Judgement, February 25, 2004.

which existed in customary international law at the time, that is in 1992, and that such participation is a form of "commission" under Article 7(1) of the Statute.

96. *Three categories of joint criminal enterprise have been identified by the International Tribunal's jurisprudence.*

97. *The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.*

98. *The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.*

99. *The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.*

100. *The actus reus of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements: First, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.*

101. *However, the mens rea differs according to the category of joint criminal enterprise under consideration:*

- With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).

- With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment.

- With regard to the extended form of joint criminal enterprise, what is required is the intention to participate in and further the common 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. In addition, responsibility for a crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk"– that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

2. Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor

102. *Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the actus reus as well as to the mens rea requirements between both forms of individual criminal responsibility:*

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the

> *commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite mens rea is intent to pursue a common purpose.*[16]

24. The latter observation made by the Appeals Chamber in the Vasiljevic case also the argument that, in the humble opinion of the Defense, in the instant case the requisite standard for *mens rea* as to the proof of participation in a joint criminal enterprise, has not been met. The Accused specifically denies the existence of *mens rea* in terms of intention to pursue any common purpose so that the Prosecution's theory myst be rejected (see further under Section VI below).

(iii) Punishability of Certain (International) Crimes

25. Finally, as to an assessment of the charges doctrinally, it is worth recalling that the Defense in the Case of Mr. Kanu, on several occasions[17] has submitted its humble opinion that several charges at issue cannot be prosecuted as (international) crimes within the scope of the Consolidated Indictment. This argument relates to, *inter alia*:

(i) the proposed act of "forced marriage" (see Defense Response to Prosecutor Request to Amend Indictment);

(ii) the applicability in the instant case of the Geneva Conventions;[18]

(iii) the charged act of alleged recruitment of child soldiers (see Count 11).

26. At trial, the Defense will return to these arguments in order to legally elaborate and refine them.

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[16] Footnotes omitted.
[17] See Motion on retroactivity; see also Defense response to request to amend Indictment.
[18] See also ad (i) of this Section.

IV POTENTIAL DEFENSES PURSUANT TO RULE 67(A)(ii)(a) AND (b)

27. This Pre-Trial Brief now arrives at the intention of the Defense to enter the following defenses, the mentioning thereof serve as notifications to Rule 67(A)(ii)(a) and (b) of the Rules:

(i) Defenses as to the Facts

28. In the **first** place, as to the presence of the Accused within the eight districts mentioned in the Consolidated Indictment (see *inter alia* paras. 43 – 50), the Accused denies physical presence within the villages mentioned therein during the charged periods.

29. **Secondly**, the phenomenon of **mistake of identity** with respect to the alleged code name of the Accused, namely "55" cannot be excluded in that the name "55" was used or misused by several other persons, individuals or organizations, as some of the witness statements disclosed by the Prosecutor may indicate. Reference is specifically made to, *inter alia*, Statement TF1-130 p. 5, where the name "55" is mentioned within the context of the RUF. To this extent, the invocation of the defense of mistake of identity should be reserved.

(a) Alibi Defense Regarding Counts 14 – 17

30. At para. 80 of the Consolidated Indictment, the Accused is charged with involvement in attacks on UNAMSIL personnel between April 15 – September 15, 2000.

31. The Defense stresses the ability of the Accused to, already at this stage of the proceedings, enter an alibi defense to the extent that he reasonably could not have been involved in the alleged crimes as mentioned under Counts 14 – 17 due to, in short, his incarceration at Cockerill Army Headquarters with respect to a shooting incident that earlier took place at Juba Hill.

32. The investigator of the Defense Team, Mr. Sima Paul Kamara, was directed by the Defense to conduct investigation of this potential alibi. Based on several investigative activities, Mr. Kamara was able to file an investigation report in respect of the establishment of this alibi, which report of March 12, 2004, is attached as **exhibit 2** to this Pre-Trial Brief. On the last page of this report, the investigator concludes that "*(...) now (is) established that the indictee was indeed incarcerated at the Cockerill Army Headquarters from 13 June to 1 December 2000.*" This conclusion is founded on the detention-record shown to Mr. Kamara, a copy of which is attached to this report.

33. Notably, Mr. Kamara was able to verify this alibi due to the allowance by the respective authorities to inspect this detention register for the period of April 15 – September 15, 2000. The specific findings are enumerated on p. 5 under ad (1) – (3) of this report. The investigator, though, remarks that the question remains as to the period 15 April – 13 June 2000, the answer of which is unfortunately prevented by "*(...) either because of their nervousness (of the military officers, GJK) of the special court or how the Sierra Leone government who is their employer and also partner in the prosecution of this trial will see them as, which may lead to their subsequent removal from the offices (...).*"

34. The opportunity should be taken to respectfully draw the attention of the honorable Trial Chamber to this practical problem in obtaining exculpatory evidence and witness statements, which may facilitate an infringement of the principle of equality of arms. In view of the observations made by the investigator, Mr. Kamara, the Defense filed with the Trial Chamber on March 19, 2004 its "Motion to Request an Order under Rule 54 with Respect to Exculpatory Evidence." In this Motion, seven potential witnesses are mentioned, in order to verify this alibi. Notably, these witnesses are potentially to be heard at trial (see also Sectin VI below).

35. In furtherance, the aforementioned Motion also seeks for an order to obtain the so-called Commission for the Consolidation of Peace ("CCP") salary vouchers which may substantiate the fact that Mr. Kanu was stationed at CCP in Freetown within the period of April 15 – June 12, 2000 which fact may further discharge Mr. Kanu as to the Counts 14 – 17 of the Consolidated Indictment.

36. This section of the Pre-Trial Brief is meant and should be considered as to comply with the Defense-obligation to notify the Prosecution of any intention to call evidence on an alibi pursuant to Rule 67(A)(ii)(a) of the Rules. As this notification must be given as soon as reasonably practical, and must specify the place at which the Accused was at the time of the allegations, the Defense is of the humble opinion that it has complied with these obligations by means of both this Pre-Trial Brief as well as the Motion on Rule 54, filed with the Trial Chamber on March 19, 2004.

(b) Case Law of International Tribunals as to Entering an Alibi-Defense

37. The ICTY Appeals Chamber Judgment of February 20, 2001 in *Delalic et al.*, under para. 581, observes that the term "*defence of alibi*" is actually a misplaced term; the invocation of an alibi merely amounts to a rebuttal of the indictment.

38. The burden of proof rests upon the Prosecution to prove a case beyond reasonable doubt, notwithstanding that the defense raised an alibi.[19] The case law of the ICTR indicates that "*the alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful.*"[20] The Defense is of the humble opinion that the presented materials which substantiate the alibi of Mr. Kanu in the instant case, filed with the Trial Chamber by means of the aforementioned Rule 54 Motion, fulfill this criterion of the ICTR case law.[21]

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[19] See *Prosecutor* v. *Kayishema and Ruzindana,* ICTR Trial Chamber Judgment May 21, 1999, para. 234 ; *Prosecutor* v. *Musema*, ICTR Trial Chamber Judgment January 27, 2000 para. 108.

[20] See also Archibold, International Criminal Courts, Practice Procedure and Evidence, at 459 – 460 (Dixon et al 2003).

[21] This Rule 54 Motion is mainly meant to obtain official confirmation and verification of the Defense materials and to cover the period April 15 – June 13, 2000.

Accordingly, in the humble opinion of the Defense, it should be seriously considered to dismiss the Consolidated Indictment with respect to the Counts 14 – 17, at least as to the period of 13 June – 15 September 2000.

39. As evidenced by and set out in the mentioned Rule 54 Motion, in the humble opinion of the Defense, the requirements of Rule 67(A)(ii)(a) are fulfilled, namely the specification of the place or places at which the Accused claims to have been present at the time of the alleged crime, the names of the witnesses and other evidence upon which he intends to rely to establish the alibi (i.e. the CCP salary vouchers and other documents in the possession of the Government).

(ii) Defenses as to the Law (Excuses)

40. Under principles of international criminal law the category of excuses, which may result in the absence of the requisite subjective (mental) element due to the existence of certain external circumstances, embraces: superior orders,[22] necessity, duress, mistake of fact and mistake of law.[23]

41. With respect to defenses as to the law, the Defense intends to enter the following special defenses as meant by Rule 67(A)(ii)(b) of the Rules; which enumeration may not be seen as exhaustive (see also Section II):

(i) The defense of mistake of law in view of the potential unclearness of the prevailing law in the instant case on several matters.[24] Some elements hereof were already set forth in, *inter alia*, the Defense Motion on Abuse of Process Due to Infringement of Principles of Nullum Crimen Sine Lege and Non-Retroactivity As to Several Counts, filed on October 20, 2003. Legal literature shows that mistake

[22] Albeit under extreme circumstances; see below.
[23] See Cassese, o.c. at 224, 235 – 263.
[24] Antonio Cassese, *International Criminal Law*, 2003, at 238 – 239, which author remarks that this defense can validly be raised as mistake of law.

of law may also enhance the situation of "*mistaken belief which is impermissible under international law.*"[25] Furthermore, courts tend to attach to mistake of law a greater weight than the one most national legal systems attribute to the same excuse in the event of "flaws of international criminal law."[26]

(ii) The defense of mistake of fact, which ultimately defects the necessary *mens rea* of the Accused and may result in acquittal.[27] By way of preliminary remark, the Defense intends to enter this defense. Mistake of fact amounts to an excuse to a criminal charge when, despite the existence of *actus reus*, the requisite *mens rea* is absent since the person mistakenly was of the honest and reasonable belief that there existed factual circumstances making the conduct lawful.[28] In the instant case, the defense of this mistake of fact may be of relevance in the event it would be established at trial that the Accused would have participated in the execution of allegedly unlawful orders, while at the same time the Accused may prove that he was not aware that the order was unlawful in point of fact and therefore lacked the requisite *mens rea*.[29]

(iii) The defense of obedience to superior orders. Although customary international law does not recognize this defense as a complete excuse, but merely as a potential mitigating circumstance with respect to the punishment,[30] the Statute of the SCSL nor its RPE seem to exclude the applicability of this defense. Similarly, Article 33 of the ICC Statute does not exclude this argument under certain circumstances in order to excuse a defendant. In this context, in the humble opinion of the

[25] See Archibold, o.c. at 471 – 472.
[26] Cassese, o.c., at 258 -- 263.
[27] *Ibid.* at 470 – 471; see also Cassese o.c., at 238 – 239.
[28] See Cassese o.c. at 251 and Article 32(1) of the ICC Statute.
[29] See Cassese o.c. at 253.
[30] See Cassese o.c. at 232.

Defense, a potential argument arises in that the Accused acted upon a (Constitutional based) obligation as to the protection of his State which obligation arose irrespective of the character or nature of the conflict and/or Government at issue.[31] This argument may also be determinative for the defense ad (ii).

V SPECIFIC REMARKS AS TO THE PROSECUTION'S THEORY ON SUPERIOR RESPONSIBILITY

42. The Accused refutes the assertion under para. 6 of the Consolidated Indictment, where it is stated that the Accused held the rank of Sergeant. As can be established, the Accused never attained this rank, but only held the rank of Corporal. Notably, the earlier mentioned CCP-salary vouchers also can confirm this.

43. As will be elaborated in section VI of this Pre-Trial Brief, this observation may have consequences for the burden of proof (see *Galic* Trial Judgment of the ICTY of December 5, 2003, discussed below).

44. More specifically, the Defense opposes the assertion that the Accused exercised any effective command, control, or authority over alleged perpetrators of the crimes as set forth in the Consolidated Indictment. Although indeed it is not necessary for there to be a formal hierarchical structure, any *de facto* position of authority or control cannot reasonably be deduced from the materials provided by the Prosecution.[32] Control must therefore be effective,[33] and it is this element which is contested by the Accused.

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[31] See also Kai Ambos, "Superior Orders," in *The Rome Statute of the ICC* (Vol. 1) (2002), at 859.
[32] See for the element of a *de facto* position, ICTY Trial Chamber decision in *Delalic et al.*, Judgment November 16, 1998, Case No. IT-1996-21-T, paras. 377 – 378.
[33] See Cassese o.c. at 208.

45. It should be stressed that superior responsibility, alternatively invoked by the Prosecution, may not be seen and applied as a form of **strict or objective** liability, that is liability for offenses for which one may be convicted without any requirement to prove any form or modality of *mens rea.*[34] It is an accepted principle of international criminal law that superiors must not be held responsible in contravention of the requirement of personal guilt.[35] From this perspective it is clear that *mens rea* as required for superior orders, cannot be founded on the basis of a theory of strict or vicarious liability. Yet, in the humble view of the Defense, the Prosecutor's Pre-Trial Brief (see Section D) seems to aim at a form of superior responsibility framed on a theory of collective criminality abstracted from the notion of personal guilt. Insofar as the Prosecution relies on superior responsibility by omission, it is tenable that there should at least be an international obligation incumbent upon the alleged superior to prevent crimes.[36]

46. In conclusion, and in addition to the rebuttal of the requisite element of "any effective control or command," it may be said that, in the humble opinion of the Defense, the Prosecutor's materials and arguments fail to substantiate and identify this element of "*any form or modality of mens rea,*" as required for this form of criminal liability.

VI ADMISSIBILITY AND (FAIR TRIAL) ASSESSMENT OF EVIDENCE

(i) Protective Measures and Time Frame to Interview OTP Witnesses

(a) Time Frame as to Disclosure of Witness Identities

47. According to the honorable Trial Chamber's Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims of November 24, 2003, the Trial Chamber ordered on p. 14 thereof that "*[t]he Prosecution should withhold identifying data of the persons the Prosecution is seeking protection for*

[34] See *Delalic et al.* Judgment, o.c., para 239; Cassese o.c. at 209.
[35] See Ambos o.c. at 847.
[36] Cassese, o.c. at 205.

as set forth in paragraph 16 or any other information which could lead to the identity of such person to the Defence until twenty-one (21) days before the witness is to testify at a trial."

48. The Defense respectfully indicates that this time frame may turn out to be insufficient in order to properly prepare its case for the following reasons:

49. In the **first** place, the preparations and coordination for the trial will be considerable. Given the composition of the Defense team, a time frame of three weeks prior to the hearing at trial can turn out to be too restrict.

50. In the **second** place, the honorable Trial Chamber has granted other Defense teams (for instance the defense of Fofana) in this respect a period of 42 days before the witness is to testify at trial. Tenable is that this period is extended and streamlined with that of the 42-day period.

51. It goes without saying that the timely disclosure of the identity of each Prosecution witness is crucial to a proper preparation of the cross-examination by the Defense. In this regard, the Defense respectfully prays the honorable Trial Chamber to reconsider its Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims of November 24, 2003, to the extent that the time frame for disclosing the identity of the Prosecution witnesses of 21 days before they are called at trial, be changed into *at least* 42 days before their testimony at trial.

(b) Redacting of Witness Statements

52. Another fair trial issue should be addressed in this Brief, i.e. the redaction of virtually all witness statements of the Prosecution until so far. In view of this, the Defense respectfully requests the honorable Trial Chamber to order the Prosecution to redact the OTP witness statements in such way that more details are provided to the Defense. The redacted versions substantially hinder the

Defense to verify any information contained therein, as in most cases no details are provided as to the place and whereabouts of the witness as well as details concerning incidents that have taken place. This seriously affects the fair trial rights of the Accused, a topic which will be addressed further by the Defense at trial.

53. In this respect, the Defense, in its humble view, stresses that redacting witness statements should only be restricted to the names of the witnesses.

(c) Exclusion of Written Prosecution Witness Statements and Exclusion from Testimony at Trial

54. A further evidentiary subject to be raised in this Pre-Trial Brief relates to the issue addresses by the Defense (Additional) Motion for Exclusion of Prosecution Witness Statements and Stay on Filing of Prosecution Witness Statements Pursuant to Rules 5 and 66(A)(i), filed on March 18 and 19, 2004.

55. The arguments raised in this Motion, are, by way of additional example, supported by the disclosure of witness statements on February 4, 2004. Again, this disclosure embraces witness statements obtained considerable time prior to the initial appearance of the Accused.[37] Judicially, in the humble view of the Defense, evidentiary ramifications should not be excluded as to the validity of certain witness statements and their potential testimony at trial.

(ii) Defense (Expert) Witnesses

56. As to the list of Defense (expert) witnesses, the Defense already identified certain witnesses which it deems relevant for hearing at trial (see Section IV above). Yet an exact indication of a number of such witnesses inclusive expert witnesses, is still under determination.

[37] See for example TF1 – 278 (March 10, 2003); TF1 – 280 (March 4, 2003); TF1 – 299 (October 18, 2002); TF1 – 303 (November 15, 2002); TF1 304 (November 16, 2002).

(iii) Exculpatory Evidence (Rules 54 and 68 of the Rules)

57. The issue of disclosure of exculpatory evidence pursuant to Rule 68 forms indirectly part of the Defense Rule 54 Motion. The Defense respectfully reiterates its comments made during the Status Conference of March 8, 2004, with respect to the compliance to Rule 68 on part of the Prosecution,[38] more specifically its observation that it is questionable whether the Prosecution fulfilled the object and purpose of Rule 68(B) by identifying exculpatory evidence. In the humble opinion of the Defense, in its humble view, this Rule is meant to direct the Prosecution to specifically indicate within the disclosed witness statements the exculpatory parts of it.

(iv) Standard of Proof

58. Generally, it should be observed that several Prosecution witness statements amount to "hearsay" statements.[39] It is the humble opinion of the Defense that resort to hearsay before the honorable SCSL should not be admitted as it does not comply with the object and purpose of *inter alia* Rules 89(B) and 95.

59. The requisite standard of proof as to the element of *mens rea* for participation in a joint criminal enterprise was earlier addressed in this Brief (see Section III above). With respect to the standard of proof required for the doctrine of superior responsibility, the Prosecution relies on, it should be recalled that the Accused did not hold the rank of Sergeant, but only the rank of Corporal. Without further motivation, it cannot be said that the Accused had any authority over individuals and/or alleged subordinates.

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[38] See Defense Notes for Status Conference, March 8, 2004 at para. 24 – 25.
[39] See, *inter alia,* TF1 – 160.

60. In para. 227 of the Prosecution's Pre-Trial Brief, it is referred to the *Galic* Trial Judgment of the ICTY of December 5, 2003, where the ICTY Trial Chamber concluded that when an accused exercises informal authority over the perpetrator, the standard of proof (with respect to the knowledge element) is higher than that which applies to an accused who holds an official position of command and serves within a formal and structured system or organization.[40] It is this higher standard of proof that prevents, in view of the Defense, a conviction based on the concept of superior responsibility with respect to Mr. Kanu.

VII CONCLUSIONS

61. This Pre-Trial Brief draws the attention of the honorable Trial Chamber to the following preliminary conclusions:

(i) The findings in this Brief oppose the acceptance of:
- the existence of a joint criminal enterprise; and
- participation in a joint criminal enterprise (both as to the *actus reus* and *mens rea*), if any, on part of Mr. Kanu;

(ii) The observations in this Brief oppose any superior responsibility of the Accused in regard to the alleged crimes, both as to the *actus reus* and *mens rea;*

(iii) The findings in this Brief advance the invocation at trial of several (special) defenses as envisioned by Rule 67(A)(ii)(a) and (b);

(iv) Contemplating the alibi defense of the Accused, it is the humble opinion of the Defense that consideration should be given to discharge the Accused in respect of the Charges 14 – 17, at least for the period June 13 – September 15, 2000;

[40] *Galic* Trial Judgment, December 5, 2003, para. 174.

(v) Finally, this Brief indicates the Defense intention to challenge the applicability of the crimes charged, both as to the facts and to the law.

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Respectfully submitted,
Done at this 22nd day of March 2004

Geert-Jan Alexander Knoops
Lead Counsel

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EXHIBIT 1

STATEMENT
By
HIS EXCELLENCY
ALHAJI DR. AHMAD TEJAN KABBAH
PRESIDENT OF THE REPUBLIC OF SIERRA LEONE

At the formal opening of the
Courthouse
For the Special Court for
Sierra Leone

On

Wednesday, 10th March, 2004

Honourable Vice-President
Mr Hans Corell, Under Secretary-General for Legal Affairs,
President and Honourable Members of the Special Court,
Excellencies,
Distinguished Guests,
Ladies and Gentlemen:

1. Throughout its history, Sierra Leone has scored a number of "firsts" in West Africa, in the rest of the Continent, and even in the world. These range from the establishment of the first institution of higher education in Africa south of the Sahara, and the first wired public broadcasting service in West Africa, to the issuance of the first free-form self-adhesive postage stamp in the world, and having produced the first African to receive the prestigious accolade of Knighthood in what was once the British Empire.

2. Now, Sierra Leone is scoring another 'first'. It is making history in international humanitarian law, specifically in the area of transitional justice. It has become the first country to establish an independent mixed court to bring to justice persons responsible for serious violations of international humanitarian law and national criminal law. And not only that, the seat of the mixed court is within the territory of the country where the alleged crimes were committed. The nomenclature 'Special Court' is therefore appropriate. The formal opening of these premises could also be described as a special occasion. I am therefore grateful to you Mr Justice Robertson, President of the Court, for the invitation to be present at this ceremony as the guest of honour, and to formally open the Courthouse.

3. While we take pride in the establishment of this unique institution, and while we applaud the quality of cooperation between the Government of Sierra Leone and the United Nations, we cannot help but recall with deep sorrow the extraordinary circumstances that prodded us to pursue this uncharted course in the administration of justice. Never in the history of this country and of West Africa have we experienced horrendous brutality against innocent civilians on such a scale. Those acts tarnished the image of Sierra Leone, a small but peaceful, friendly and enlightened nation.

4. This notwithstanding, and long before the UN Security Council adopted resolutions stressing the need to talk to the rebels and try to end the war peacefully, and long before we were persuaded to negotiate with those who had committed heinous acts of brutality and terrorism against our people, my Government had already initiated a series of dialogue with the leader of the rebel movement. We concluded two peace agreements with him, gave him

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and other members of his movement cabinet and high-ranking positions. We went further to grant them the most profound and generous consideration one could imagine, namely amnesty. And lest we forget, Foday Sankoh also received absolute and free pardon under Section 63 of the Sierra Leone Constitution.

5. Mr President of the Special Court, it is relevant on this occasion to recall the judicial, moral and political risks that we took five years ago when we allowed the rebel leader Corporal Foday Sankoh, to leave this jurisdiction so that he could travel to Lomé for peace talks, even though he had been convicted, sentenced and was waiting to have his conviction reviewed by the Sierra Leone Court of Appeal. It was an unprecedented decision, one that apparently escaped the attention of the international community including the international media. The people of Sierra Leone were apprehensive that Foday Sankoh would never return to Sierra Leone to face justice.

6. However, yearning for peace, they gave me their overwhelming support, and Foday Sankoh, a convicted man, travelled out of this jurisdiction.

7. We all know what happened after Lomé. How can anyone forget the events of May 2000, less than a year after the Lomé Peace Agreement, when impunity raised its vicious head once again on an already traumatized population?

8. Mr President of the Special Court, what happened in Sierra Leone was not just an internal issue. It was not, as some erroneously described it, a civil war. It was, as I have always maintained, a war of aggression aided, abetted and fuelled by networks of ruthless merchants of illegal diamonds and illegal arms. By virtue of their acts, they were merchants of death and destruction. We were relieved when the Security Council subsequently acknowledged the international and regional dimensions of the conflict and determined that the situation was a threat to international peace and security. Therefore the suffering of the people of Sierra Leone became a matter of concern to people everywhere, to humanity as a whole. As I told the UN Secretary-General in my historic letter of 12 June, 2000, and I quote:

9. "I believe that crimes of the magnitude committed in this country are of concern to all persons in the world, as they greatly diminish respect for international law and for the most basic human rights. It is my hope that the United Nations and the international community can assist the people of Sierra Leone in bringing to justice those responsible for those grave crimes."

10. So, this is a Special Court for Sierra Leone, a symbol of the rule of law and an essential element in the pursuit of peace, justice and national reconciliation for the people of Sierra Leone. It is also a Special Court for the international community, a symbol of the rule of international law, especially at a time when some State and non-State actors are increasingly displaying, shamelessly, contempt for the principles of international law, including international humanitarian law and human rights law. This Special Court is good for Sierra Leone. It is also good for the world today. It will certainly contribute to the jurisprudence of international humanitarian law, and enhance the promotion and protection of the fundamental rights of people everywhere.

11. Without the cooperation of the United Nations, the international community and the Government and people of Sierra Leone there would have been no Special Court. This is why I should like to take this opportunity to express sincere thanks, first to the Secretary-General of the United Nations. He responded expeditiously to my request, and the Security Council gave him only thirty days to come up with a plan based on my proposal for the creation of an independent special court. Our thanks also go to the States and organizations that have made financial and other contributions to the Court, and to members of the Management Committee

for their support and oversight function. I am delighted to see their representatives present at this ceremony.

12. Let no one underestimate the formidable task and challenge that this "hybrid" institution faces and will continue to face in its lifetime. The entire world, especially the people of Sierra Leone, would be watching its proceedings, carefully. The Court must see that justice is done. It must also, as far as possible, by its proceedings and judgements, dispel any notion that it is a political tool of a particular government or group of States. This is crucial to its success because of perceptions and misperceptions about the so-called "thin line" between politics and the administration of justice on the one hand, and international politics and international law on the other.

13. On the issue of its independence and credibility the Security Council in its resolution 1315 (2000) of 14 August 2000, correctly emphasized the importance of ensuring the impartiality, independence and credibility of the judicial process of the Special Court, in particular with regard to the status of the judges and the prosecutors.

14. In this connection, I would like to assure you Mr President that we have absolute confidence in the competence and integrity of all those who have been appointed to serve in the Chambers and Registry of the Court. I would also like to commend you for the effective sensitisation programme that is being conducted throughout the country. The programme is a necessary acknowledgement of the fact that (a) this particular mechanism of accountability is new to the people of Sierra Leone, and (b) it has emerged almost concurrently with the proceedings of the transitional justice mechanism embodied in the Truth and Reconciliation Commission.

15. I would strongly recommend that the Court continue, and even strengthen the sensitisation or public information programme. We note with interest recent improvements in accessibility to information on the Court's internet website. Further improvements would ensure that the Court's external constituencies are also kept fully and reliably informed about the activities of this new institution in international humanitarian and human rights law.

16. Mr President of the Special Court, I would like to reassure you that the Government of Sierra Leone is fully committed to the success of this Court, and will continue to cooperate with its organs at all stages of the proceedings, in accordance with Article 17 of the Statute. Such cooperation is in the interest of the people of this country, in particular the victims of the atrocious crimes that the Court has been empowered to try.

17. I would like to commend the architects who designed this impressive structure, and the builders, workers and all those who in one way or the other were recruited to lend a hand so to speak in the construction of the building within such a short time. The fact that the proceedings of the Special Court will be conducted in a spacious and relatively comfortable working environment should enhance its overall efficiency.

18. At the end of its mandate the Special Court will leave a legacy in the annals of the administration of justice in Sierra Leone and in the international community. It will also bequeath to the people of Sierra Leone a citadel of justice in the form of this beautiful courthouse.

19. I have the honour to now formally declare open the new home of the Special Court for Sierra Leone.

I thank you all.

SIMA KAMARA
79 Bass Street
Freetown.

12th March, 2004

Geert-Jan Alexander Knoops
Lead Counsel
DOSCSL

EXHIBIT 2

Sir,

INVESTIGATION REPORT IN RESPECT OF INDICTEE SANTIGIE BORBOH KANU'S ALIBI AT COCKERILL ARMY HEADQUARTERS

I wish to write and submit this report on the above-subject matter.

On Monday the 9th of February, I was directed by MR. J.O.D. COLE a co-defence counsel for the indictee to conduct investigation on an alibi made by the indictee that between the 15th April to the 15th September 2000, he was in detention at cockerill army headquarters in respect of a shooting incident that took place at Juba, which is in contrast to count 14-17 of the indictment made by the Chief Prosecutor's Office which states that between the 15th April to 15th September 2000 the indictee was intentionally directing attacks on UNAMSIL and other personnel Involved in humanitarian assistance or peace keeping mission located at various locations including Bombali, Kailahun, Kambia and Kono districts. I visited the ministry of defence to see the Chief of defence staff with a reminder letter from the defence counsel MR. J.O.D. COLE with reference to two letters that were earlier sent by another defence counsel MR. AGIE E. Manly-Spain to the C.D.S. to grant me the investigator complete and unhindered access to relevant documents and potential witnesses that are connected to the indictees detention at Cockerill.

Unfortunately the C.D.S. was out of the country but I spoke with his personnal assistant a Major Musa who confirmed receiving the two letters from the Co-defence counsel MR. AGIE E. MANLY-SPAIN and that they were forwarded to the assistant C.D.S. for necessary action, he tried to get him on the telephone but was told that the Asst. C.D.S. is on an operational exercise within the country and could not be reached. Major Musa then assured me of his co-operation and that he would do all things possible to get in touch with the Asst. C.D.S. and inform him of my visit and request. He then asked me to be calling on him for any information he may have received. This I brought to the attention of MR. J.O.D. Cole a co-defence counsel. After frantic efforts throughout the week to get the clearance to start my investigation. I was disappointedly informed by Major Musa that he had spoken with the Asst. C.D.S. about our request and the asst. C.D.S. told him that the request made by the defence counsel had been referred to the Army legal department for advice and uptill now have not received any reply from them and that it is also unfortunate that the officers responsible to give advice on such request, a British and a Sierra Leonean lawyer are presently out of the country on annual and sick leave respectively and hopefully will be back at the end of February, 2004. He also informed me that as not members of the army legal department, the C.D.S. office is not in a position to give clearance for such request unless otherwise directed by the legal department. I then reminded him of the sriousness of this investigation and the time already wasted, which he blamed on office procedure, but reassured me of his co-operation and encouraged me to be calling on him through their hot line Tel:292929 ext. 114. for any development relating to our request. This I also brought to the attention of MR. J.O.D. COLE the defence counsel who advice that whilst waiting for the clearance from the C.D.S. office, I should start with another assignment at Lumpa.

On Monday 1st of March 2004 I contacted Major Musa on the telephone and enquired about the arrival of their legal advicer, he then told me that he was just assisting me all this time because the officer who is responsible for that section was on sick leave and has now resume work, he then connected me to the Director of Training and personnel. I then introduced myself to her and explained my mission and the assistance I needed from the chief of defence staff. She acknowledge receiving the request made by my defence counsels and also confirmed the arrival of the legal advicer and also informed me that she will be meeting with them to delibrate on the issue and will then get back to me in two days time. I spent that next two days with the Defence team comprising of MR. AGIE MANLY-SPAIN and MR. J.O.D. COLE preparing for the commencement of the Status conference which was to be held on Monday 8th March 2004.

On Thursday 4th March 2004 I telephone the director of training to enquire about our request, she then ask me to call again in the afternoon which I did and it was at that call she told me that the green light has been given me to carryout my investigation. She then directed me to one Major Kaita who is the Military Police boss at Cockerill who is to assist me in my investigation. As the time was already late I decided to visit him the next day.

On Friday the 5th March 2004 at about 0830 hrs I visited the Cockerill headquarters to see Major Keita and was told that the Major is presently at the National Stadium on security coverage as they were expecting the arrival of the president of Sierra Leone to officially opened the Sierra Leone Armed Forces Sport day meeting. I then went to the National Stadium where upon enquiries was able to meet and know him for the first time. I then introduced myself to him and told him of my mission and the instruction given by the Director of Training. He then told me that as I can see for myself that

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he is tied up and that the Sport meeting will not end until Saturday 6th March 2004, so he decided that I should meet him in his office on Monday 8th March 2004. From the National Stadium I then went directly to the defence office where I met Ms. Karlijn van der Voort and was later joined by Mr. Agie Manly-Spain and Mr. J.O.D. Cole in continuation of the preparation for the Status Conference which continued the next day Saturday 6th March 2004.

I was also asked by Karlijn to go and verify the name and position of the Officer who did the recommendation and signature on the discharged book of the indictee Santigie B. Kanu the next time I visited the Cockerill Headquarters.

On Monday 8th March 2004 I visited the Cockerill Headquarters where I met Maj. Keita and after delibrating on the fact I was trying to established, he then sent for Captain Sylvanus who the investigator in respect of that shooting incident that land the indictee in their custody . I then requested to see and inspect the detention register for the period of 15th April to 15th September 2004. They took almost the whole day in searched of this register but could not be trace. when I questioned them how such a sensitive document could not be documented for easy reached, their response was that during that time in questioned, the Cockerill Army Headquarters was almost single handed administered by ECOMOG Officers with only few Sierra Leoneans Army personnel who have little or no knowledge about documentation and that it was only after the advent of IMATT Officers that documentary Machinery was put in place at the records office.

I was told to go and come back in two days time to enable them conduct an intensive search and hopefully will have something for me on my return. I then brought up discharged card issue, the Major then sent me with his orderly to the administrative building where it was clearify by one female IMATT Sergent Major that it was written and

sign by the commanding afficer of the enlistment and discharged section by the name of lieutinant Bunduka and is presently on course at the Junior Staff College at Leicester Village. I then brought it to the attention of Ms. Karlijn on my returned to the defence office.

On Wednesday 10th March 2004 at about 0900 hrs I again visited the Cockerill Army Headquarter where I was welcome with the news that the detention register for the period 15th April to 15th September 2000 have been found. I then requested to see and inspected it, and it was granted to me. After inspecting it I was convinced that it was authentic because of its age and other occurences that were recorded in it. I then went through the contents of the detention register and found the following information:

(1) That the indictee Santigie Kanu was arrested and detained on the 13th June 2000 and was of the rank of a Sergent at that time, and that it was only after the verification exercise in the Military was done, that it was discovered that he is a corporal and was then demoted to his official rank of a corporal.

(2) That during the time of his arrest he was a serving soldier attached to the commission for the consolidation of Peace whose chairman was Johnny Paul Koroma.

(3) That the indictee was released from custody at the Cockerill Army headquarters on the 1st of December 2000.

Attached are the photo copies of the detention register where the date, unit, name, offence and action taken where recorded in respect of the indictee Santigie B. Kanu.

I also admonished them to take great care of the detention register as they may be called upon at anytime to produce it in court during the trial.

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Sir, as I have now established that the indictee was indeed incarcerated at the Cockerill Army Headquarters from the 13th June to 1st December 2000. My next step now is to investigate where was he between the 15th April to the 12th of June 2000. My next stop will be the commission for the Consolidation of peace where he was attached before the day he was arrested, who attached him there and when was he attached there, as these are some of the pertinent questions the officers assisting me cannot answer, either because of their nervousness of the special court or how the Sierra Leone Government who is their employer and also partner in the prosecution of this trial will see them as, which may lead to their subsequent removal from the offices which they cherished so much.

These are some of the problems that is making my work in the field very slow and straineous, but with time and perseverance it can be done.

Faithfully Submitted by:

SIMA PAUL KAMARA

INVESTIGATOR

C.C. A.E. MANLY-SPAIN
CO- DEFENCE COUNSEL

2. J.O.D. COLE

CO-DEFENCE COUNSEL

Question No.....

Write on both sides of the paper

FOLIO "A" 646

IN EITHER MARGIN

DETAINEES BOOK OF RECORD

S/N	DATE	TIME	NAMES OF SUSPECTS	UNIT	OFFENCE	ACTION TAKEN
~~1~~	10-8-2000					
1.	13/6/00		18164955 Sgt Kanu.S.	CCP	UNL/Firing	
2	26/7/00		" 5842 " Massaquoi	"	Larceny	RELEASE
3	4/8/00		18171115 L/C Gibera	7th Bn	"	
4	26/8/00		LT. AB Turay 653	SLMP		
5	7/8/00		SLR/1918 Pte Koroma	RUF	Murder	
6	7/8/00		" 2177 " Musa.Y.	"	"	
7	9/8/00		" 1088 " Koroma.S	CDS	Harbouring	RELEAS
8	2/8/00		18170438 " Kanneh.A.	ASLA	Larceny	
9	10/8/00		SLR/1109 " Kamara A	B.T.C	AWOL	
10	20/7/00		Junior Tarawalli	C.D.F	H/Breaking	
11	"		Mohamed Kamara	"	"	
12	"		Joseph Kekura	"	"	
13	"		Jusu-J. Konneh	"	"	
14	"		Charles Obi	"	"	
15	"		Joseph Samu	"	"	
16	"		Mohamed Bimbo	"	"	
17	"		James Junior	"	"	
18	"		Musa Mansaray	"	"	
19	"		Mustapha Kamara	"	"	
20	"		Abu B Kamara	"	"	
21	"		Eric Momoh	"	"	
22	"		Walter Fedrick	"	"	
23	"		King Chux	"	"	
24	"		Junior Kalla	"	"	
25	"		Duwai Samu	"	"	
26	24/7/00		Sorie Kabia	RUF	RUF. Suspect	
27	"		John Borby	"	"	
28	"		Ibrahim Kuyateh	"	"	

FOLIO "B"

Informed

LIST OF SUSPECTS IN CUSTODY AS AT FRIDAY 1ST DECEMBER 2000

S/N	NAMES OF SUSPECT	DATE	UNIT	OFFENCE	REMARKS
1	1816 4955 Sgt Kanu SB	13/6/00	CCP	UNL-FIRING	Released
2	SLR/2567/2000 pte Lamin K	18/11/00	BTC	IMPERSONATION	
3	18166603 cpl Sesay, B	"	"	"	
4	Mr Eric Mustapha	4/4/00	KABALA	RUF SUSPECT	CASE WITH MIB
5	SLBG 2391 pte Bockarie	28/4/00	BTC	IMPERSONATION	"
6	1816 4123 cpl Banya	"	7BN	PROTECTIVE CUSTODY	MAJOR HELLING
7	SLR/1180/99 pte Stafford	"	CAMP MO	DISMISSED	SLMP
8	SLR/0927/99 " Williams	"	MIB	AIDING/ ABETING	"
9	18174446 L/cpl Mansaray	"	BTC	PROTECTIVE CUSTODY	"
10	SLBG/1574 pte Osman BK	"	"	"	"
11	1817 7489 pte Sanu	"	"	"	"

DEFENSE LIST OF ATTACHED AUTHORITIES

- Relevant part of *Prosecutor* v. *Krnojelac*, ICTY Trial Chamber Judgment, March 15, 2002, Case No. IT-97-25-T.

- Relevant part of *Prosecutor* v. *Tadic*, ICTY Appeals Chamber Judgment, July 15, 1999, Case No. IT-94-1-A, para. 220.

- *Prosecutor* v. *Krnojelac*, ICTY Trial Chamber Decision on Form of Second Amended Indictment, May 11, 2000, Case No. IT-97025-T.

- Relevant part of *Prosecutor* v. *Vasiljevic*, Appeals Chamber Judgement, February 25, 2004, Case No.: IT-98-32-A.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY AND SUPERIOR RESPONSIBILITY

A. Individual criminal responsibility under Article 7(1) of the Statute

72. Article 7(1) of the Tribunal's Statute provides that:

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

73. The Prosecution pleaded Article 7(1) in its entirety, and it includes within the terms of that Article the criminal responsibility of the Accused as a participant in various joint criminal enterprises. Such an approach is permitted by what was said by the Appeals Chamber in the *Tadic* Appeal Judgment:

> 191. [...] Although only some members of the group may physically perpetrate the criminal act, [...] the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.
>
> 192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending on the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.[221]

The Prosecution has sought to relate the criminal liability of a participant in a joint criminal enterprise who did not personally physically commit the relevant crime to the word "committed" in Article 7(1), but this would seem to be inconsistent with the Appeals Chamber's description of such criminal liability as a form of accomplice liability,[222] and with its definition of the word "committed" as "first and foremost the physical perpetration

[221] *Tadic* Appeal Judgment, pars 191-192. This statement has been interpreted by the Prosecutor as meaning that an accused person who does not personally physically perpetrate the crime can still be held to have committed the crime when he or she participated in a joint criminal enterprise.

[222] *Tadic* Appeal Judgment, par 192.

of a crime by the offender himself".[223] For convenience, the Trial Chamber proposes to refer to the person who physically committed the relevant crime as the "principal offender".

74. The purpose behind the Prosecution's approach appears to be to classify the participant in a joint criminal enterprise who was not the principal offender as a "perpetrator" or a "co-perpetrator", rather than someone who merely aids and abets the principal offender. The significance of the distinction appears to be derived from the civil law, where a person who merely aids and abets the principal offender is subject to a lower maximum sentence.

75. The Trial Chamber does not accept that this distinction is necessary for sentencing in international law, and in particular holds that it is irrelevant to the sentencing practice of this Tribunal. The Appeals Chamber has made it clear that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.[224] The seriousness of what is done by a participant in a joint criminal enterprise who was not the principal offender is significantly greater than what is done by one who merely aids and abets the principal offender. That is because a person who merely aids and abets the principal offender need only be aware of the intent with which the crime was committed by the principal offender, whereas the participant in a joint criminal enterprise with the principal offender must share that intent.[225]

76. Two recent decisions by Trial Chamber I have explored this issue of perpetration in some detail. In *Prosecutor v Krstic*, a distinction was drawn between an accomplice (as a secondary form of participation) and a co-perpetrator (as a direct and principal form of participation, but falling short of that of the principal offender).[226] In *Prosecutor v Kvocka*, a distinction was drawn between a co-perpetrator (who shares the intent of the joint criminal enterprise) and an aider and abettor (who merely has knowledge of the principal offender's

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[223] *Tadic* Appeal Judgment, par 188.
[224] *Delalić* Appeal Judgment, pars 429-430; *Aleksovski* Appeal Judgment, par 182.
[225] *See Prosecutor v Brdanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36 PT, 26 June 2001 ("*Brdanin and Talic* Decision on Form of Further Amended Indictment"), par 27, fn 108; *see* also *Prosecutor* v *Furundžija*, IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundžija* Trial Judgment"), pars 245, 249; *Kupreškic* Trial Judgment, par 772; *Tadic* Appeal Judgment, par 229; *Prosecutor v Furundžija* , IT-95-17/1-A, 21 July 2000 ("*Furundžija* Appeal Judgment"), par 118.
[226] *Prosecutor v Krstic*, IT-98-33-T, Judgment, 2 Aug 2001 ("*Krstic* Trial Judgment"), pars 642-643.

intent).[227] In determining the relevant category, the Trial Chamber said, the greater the level of participation, the safer it is to draw an inference that the particular accused shared the intent of the joint criminal enterprise.[228]

77. This Trial Chamber does not hold the same view as Trial Chamber I as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater sentence than the many functionaries who between them carry out the actual killing. Categorising offenders may be of some assistance, but the particular category selected cannot affect the maximum sentence which may be imposed and it does not compel the length of sentences which will be appropriate in the particular case. This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice.[229] This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadic*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice.[230] For convenience, however, the Trial Chamber will adopt the expression "co-perpetrator" (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender.

1. Joint criminal enterprise

78. The *Tadic* Appeal Judgment identified three categories of criminal liability pursuant to a joint criminal enterprise. The first category is where all the participants in the joint criminal enterprise share the same criminal intent. The second category is similar but relates to the concentration camp cases. Neither the existence of this second category nor

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[227] *Prosecutor v Kvocka and Others*, IT-98-30/1-T, Judgment, 2 Nov 2001 ("*Kvocka* Trial Judgment"), pars 249, 284.

[228] *Kvocka* Trial Judgment, pars 287-289.

[229] The jurisprudence of the post-World War II cases surveyed by Trial Chamber I in *Kvocka* drew no distinction between the categories of co-perpetrator and aider and abettor in determining the criminal responsibility of the accused, as Trial Chamber I conceded: *Kvocka and Others* Trial Judgment, par 282, *see also* fn 488.

[230] An accomplice to a joint criminal enterprise refers to a person who shares the intent of that enterprise and carries out acts to facilitate the commission of the agreed crime: *Furundžija* Trial Judgment, pars 245, 249;

its detailed definition was an issue in the *Tadic* Appeal. The Trial Chamber is satisfied that the only basis for the distinction between these two categories made by the *Tadic* Appeals Chamber is the subject matter with which those cases dealt, namely concentration camps during World War II. Many of the cases considered by the *Tadic* Appeals Chamber to establish this second category appear to proceed upon the basis that certain organisations in charge of the concentration camps, such as the SS, were themselves criminal organisations,[231] so that the participation of an accused person in the joint criminal enterprise charged would be inferred from his membership of such criminal organisation. As such, those cases may not provide a firm basis for concentration or prison camp cases as a separate category. The Trial Chamber is in any event satisfied that both the first and the second categories discussed by the *Tadic* Appeals Chamber require proof that the accused shared the intent of the crime committed by the joint criminal enterprise. It is appropriate to treat both as basic forms of the joint criminal enterprise.[232] The third category identified by the *Tadic* Appeal Judgment is distinguishable. It applies where all of the participants share a common intention to carry out particular criminal acts and where the principal offender commits an act which falls outside of the intended joint criminal enterprise but which was nevertheless a "natural and foreseeable consequence" of effecting the agreed joint criminal enterprise.[233]

79. For liability pursuant to a joint criminal enterprise to arise, the Prosecution must establish the existence of that joint criminal enterprise and the participation in it by the Accused.[234]

80. A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding

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Kupreskic Trial Judgment, par 772; *Tadic* Appeal Judgment, par 229; *Furundžija* Appeal Judgment, par 118.

[231] *See* Nuremberg Charter, Control Council No. 10.

[232] *See Brdanin and Talic* Decision on Form of Further Amended Indictment, par 27.

[233] *See Brdanin and Talic* Decision on Form of Further Amended Indictment, pars 24 - 27.

[234] *Tadi}* Appeal Judgment, par 227.

or arrangement amounting to an agreement formed between them then and there to commit that crime.[235]

81. A person participates in that joint criminal enterprise either:

(i) by participating directly in the commission of the agreed crime itself (as a principal offender);

(ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime; or

(iii) by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.

82. If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are guilty of the crime regardless of the part played by each in its commission.[236]

83. To prove the basic form of joint criminal enterprise, the Prosecution must demonstrate that each of the persons charged and (if not one of those charged) the principal offender or offenders had a common state of mind, that which is required for that crime.[237] Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.

84. In the Indictment, the Prosecution specifically alleges that the Accused acted pursuant to a joint criminal enterprise with guards and soldiers to persecute the Muslim and

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[235] Decision on Form of Second Indictment, 11 May 2000, par 15; *see also Tadi}* Appeal Judgment, par 227(ii); *Furundžija* Appeal Judgment, par 119.

[236] Decision on Form of Second Amended Indictment, 11 May 2000, par 15. In that decision, the direct participant in the joint criminal enterprise, ie the person who physically perpetrates the crime is referred to as a co-perpetrator rather than a perpetrator. Given the ambiguity surrounding the term co-perpetrator engendered by the Prosecution's arguments referred to above, the Trial Chamber prefers to use the term principal offender to make it clear that it is only the person who physically carries out the crime personally that commits that crime. In par (ii); the Trial Chamber refers to a person being present at the time the offence is committed by another. However, presence at the time a crime is committed is not necessary. A person can still be liable for criminal acts carried out by others without being present – all that is necessary is that the person forms an agreement with others that a crime will be carried out.

[237] *Brdanin and Talic* Decision on Form of Further Amended Indictment, par 26.

other non-Serb male civilian detainees at the KP Dom on political, racial or religious grounds.[238] This was expressly interpreted by the Trial Chamber as alleging a basic joint criminal enterprise, but not an extended one relating to crimes which did not fall within the agreed aspects of that joint criminal enterprise.[239] The Indictment also alleges that the Accused acted "in concert" with others with respect to acts of torture, beatings[240] and enslavement.[241] The Trial Chamber interprets the words "in concert with" to connote acting pursuant to a basic joint criminal enterprise. Accordingly, the Accused is specifically alleged to have acted pursuant to a basic joint criminal enterprise[242] with respect to certain acts alleged as torture, enslavement, cruel treatment and inhumane acts.[243]

85. Even where a particular crime charged has not been specifically pleaded in the indictment as part of the basic joint criminal enterprise, a case based upon the Accused's participation in a basic joint criminal enterprise to commit that crime may still be considered by the Trial Chamber if it is one of the crimes charged in the indictment and such a case is included within the Prosecution's Pre-Trial Brief.[244] In the present case, the Prosecution Pre-Trial Brief sufficiently put the Accused on notice that a basic joint criminal enterprise was alleged with respect to all the crimes charged in the Indictment.[245]

86. Although there has been no relevant amendment made to the Indictment following the Trial Chamber's express interpretation of the Indictment as alleging a basic joint criminal enterprise, but not an extended one, the Prosecution nevertheless sought in their Pre-Trial Brief to rely on the extended form of the joint criminal enterprise. It asserted that, even if it were not established that the Accused participated in a joint criminal enterprise of persecution, beatings, torture and murder, these crimes were "natural and foreseeable consequences" of the Accused's participation in a joint criminal enterprise of illegal imprisonment of the non-Serb detainees and in particular of the Accused's action in

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[238] Indictment, par 5.1.
[239] Decision on Form of Second Indictment, 11 May 2000, par 11.
[240] Indictment, pars 5.17, 5.21, 5.22 and 5.26.
[241] Indictment, par 5.41.
[242] That is, not within an extended common purpose.
[243] Although it is not necessary for the purposes of this case, the Trial Chamber notes that the Indictment also alleges that the Accused participated in or aided and abetted the execution of a common plan involving imprisonment, torture and beatings, killings, forced labour, inhumane conditions and deportation and expulsion as persecution (Indictment, par 5.2). This sufficiently put the Accused on notice that the common purpose was also alleged for those crimes identified as part of the persecution count where charged as separate offences.
[244] *Kupreškic* Appeal Judgment, par 14.
[245] Prosecution Pre-Trial Brief, pars 45, 47-56.

permitting outsiders access to the detainees.[246] The Trial Chamber in the exercise of its discretion considers that, in the light of its own express interpretation that only a basic joint criminal enterprise had been pleaded, it would not be fair to the Accused to allow the Prosecution to rely upon this extended form of joint criminal enterprise liability with respect to any of the crimes alleged in the Indictment in the absence of such an amendment to the Indictment to plead it expressly.

87. Where the Trial Chamber has not been satisfied that the Prosecution has established that the Accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a joint criminal enterprise, it has then considered whether it has nevertheless been established that the Accused incurred criminal responsibility for any of those crimes as an aider and abettor to them.

2. Aiding and abetting

88. It must be demonstrated that the aider and abettor carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender.[247] The act of assistance need not have actually caused the act of the principal offender,[248] but it must have had a substantial effect on the commission of the crime by the principal offender.[249] The act of assistance may be either an act or omission, and it may occur before, during or after the act of the principal offender.[250]

89. Presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant legitimising or encouraging effect on the principal offender.[251]

90. The *mens rea* of aiding and abetting requires that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.[252] The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal

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[246] Prosecution Pre-Trial Brief, pars 57-62.
[247] *Furund`ija* Trial Judgment, pars 235, 249.
[248] *Furund`ija* Trial Judgment, pars 233, 234,249; *Kunarac* Trial Judgment, par 391.
[249] *Aleksovski* Appeal Judgment, par 162.
[250] *Aleksovski* Trial Judgment, par 129; *Blaški}* Trial Judgment, par 285; *Kunarac* Trial Judgment, par 391.
[251] *Furund`ija* Trial Judgment, par 232; *Tadi}* Trial Judgment, par 689; *Kunarac* Trial Judgment par 393.
[252] *Aleksovski* Appeal Judgment, par 162; *Tadi}* Appeal Judgment, par 229; *Kunarac* Trial Judgment, par 392.

offender's *mens rea*. However, the aider and abettor need not share the *mens rea* of the principal offender.[253]

B. Superior responsibility under Article 7(3) of the Statute

91. The Prosecution also alleges that the Accused incurred criminal responsibility as a superior under Article 7(3) of the Tribunal's Statute for each of the criminal acts charged. Article 7(3) provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

92. The elements of individual criminal responsibility under Article 7(3) of the Statute have been firmly established by the jurisprudence of the Tribunal.[254] Three conditions must be met before a superior can be held responsible for the acts of his or her subordinates:

1. the existence of a superior-subordinate relationship;

2. the superior knew or had reason to know that the subordinate was about to commit such acts or had done so; and

3. the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the principal offenders thereof.

93. The existence of a superior-subordinate relationship requires a hierarchical relationship between the superior and subordinate. The relationship need not have been formalised and it is not necessarily determined by formal status alone.[255] A hierarchical relationship may exist by virtue of an accused's *de facto*, as well as *de jure*, position of superiority.[256] What must be demonstrated is that the superior had "effective control" over the persons committing the alleged offences. Effective control means the material ability to prevent offences or punish the principal offenders. Where a superior has effective control and fails to exercise that power he will be responsible for the crimes committed by his

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[253] *Aleksovski* Appeal Judgment, par 162.
[254] *Delali}* Appeal Judgment, pars 189-198, 225-226, 238-239, 256, 263; *Aleksovski* Appeal Judgment, par 72.
[255] *Delali}* Appeal Judgment, pars 205-206.
[256] *Delali}* Appeal Judgment, pars 192-194, 266.

subordinates.[257] Two or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time.[258]

94. It must be demonstrated that the superior knew or had reason to know that his subordinate was about to commit or had committed a crime. It must be proved that (i) the superior had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal, or (ii) he had in his possession information which would at least put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates.[259] This knowledge requirement has been applied uniformly in cases before this Tribunal to both civilian and military commanders.[260] The Trial Chamber is accordingly of the view that the same state of knowledge is required for both civilian and military commanders.

95. It must be shown that the superior failed to take the necessary and reasonable measures to prevent or punish the crimes of his subordinates. The measures required of the superior are limited to those which are feasible in all the circumstances and are "within his power". A superior is not obliged to perform the impossible. However, the superior has a duty to exercise the powers he has within the confines of those limitations.[261]

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[257] *Delali}* Appeal Judgment, pars 196-198.
[258] *Blaški}* Trial Judgment, par 303; *Aleksovski* Trial Judgment, par 106.
[259] *Delali}* Appeal Judgment, pars 223-226.
[260] *Delali}* Appeal Judgment, pars 196-197.
[261] *Delali}* Appeal Judgment, par 226.

> the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship (emphasis added).[276]

219. The same notion was enunciated by the same Court of Cassation in many other cases.[277] That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous.[278] Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*).

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to

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[276] *See Giustizia penale*, 1950, Part II, cols. 696-697 (emphasis added).

[277] *See* e.g. Court of Cassation, 15 March 1948, *Peveri* case, in *Archivio penale*, 1948, pp. 431-432; Court of Cassation, 20 July 1949, *Mannelli* case, in *Giustizia penale*, 1949, Part II, col. 906, no.599; Court of Cassation, 27 October 1949, *P.M. v. Minafò*, in *Giustizia penale*, 1950, Part II, col. 252, no. 202; 24 February 1950, *Montagnino*, *ibid.*, col.821; 19 April 1950, *Solesio et al.*, *ibid.*, col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.*, held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (*Giustizia penale*, 1947, Part II, col. 483, no. 382).

[278] In the *Antonini* case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a "reprisal" for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

> [i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.[279] This Convention would seem to be significant because it upholds the notion of a

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holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (*see* text of the judgement in *Giustizia penale*, 1949, Part II, cols. 740-742).

[279] The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (*see* UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that "some terms used ?in the Conventiong such as [...] 'such contribution' (Article 2, para. 3(c)) were ambiguous" (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore "interpret 'such contribution' [...] to mean abetment, assistance or other similar acts as defined by Japanese legislation" (*ibid*).

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Ms Dorothee de Sampayo Garrido-Nijgh

Decision of:
11 May 2000

PROSECUTOR

v

Milorad KRNOJELAC

DECISION ON FORM OF SECOND AMENDED INDICTMENT

The Office of the Prosecutor:

Mr Dirk Ryneveld
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. Milorad Krnojelac ("accused") has been charged with crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws or customs of war. The general nature of the case against him and of the offences with which he has been charged are adequately described in the two decisions already given by the Trial Chamber in relation to the form of the previous indictments filed by the prosecution in this case.[1]

2. An issue raised in both decisions was the sufficiency of the pleading concerning the individual responsibility of the accused for the offences charged pursuant to Article 7(1) of the Tribunal's Statute. A distinction was drawn between the allegation that the accused had himself committed those offences (referred to as his "personal" responsibility) and the allegation that he had planned, instigated, ordered or

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otherwise aided and abetted in the planning, preparation or execution of those offences (referred to as his "aiding and abetting" responsibility).[2]

3. In the First Decision, the prosecution was ordered to identify, in relation to each count or group of counts, the material facts (but not the evidence) upon which it relies to establish the individual responsibility of the accused for the particular offence or group of offences charged.[3] In the Second Decision, the prosecution was ordered to identify, so far as it was possible to do so, the victim or victims, the places and the approximate dates of the offences charged and the means by which it was alleged that the accused himself committed those offences, or in the alternative to withdraw from the charge of individual responsibility the allegation that the accused "personally" committed those offences.[4]

4. The prosecution, in its second amended indictment,[5] took neither course. Instead, it pleaded for the first time a "common purpose" case, in the following terms:

> 5.1 MILORAD KRNOJELAC, from April 1992 until August 1993, while acting as the camp commander at the Foca KP Dom, **together with the KP Dom guards under his command and in common purpose with the guards and soldiers specified elsewhere in this indictment,** persecuted the Muslim and other non-Serb male civilian detainees at the KP Dom facility on political, racial or religious grounds.[6]

5. In par 5.2, the "common plan" in the execution of which the accused is alleged to have "participated [...] or aided and abetted" is identified as "involving":

> (a) the prolonged and routine imprisonment and confinement within the KP Dom facility of Muslim and other non-Serb male civilian inhabitants of Foca municipality and its environs;
>
> (b) the repeated torture and beatings of Muslim and other non-Serb male civilian detainees at KP Dom;
>
> (c) numerous killings of Muslim and other non-Serb male civilian detainees at KP Dom;
>
> (d) the prolonged and frequent forced labour of Muslim and other non-Serb male civilian detainees at KP Dom; and
>
> (e) the establishment and perpetuation of inhumane conditions against Muslim and other non-Serb male civilian detainees within the KP Dom detention facility.

The participation of the accused in the "prolonged and routine imprisonment of non-Serb civilians under inhumane conditions" is identified in the same paragraph as:

> [...] by providing the detention facilities, by being in the position of camp administrator and by establishing living conditions characterised by inhumane treatment, overcrowding, starvation, forced labour, and constant physical and psychological assault.

6. Paragraph 5.2 goes on to identify further the nature of the accused's participation in the various elements of the "common plan" and those with whom he is alleged to have acted in concert. The allegations are that the accused, acting as the camp commander:[7]

> (i) (in concert with other high-level prison staff) established a pattern of torture and beatings whereby guards took the detainees out of the cells and brought them to the interrogation rooms and provided the office in which these day-time interrogations and beatings took place;

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(ii) (in concert with political leaders or military commanders and other high-level prison staff) prepared lists of detainees to be further beaten during night-time interrogations and established a daily routine for these beatings;

(iii) (in concert with other high-level prison staff) ordered the guards to beat detainees even for minor violations of the prison rules;

(iv) (in conjunction with his subordinates) subjected the other detainees to collective punishment;

(v) (in concert with other high-level prison staff) participated by ordering the punishment; and

(vi) (in concert with other high-level prison staff) formed and began to supervise a workers' group of approximately seventy of the detainees with special skills – of whom most were kept imprisoned from the Summer of 1992 until 5 October 1994 for the primary purpose of being used for forced labour.

7. Paragraph 5.2 also alleges that the accused participated in the beatings of detainees referred to:

> [...] by allowing the Serb military personnel to enter the prison and assault the detainees whenever they wanted and by instructing his guards to lead the soldiers to the cells and select detainees for beatings; he encouraged and approved assaults by the guards.

He is also alleged to have participated in the beatings and killing of non-Serb civilian detainees:

> [...] by ordering and supervising the actions of his guards and allowing military personnel access to the detainees for this purpose.

Finally, par 5.2 alleges that the accused assisted in the deportation or expulsion of the majority of Muslim and non-Serb males from the Foca municipality by selecting detainees from the KP Dom for deportation to Montenegro.

II The complaints made by the accused

(a) Paragraph 5.2 of the second amended indictment

8. The accused has filed a Preliminary Motion pursuant to Rule 72 of the Tribunal's Rules of Procedure and Evidence complaining, *inter alia*, that the form in which par 5.2 has been pleaded is insufficiently precise.[8] He asserts that the indictment is deficient in not identifying (a) the essence of the common plan,[9] (b) the authors of that plan (and, if unknown, their category as a group) and whether they were civil or military authorities, (c) whether the plan was intended for the Municipality of Foca only or for the entire territory of Bosnia and Herzegovina, (d) the persons designated to execute the plan (and, if unknown, their category as a group), (e) the relationship between the accused and those persons, and (f) the acts which the accused is alleged to have done in person, those which he is alleged to have aided and abetted or supported others to do, and those for which he is alleged to have command responsibility.

9. This complaint raises an issue as to the true nature of the "common purpose" case now pleaded for the

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first time in the second amended indictment. The availability of a common purpose case under the Tribunal's Statute was upheld by the Appeals Chamber in *Prosecutor v Tadic.*[10] Such a case is described by the Appeals Chamber, variously (and apparently interchangeably), as a common criminal plan,[11] a common criminal purpose,[12] a common design or purpose,[13] a common criminal design,[14] a common purpose,[15] a common design,[16] and a common concerted design.[17] The common purpose is also described, more generally, as being part of a criminal enterprise,[18] a common enterprise,[19] and a joint criminal enterprise.[20]

10. The second amended indictment does not define the term "common purpose", but in pars 5.1-2 it speaks in general of the accused acting "in concert" (or "in conjunction") with others as part of a "common plan". In order to achieve some measure of consistency, the Trial Chamber intends in this decision to refer to this newly pleaded case as one in which the accused is alleged to have shared a common purpose with others as part of a joint criminal enterprise to commit the crime against humanity (based upon persecution) charged in Count 1 to which pars 5.1-2 relate.

11. In the *Tadic* Conviction Appeal Judgment, the Appeals Chamber held, in summary, that the notion of common design "as a form of accomplice liability" was firmly established in customary international law and available under the Tribunal's Statute.[21] It identified the notion of common design as being applied by customary international law in three distinct categories of cases:

> First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise, and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[22]

As the indictment is silent on the subject, it is unnecessary for present purposes to consider the last of those categories, where the offence charged falls outside the scope of the common purpose of those engaged in the joint criminal enterprise but which is nevertheless within the contemplation of the accused as a possible incident of that enterprise.

12. What is clear from all of the law relating to a joint criminal enterprise is that the prosecution needs to rely upon such a case only where it is unable to establish beyond reasonable doubt that the accused was the person who personally committed the offence charged. It is also reasonably clear – from the circumstances in which the prosecution came to plead the common purpose case, as already described – that the prosecution is indeed unable to establish beyond reasonable doubt that the accused personally committed the offence charged, and that it relies merely upon the inferences available from "the nature of the accused's authority" within the KP Dom.[23]

13. The Trial Chamber interprets the second amended indictment as substituting the common purpose case now pleaded for the allegation of personal liability which arises from inclusion of the word "committing" in par 4.9, upon the basis that the prosecution is unable to plead the information which it was ordered by the Second Decision to include in this indictment. Its case is now that, although it cannot establish that the accused personally committed the offence charged in Count 1, it will prove that he participated with a common purpose as part of a criminal enterprise to commit that offence. Such a case does not exclude the possibility that the accused did in fact personally commit those offences; however,

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the prosecution will not be leading evidence in an endeavour to establish beyond reasonable doubt that he personally did so unless it has first obtained leave and, if necessary, made an amendment to the indictment. It may, of course, rely upon any evidence which may emerge during the trial and which establishes that fact.

14. The Trial Chamber recognises the validity of such an approach, and it is satisfied that the accused is not thereby prejudiced by the absence of the particulars which had been ordered – provided that the common purpose case has been pleaded with sufficient particularity. To that issue the Trial Chamber will turn, after making the point that the common purpose case could have been better and more logically pleaded. However, the clumsiness of its expression does not render it deficient in form.

15. The law is that, where two or more persons carry out a joint criminal enterprise, each is responsible for the acts of the other or others in carrying out that enterprise. The prosecution must establish (1) the existence of that joint criminal enterprise, and (2) the participation in it by the accused.

As to (1): A joint criminal enterprise exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime.

As to (2): A person participates in that joint criminal enterprise either:

(i) by participating directly in the commission of the agreed crime itself (as a co-perpetrator); or

(ii) by being present at the time when the crime is committed, and (with knowledge that the crime is to be or is being committed) by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime;[24] or

(iii) by acting in furtherance of a particular system (for example, of persecution) in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and the intent to further that system.[25]

If the agreed crime is committed by one or other of the participants in that joint criminal enterprise, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.

16. In order to know the nature of the case he must meet, the accused must be informed by the indictment of:

(a) the nature or purpose of the joint criminal enterprise (or its "essence", as the accused here has suggested),

(b) the time at which or the period over which the enterprise is said to have existed,

(c) the identity of those engaged in the enterprise – so far as their identity is known, but at least by reference to their category as a group, and

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(d) the nature of the participation by the accused in that enterprise.

Where any of these matters is to be established by inference, the prosecution must identify in the indictment the facts and circumstances from which the inference is sought to be drawn.

17. The only deficiency in the second amended indictment in relation to those matters lies in the identification of those who are alleged to have been engaged in the enterprise with the accused. In par 5.1, the others are identified as the guards and soldiers "specified elsewhere in this indictment". This is inconsistent with the terms of par 5.3, in which the prosecution limits its case on the crime against humanity charged in Count 1 to the participation of the accused in the acts and omissions described in par 5.2. The open-ended reference in par 5.1 to *any* of the guards or soldiers specified *anywhere* else in the indictment is far too wide; indeed, *nowhere* else in the indictment does the prosecution "specify" any guards and soldiers by name or other positive identification. The Motion does not specifically object to the width of this description in par 5.1, but in this context the prosecution cannot in fairness be permitted to go outside those paragraphs which are said to relate to Count 1 for its identification of the guards and soldiers involved – in other words, beyond the persons specified in par 5.2.

18. In par 5.2, the persons alleged to have participated with the accused in the joint criminal enterprise are described only by categories – "high level prison staff", "political leaders", "military commanders" and "subordinates". The Second Decision required the prosecution to make it clear *in the indictment itself* that (if this were the case) it was unable properly to identify any such persons referred to, and *only then* could it identify them in the best way it was able to,[26] such as describing them by their "category" (or their official positions) as a group.[27] The assertion by the prosecution, in its response to the Motion,[28] that it had set forth the information "to the extent that information is known by the Prosecution" does not satisfy that requirement.[29]

19. The Trial Chamber nevertheless believes that both the parties and the Chamber have spent more than enough time already during the pre-trial period of this case endeavoring to ensure that the indictment is pleaded properly. In the light of the statement in its Response that the prosecution is unable to identify these persons any better than it has, and as this is the only defect in the form of the second amended indictment which the accused has been able to demonstrate in his Motion, it would serve no useful purpose after all this time to require the prosecution to plead a third amended indictment simply to fulfil the obligation which it had to make that statement in the current indictment. The Trial Chamber stresses however, that it would not be appropriate for the prosecution to fail to comply with that obligation in other indictments.

(b) Paragraphs 5.4-5.6

20. The accused asserts that paragraphs 5.4 to 5.6 contain contradictory allegations which cause confusion.[30]

21. Paragraph 5.4 alleges that certain Muslim male detainees were "beaten" in the prison yard by the prison guards or by soldiers in the presence of regular prison personnel, "as described in paragraphs 5.5 and 5.6". Paragraph 5.5 describes how soldiers forced certain detainees upon their arrival at KP Dom to line up against the prison wall with their hands above their heads, and then beat, kicked and hit them with rifle butts. Paragraph 5.6 describes how guards beat other detainees upon their arrival at KP Dom. The accused is alleged by par 5.4 to have participated in these "beatings": (i) by granting soldiers access to the detainees and by instructing his guards not to intervene, and (ii) by encouraging and approving assaults by the guards.

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22. The Trial Chamber sees no contradiction or confusion in these paragraphs. The words "beaten" and "beatings" in par 5.4 are general in nature, and include all of the conduct by the soldiers described in par 5.5 and of the guards described in par 5.6. The instruction not to intervene which the accused is alleged to have given to his guards is clearly referable to the actions of the soldiers described in par 5.5. The clear implication is that the prison guards would otherwise have been in a position to intervene when the soldiers beat the detainees. In those circumstances, the absence of any express allegation to that effect in par 5.5 does not render the form of the indictment defective. The accused is alleged to bear responsibility for having instructed the guards not to intervene when the soldiers beat the detainees.

23. All of this was discussed in the First Decision,[31] and was the subject of further consideration in the Second Decision.[32] If there *were* confusion now in the second amended indictment (which the Trial Chamber does not accept), it was present also in at least the first amended indictment, but it induced no such complaint at the time. The Trial Chamber has already pointed out to counsel for the accused that the opportunity given by Rule 50(C) to file a preliminary motion alleging defects in the form of an *amended* indictment is directed to the material added by amendment. That opportunity cannot be used to raise issues in relation to the amended indictment which could have been raised in relation to the earlier indictment but were not.[33] Counsel was reminded of this point at the recent Status Conference.[34]

24. The complaint is rejected.

(c) Paragraphs 5.4-5.6, 5.21, 5.23, 5.25, 5.27-5.29

25. The accused complains that, although the prosecution has complied with the directions given in the Second Decision to state in relation to certain nominated paragraphs that (if it were the case) it was unable properly to identify any particular persons referred to,[35] the prosecution has failed to do so in relation to the above paragraphs now nominated in the Motion.[36]

26. There is no suggestion that these paragraphs are significantly different from the corresponding ones in the previous indictment, and no such complaint was made in relation to that indictment. For the reasons already given, it is too late to complain now.

(d) Paragraph 5.22

27. Paragraph 5.22 commences:

> Local and military police, in concert with the prison authorities, interrogated the detainees after their arrival at the KP Dom. **MILORAD KRNOJELAC**, in concert with other high-level prison staff, established a pattern whereby guards took the detainees out of their cells and brought them to the interrogation rooms.

The accused complains that it is not clear whether the reference to "prison authorities" means:

> [...] the leading staff of the prison or not, whether the prison authorities are civil or military, whether the accused's relationship with such authorities is subordinate or superior.[37]

The same expression "prison authorities" was used in the corresponding paragraph in the previous indictment. It did not excite any such complaint at that time and, for that reason alone, the complaint now made for the first time is rejected. In any event, the accused is described in par 3.1 of both this and the previous indictment as "the commander of the KP Dom" and "in a position of superior authority to everyone in the camp".

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28. The accused complains that the expression "established a pattern" is unclear.[38] The previous indictment referred to "a pattern established" by the accused.[39] There is no difference. No complaint was made then, and none may therefore be made now. The prosecution has cured the ambiguity criticized in the Second Decision,[40] by expressly alleging the accused's responsibility to have been one of aiding and abetting.

29. Both of these complaints are unjustified, and they are rejected.

III Application for oral argument

30. The accused has proposed that the Trial Chamber should assess the need for oral argument concerning this Motion once the prosecution has responded.[41]

31. The Trial Chamber has already discussed the general practice of the Tribunal not to hear oral argument on motions prior to the trial unless good reason is shown for its need in the particular case.[42] Counsel for the accused has not identified any particular issues upon which he wishes to put oral argument or explained why he was unable to put those arguments in writing. The Trial Chamber sees no need for oral argument upon this Motion.

IV Disposition

32. For the foregoing reasons, Trial Chamber II dismisses the Motion.

Done in English and French, the English text being authoritative.

Dated this 11th day of May 2000,
At The Hague,
The Netherlands.

_____
Judge David Hunt
Presiding Judge

[Seal of the Tribunal]

1. Decision of the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999 ("First Decision") and Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000 ("Second Decision").
2. Second Decision, par 18.
3. First Decision, par 17.
4. Second Decision, par 21. Insofar as the accused has additionally been charged with an aiding and abetting responsibility in relation to the same facts, the prosecution was also ordered to plead "a specific, albeit concise, statement [...] of the nature and extent of his participation in the several courses of conduct alleged": par 22.

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5. Filed on 3 March 2000.
6. The additional words are shown in **bold** type.
7. The accused is described in par 3.1 as "the commander of the KP Dom", "in a position of superior authority to everyone in the camp", "the person responsible for running the Foca KP Dom as a detention camp", and as having "ordered and supervised the prison staff on a daily basis".
8. Defence Preliminary Motion of the Second Amanded SsicC Indictment, 25 Apr 2000 ("Motion"), pars 18-19.
9. The Motion describes this as "the collective (joint) plan", which appears to have resulted from an English translation of the Bosnian/Croatian/Serbian version of the original indictment (in the English language) from which counsel has worked.
10. Case IT-94-1-A, Judgment, 15 July 1999 ("*Tadic* Conviction Appeal Judgment"), pars 185-229.
11. *Tadic* Conviction Appeal Judgment, par 185.
12. *Ibid*, par 187.
13. *Ibid*, par 188.
14. *Ibid*, pars 191, 193.
15. *Ibid*, pars 193, 195, 204, 225.
16. *Ibid*, pars 196, 202, 203, 204.
17. *Ibid*, par 203.
18. *Ibid*, par 199.
19. *Ibid*, par 204.
20. *Ibid*, par 220.
21. *Ibid*, par 220.
22. *Ibid*, par 220. The Appeals Chamber returned to summarise the relevant *actus reus* and *mens rea* in the different categories at pars 227-228. There will no doubt be discussion at some later stage as to whether there are some inconsistencies in these formulations, but the passage already quoted is sufficient for present purposes.
23. *Ibid*, par 220.
24. The presence of that person at the time when the crime is committed and a readiness to give aid if required is sufficient to amount to an encouragement to the other participant in the joint criminal enterprise to commit the crime. This is really akin to aiding and abetting as an accessory.
25. This formulation is based upon the "concentration camp" cases, discussed in the *Tadic* Conviction Appeal Judgment, par 203. The requisite intent may, depending upon the circumstances, be inferred from the accused's position of authority: *Ibid*, par 203.
26. Second Decision, pars 34, 43, 57. See also First Decision, par 58.
27. First Decision, par 46.
28. Prosecutor's Response to Defence Preliminary Motion on the Second Amended Indictment, 2 May 2000 ("Response"), par 5.
29. The inability of the prosecution to identify *any* of these persons – even the "political leaders" – suggests that its case will rely solely upon inferences to be drawn from the mere existence of the armed conflict which is alleged. As stated in the earlier decisions, that inability on the part of the prosecution inevitably reduces the weight to be afforded to such a case, although it does not affect the form of the indictment: First Decision, par 40; Second Decision, par 57.
30. Motion, pars 20-22.
31. Paragraph 45.
32. Paragraph 27.
33. Second Decision, par 15. It was also said that, in an appropriate case, an extension of time to complain of a particular defect maybe granted. The complaints now made in the Motion are not of such a nature as to warrant extending the time allowed by Rule 72 to permit them to be raised at this stage.
34. 17 Apr 2000, Transcript 81-82.
35. This concession overlooks the prosecution's failure to do so in relation to pars 5.1-2.
36. Motion, par 23.
37. Motion, par 24.
38. Motion, par 25. The Motion describes this as "introduced the practice", which appears to have resulted from an English translation of the Bosnian/Croatian/Serbian version of the original indictment (in the English language) from which counsel has worked.
39. Paragraph 5.22.
40. Paragraph 40.
41. Motion, p 1.
42. First Decision, pars 64-68.

discriminatory intent for the crime of persecution.[166] The Appellant is also alleging that the Trial Chamber committed an error of law by "convicting the accused for persecution solely on the basis of one incident."[167]

92. Under the fourth ground of appeal, the Appellant argues that he cannot be convicted cumulatively, in respect of the same conduct, of both murder under Article 3 of the Statute and persecution by way of murder under Article 5 of the Statute.[168]

93. Before addressing the above-mentioned arguments, the Appeals Chamber finds it necessary to recall the law applicable to joint criminal enterprise and the differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor.

A. Law applicable to joint criminal enterprise, participation as a co-perpetrator or as an aider and abettor

1. Joint criminal enterprise

94. Article 7(1) of the Statute sets out certain forms of individual criminal responsibility which apply to the crimes falling within the International Tribunal's jurisdiction. It reads as follows:

> **Article 7**
> **Individual criminal responsibility**
>
> 1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

95. This provision lists the forms of criminal conduct which, provided that all other necessary conditions are satisfied, may result in an accused incurring individual criminal responsibility for one or more of the crimes provided for in the Statute. Article 7(1) of the Statute does not make explicit reference to "joint criminal enterprise." However, the Appeals Chamber has previously held that participation in a joint criminal enterprise is a form of liability which existed in customary international law at the time, that is in 1992, and that such participation is a form of "commission" under Article 7(1) of the Statute.[169]

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[166] *Ibid*, paras 10-14.
[167] *Ibid*, paras 5-6.
[168] Defence Appeal Brief, paras 217-219.
[169] *See Tadić* Appeals Judgement, para. 188 and para. 226, which provides that "[t]he Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law." To reach this finding the Appeals Chamber interpreted the Statute on the basis of its purpose as set out in the report of the United Nations Secretary-General to the Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council

96. Three categories of joint criminal enterprise have been identified by the International Tribunal's jurisprudence.[170]

97. The first category is a "basic" form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention.[171] An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.

98. The second category is a "systemic" form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment.[172] An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.

99. The third category is an "extended" form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.[173] An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect "ethnic cleansing")

Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993. It also considered the specific characteristics of many crimes perpetrated in war. In order to determine the status of customary law in this area, it studied in detail the case-law relating to many war crimes cases tried after the Second World War (paras 197 et seq.). It further considered the relevant provisions of two international Conventions which reflect the views of many States in legal matters (Article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings, adopted by a consensus vote by the General Assembly in its resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998; Article 25 of the Statute of the International Criminal Court, adopted on 17 July 1998 by the Diplomatic Conference of Plenipotentiaries held in Rome) (paras 221-222). Moreover, the Appeals Chamber referred to national legislation and case-law stating that it was a matter of specifying that the notion of "common purpose," established in international criminal law, has foundations in many national systems, while asserting that it was not established that most, if not all of the countries, have the same notion of common purpose (paras 224-225). The *Tadić* Appeals Chamber used interchangeably the expressions "joint criminal enterprise," "common purpose" and "criminal enterprise," although the concept is generally referred to as "joint criminal enterprise," and this is the term used by the parties in the present appeal. *See* also, *Ojdanić* Decision, para. 20 regarding joint criminal enterprise as a form of commission.

[170] *See* in particular *Tadić* Appeals Judgement, paras 195-226, describing the three categories of cases following a review of the relevant case-law, relating primarily to many war crimes cases tried after the Second World War. *See* also *Krnojelac* Appeals Judgement, paras 83-84.

[171] *Ibid*, para. 196. *See* also, *Krnojelac* Appeals Judgement, para 84, providing that, "apart from the specific case of the extended form of joint criminal enterprise, the very concept of joint criminal enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, share the perpetrators' joint criminal intent."

[172] *Tadić* Appeals Judgement, paras 202-203. Although the participants in the joint criminal enterprises of this category tried in the cases referred to were mostly members of criminal organisations, the *Tadić* case did not require an individual to belong to such an organisation in order to be considered a participant in the joint criminal enterprise. The *Krnojelac* Appeals Judgement found that this "systemic" category of joint criminal enterprise may be applied to other cases and especially to the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, para. 89.

[173] *Ibid,* para. 204, which held that "[c]riminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk." The Appeals Chamber came to the conclusion that this form of liability was applicable to Duško Tadić, para. 232.

with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.

100. The *actus reus* of the participant in a joint criminal enterprise is common to each of the three above categories and comprises the following three elements: First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.[174] Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no necessity for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.[175] Third, the participation of the accused in the common purpose is required, which involves the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.[176]

101. However, the *mens rea* differs according to the category of joint criminal enterprise under consideration:

- With regard to the basic form of joint criminal enterprise what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).[177]

- With regard to the systemic form of joint criminal enterprise (which, as noted above, is a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this system of ill-treatment.[178]

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common 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. In addition, responsibility for a

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[174] *Ibid*, para. 227, referring to the *Essen Lynching* and the *Kurt Goebell* cases.
[175] *Ibid*, where the *Tadić* Appeals Chamber uses the expressions, "purpose," "plan," and "design" interchangeably.
[176] *Ibid.*
[177] *Ibid*, paras 196 and 228. *See* also *Krnojelac* Appeals Judgement, para. 97, where the Appeals Chamber considers that, "by requiring proof of an agreement in relation to each of the crimes committed with a common purpose, when it assessed the intent to participate in a systemic form of joint criminal enterprise, the Trial Chamber went beyond the criterion set by the Appeals Chamber in the *Tadić* case. Since the Trial Chamber's findings showed that the system in place at the KP Dom sought to subject non-Serb detainees to inhumane living conditions and ill-treatment on discriminatory grounds, the Trial Chamber should have examined whether or not Krnojelac knew of the system and agreed to it, without it being necessary to establish that he had entered into an agreement with the guards and soldiers - the principal perpetrators of the crimes committed under the system - to commit those crimes."

crime other than the one which was part of the common design arises "only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*"[179] – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise.

2. Differences between participating in a joint criminal enterprise as a co-perpetrator or as an aider and abettor

102. Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:

(i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.

(ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.

B. Alleged errors of law

1. Alleged errors of law related to the concept of joint criminal enterprise

103. Before turning to the alleged errors of law of the Trial Chamber concerning the concept of joint criminal enterprise and persecution, the Appeals Chamber will first determine under which category of joint criminal enterprise the Drina River incident falls.

[178] *Ibid*, paras 202, 220 and 228.
[179] *Ibid*, para. 228. *See* also paras 204 and 220.