

of the substantial likelihood that a crime would be committed in response to his prompting.<sup>257</sup>

169. There must be a causal connection between the instigation and the execution of the crime, but this connection need not amount to a *conditio sine qua non*.<sup>258</sup> Instigation can be express or implied, and can also occur by omission rather than by a positive act, provided that the accused intended to cause the direct perpetrator to act in a particular way and, in fact, had that effect.<sup>259</sup> A superior's persistent failure to prevent or punish crimes by his subordinates can also constitute instigation.<sup>260</sup>
170. It is necessary that the Accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts or omissions.<sup>261</sup> Consequently, as in the case of "planning", the accused may be held criminally responsible for "instigating" crimes that are committed in the course of executing the instigated crime, even if the accused did not intend to instigate such crimes, so long as he was aware of the substantial likelihood of their being committed.<sup>262</sup> Accordingly, the required *mens rea* is that of intent or recklessness.<sup>263</sup>
171. An accused "cannot be convicted as an instigator if he would be found guilty of having directly/physically perpetrated the same crime."<sup>264</sup>

<sup>257</sup> *Kordić and Čerkez* Appeal Judgment, paras. 27, 32.

<sup>258</sup> *Blaškić* Trial Judgment, para. 280; *Tadić* Trial Judgment, para. 688; *Kvočka* Trial Chamber Judgment, para. 252; *Čelebići* Trial Judgment, para. 327; *Kordić and Čerkez* Trial Judgment, para. 387; Also see Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, page 190; *Galić* Trial Judgment, para. 168; *Akayesu* Trial Judgment, para. 482; *Orić* Trial Judgment, para. 271.

<sup>259</sup> *Blaškić* Trial Judgment, paras 280, 269; *Brđanin* Trial Judgment, para. 269; *Galić* Trial Judgment, para. 168; *Blaškić* Trial Judgment, para. 337; *Kordić and Čerkez* Appeal Judgment, para. 32.

<sup>260</sup> *Blaškić* Trial Judgment, para. 337.

<sup>261</sup> *Brđanin* Trial Judgment, para. 269.

<sup>262</sup> *Kordić and Čerkez* Appeal Judgment, para. 32 ; *Limaj et al.* Trial Judgment para. 514; *Tadić* Appeal Judgment, para. 220: "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* required..." ; *Tadić* Trial Judgment, para. 692: "the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question."

<sup>263</sup> *Blaškić* Trial Judgment, para. 267: "To establish the *mens rea* of the superior who orders, plans or instigates, requires direct or indirect intent, it is necessary to prove his direct or indirect intent, the latter corresponding to the notion of recklessness in common law and the notion of *dolus eventualis* in civil law."

<sup>264</sup> *Stakić* Rule 98bis Decision, para. 107.

## ii. Ordering

172. In order to secure a conviction for ordering a crime, the Prosecution must demonstrate that: (1) the actus reus of the crime was performed by a person or persons other than the accused, with or without the participation of the accused; (2) the perpetrator(s) acted in execution of an express or implied order given by the accused to a subordinate or other person over whom the accused was in a position of authority; and (3) the accused issued the order with direct intent, or the accused was aware of the substantial likelihood that the crime committed would be an adequate consequence of carrying out the order.<sup>265</sup>
173. An accused may be held liable for orders given within regular military formations as well as irregular bodies, such as paramilitary forces, in which there is no *de jure* superior-subordinate relationship, provided the accused is vested with an authority that enables him or her to give orders to the other members of the group.<sup>266</sup> The necessary authority may be informal or of a purely temporary nature.<sup>267</sup>
174. There is no requirement that the order be in writing or in any particular form.<sup>268</sup> It may be express or implied.<sup>269</sup> An order “does not need to be given by the superior directly to the person(s) who perform (s) the *actus reus* of the offence.”<sup>270</sup> The existence of an order may be proven circumstantially and there is no requirement to adduce direct evidence that the order was given.<sup>271</sup>
175. That an accused is in a position of authority and “ordered” a particular crime may be inferred from a number of factors, including the number of illegal acts; the number, identity and type of troops involved; the effective command and control exerted over these troops; the logistics involved, if any; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; the location of the superior at the time; and the superior’s knowledge of

<sup>265</sup> *Strugar* Trial Judgment, paras. 331-333; See also *Brima* Decision on Motion for Acquittal, para. 295.

<sup>266</sup> *Strugar* Trial Judgment, para. 331; *Kordić and Čerkez* Appeal Judgment, para. 28; *Kordić and Čerkez* Trial Judgment, para. 388; *Brđanin* Trial Judgment, para. 270.

<sup>267</sup> *Semanza* Appeal Judgment, para. 363; *Kordić and Čerkez* Trial Judgment, para. 388;

<sup>268</sup> *Strugar* Trial Judgment, para. 331; *Blaškić* Trial Judgment, para. 281.

<sup>269</sup> *Blaškić* Trial Judgment, para. 281.

<sup>270</sup> *Ibid.*, para. 282.

<sup>271</sup> *Strugar* Trial Judgment, para. 331; *Kordić and Čerkez* Trial Judgment, para. 388; *Blaškić* Trial Judgment, para. 281.

crimes committed by his subordinates.<sup>272</sup> An accused may also be liable for receiving a criminal order and using his powers to instruct his subordinates to perform it. According to the *Kupreškić* Trial Chamber, this amounts to the “reissuing of orders that were illegal in the circumstances.”<sup>273</sup>

176. A causal link between the act of ordering and the physical perpetration of a crime” is a required component of the *actus reus* of ordering.<sup>274</sup> Such link need not be such that the offence would not have been committed in the absence of the order.<sup>275</sup>
177. With regard to *mens rea*, it must be established that the accused in issuing the order intended to bring about the commission of the crime, or was aware of the substantial likelihood that it would be committed in execution of the order.<sup>276</sup> However, if the order is generic (e.g. a general order to abuse prisoners of war), the mental element of recklessness or gross negligence is sufficient.<sup>277</sup> It should be mentioned that it is the *mens rea* of the person who gave the order that is important and not that of the actual perpetrator.<sup>278</sup>
178. As is the case with “planning” and “instigating,” a conviction for “ordering” a particular crime will not be entered where the accused has committed the same crime.<sup>279</sup>

### iii. Committing

- <sup>179</sup> An accused may be found liable for directly committing a crime if the Prosecution has demonstrated that: (1) the accused performed all elements of the *actus reus* of the crime

<sup>272</sup> *Galić* Trial Judgment, para. 171; UN Commission of Experts, *Final Report*, p. 17. Similar indicia are relevant for the purposes of establishing individual criminal responsibility for “planning” a crime within the jurisdiction of the Tribunal.

<sup>273</sup> *Kupreškić* Trial Judgment, para. 862.

<sup>274</sup> *Strugar* Trial Judgment, para. 332.

<sup>275</sup> *Ibid.*

<sup>276</sup> *Strugar* Trial Judgment, para. 333 (citing *Kvočka* Trial Judgment, para. 252; *Blaškić* Appeal Judgment, para. 42; *Kordić and Čerkez* Appeal Judgment, para. 30); *Tadić* Trial Judgment, para. 692: “the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.”

<sup>277</sup> Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, p. 194, footnote 13; *Blaškić* Trial Judgment, para. 267: “To establish the *mens rea* of the superior who orders, plans or instigates, requires direct or indirect intent, it is necessary to prove his direct or indirect intent, the latter corresponding to the notion of recklessness in common law and the notion of *dolus eventualis* in civil law.”

<sup>278</sup> *Blaškić* Trial Judgment, para. 282: “what is important is the commander’s *mens rea*, not that of the subordinate executing the order.”

<sup>279</sup> *Stakić* Rule 98 bis Decision, para. 109.

in question. This means the participation of the accused physically or otherwise directly, in the material elements of a crime under the Tribunal's Statute<sup>280</sup> or failing to act when such a duty exists;<sup>281</sup> and (2) the accused acted with the required mens rea of the crime in question.<sup>282</sup> The accused must either possess the mens rea of the relevant crime, or be aware of the substantial likelihood that a crime would occur as a consequence of his act or omission.<sup>283</sup>

#### iv. Aiding and Abetting

180. The elements of aiding and abetting are: (1) the accused carries out act(s) or omission(s)<sup>284</sup> specifically directed to assist, encourage or lend moral support to the perpetration of a crime physically committed by a person other than the accused; (2) the accused's conduct has a substantial effect upon the perpetration of the crime; and (3) the accused acted with knowledge that his conduct would assist in the commission of the crime.<sup>285</sup> While having a role in a system without influence would not be enough to attract criminal responsibility<sup>286</sup>, there is *no* requirement that the conduct of the aider and abettor be a *conditio sine qua non* of the actions of the perpetrator(s).<sup>287</sup> The fact that similar assistance could have been obtained from someone else does not remove the accused's responsibility.<sup>288</sup>
181. Aiding and abetting need not be tangible, but may consist of moral support or encouragement of the principals.<sup>289</sup> Presence during the commission of the crime can

<sup>280</sup> Kvočka Trial Judgment, para. 251.

<sup>281</sup> Simić Trial Judgment, para. 137; Stakić Trial Judgment, para. 439; Naletilić and Martinović Trial Judgment, para. 62; Vasiljević Trial Judgment, para. 62; Kvočka Trial Judgment, paras 250-251; Krstić Trial Judgment, para. 601; Kunarac Trial Judgment, para. 390; Kordić and Čerkez Trial Judgment, para. 376.

<sup>282</sup> Kordić and Čerkez Trial Judgment, para. 376; Kunarac Trial Judgment, para. 390; Kvočka Trial Judgment, para. 251.

<sup>283</sup> Kvočka Trial Judgment, para. 252.

<sup>284</sup> Brđanin Trial Judgment, para. 271; Kvočka Trial Judgment, para. 256; Aleksovski Trial Judgment, para. 62; Blaškić Trial Judgment, para. 284; Tadić Trial Judgment, para. 686; Čelebići Trial Judgment, para. 842; Akayesu Trial Judgment, para. 705.

<sup>285</sup> Blaškić Appeal Judgment, para. 45 (citing Vasiljević Appeal Judgment, para. 102); Strugar Trial Judgment, para. 349; Brđanin Trial Judgment, para. 271; Blaškić Trial Judgment, para. 286.

<sup>286</sup> Furundžija Trial Judgment, para. 232.

<sup>287</sup> Strugar Trial Judgment, para. 349 (citing Blaškić Appeal Judgment, para. 48); Furundžija Trial Judgment, paras. 232-235.

<sup>288</sup> Furundžija Trial Judgment, paras. 224, 232-235; Kayishema Appeal Judgment.

<sup>289</sup> Furundžija Trial Judgment, para. 199.

constitute “abetting” if it has an encouraging effect on the perpetrators, or gives them moral support or psychological support, or has a significant legitimising or encouraging effect on the principals, even if the accused takes no active part in the crime.<sup>290</sup> The presence of a superior can be perceived as an important *indicium* of encouragement or support.<sup>291</sup> The *actus reus* of aiding and abetting can take place before, during or after the crime has been committed, and this form of participation may take place geographically and temporally removed from the crime’s location and timing.<sup>292</sup> It is not necessary for the person aiding or abetting to be present during the commission of the crime.<sup>293</sup> Thus, presence, particularly when coupled with a position of authority, is a probative, but not determinative, indication that an accused encouraged or supported the perpetrators of the crime.<sup>294</sup> The Prosecution submits that a persistent failure to prevent or punish crimes by subordinates over time may also constitute aiding or abetting.<sup>295</sup> Aiding and abetting does not require a pre-existing plan or arrangement to engage in the criminal conduct in question and the principal may not even know about the accomplice’s contribution.<sup>296</sup>

182. The *mens rea* requirement for aiding and abetting is satisfied if the accused knows – in the sense of awareness – that his actions or omissions will assist the perpetrator in the commission of a crime.<sup>297</sup> The aider and abettor must at least have accepted that the commission of a crime would be a possible and foreseeable consequence of his conduct.<sup>298</sup> Such awareness may be inferred from all relevant circumstances and does

<sup>290</sup> *Tadić* Trial Judgment, paras 689-692 (see also paras 678-687); *Akayesu* Trial Judgment, paras 546-548; *Čelebići* Trial Judgment, paras 327-328; *Furundžija* Trial Judgment, paras 205-209, 232-235.

<sup>291</sup> *Brđanin* Trial Judgment, para. 271; *Akayesu* Trial Judgment, paras. 693, 704-705.

<sup>292</sup> *Blaškić* Appeal Judgment, para. 48; *Simić* Trial Judgment, para 162; *Naletilić and Martinović* Trial Judgment, para. 163; *Vasiljević* Trial Judgment para. 70; *Kvočka* Trial Judgment, para. 256; *Blaškić* Trial Judgment, para. 285; *Krnojelac* Trial Judgment, para. 88; *Kunarac* Trial Judgment, para. 391; *Aleksovski* Trial Judgment, para. 129.

<sup>293</sup> *Akayesu* Trial Judgment, para. 484.

<sup>294</sup> *Kvočka* Trial Judgment, para. 257; *Kunarac* Trial Judgment, para. 393; see *Tadić* Trial Judgment, para. 689; *Aleksovski* Trial Judgment, paras 64-65; *Akayesu* Trial Judgment, para. 693.

<sup>295</sup> *Blaškić* Trial Judgment, para. 337.

<sup>296</sup> *Kordić and Čerkez* Trial Judgment, para. 399; *Tadić* Trial Judgment, para. 677; *Čelebići* Trial Judgment, paras 327-328.

<sup>297</sup> *Strugar* Trial Judgment, para. 350 (citing *Tadić* Appeal Judgment, para. 229; *Aleksovski* Appeal Judgment, para. 162; *Blaškić* Appeal Judgment, para. 49); *Furundžija* Trial Judgment, para. 245; *Čelebići* Trial Judgment, paras 327-328; *Kunarac* Trial Judgment, para. 392. The principal need not know that he has been assisted by the aider and abettor. *Tadić* Appeal Judgment, para. 229 (ii); *Brđanin* Trial Judgment, para. 272.

<sup>298</sup> *Kvočka* Trial Judgment, para. 255.

not need to be explicitly expressed.<sup>299</sup> The aider and abettor needs to have as a minimum, accepted that his/her assistance would be a possible and foreseeable consequence of his conduct.<sup>300</sup> While the aider and abettor need not share the *mens rea* of the principal, he must be aware of the essential elements of the crime ultimately committed by the principal.<sup>301</sup> It is not necessary that the aider and abettor know the precise crime that was intended or actually committed, as long as he was aware that one or a number of crimes would probably be committed, and one of those crimes was in fact committed.<sup>302</sup>

183. Conduct held to constitute aiding and abetting has included supplying the weapon or other instruments used in the commission of the crime;<sup>303</sup> failing to prevent others from perpetrating crimes in circumstances where the accused is under a legal obligation to protect a victim;<sup>304</sup> failing to maintain law and order by a person in a position of authority;<sup>305</sup> and the presence of the accused coupled with a position of authority during the perpetration of a crime.<sup>306</sup>

184. Either aiding or abetting alone is sufficient to render the perpetrator criminally liable.<sup>307</sup>

## B. SUPERIOR RESPONSIBILITY: ARTICLE 6(3) OF THE STATUTE

185. The Prosecutor charges the three Accused persons under Article 6(3) of the Statute with regard to all charges in the Indictment for the criminal acts of their subordinates.

<sup>299</sup> *Strugar* Trial Judgment, para. 350; *Tadić* Trial Judgment, paras 675-676; *Čelebići* Trial Judgment, paras 327-328.

<sup>300</sup> *Blaškić* Trial Judgment, para. 286: "in addition to knowledge that his acts assist the commission of the crime, the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct."

<sup>301</sup> *Strugar* Trial Judgment, para. 350 (citing *Aleksovski* Appeal Judgment, para. 162).

<sup>302</sup> *Strugar* Trial Judgment, para. 350 (citing *Blaškić* Appeal Judgment, para. 50); *Brđanin* Trial Judgment, para. 272.

<sup>303</sup> *Tadić* Trial Judgment, paras 680, 684 (referring with apparent approval to the *Zyklon B* and *Mulka* cases).

<sup>304</sup> *Tadić* Trial Judgment, para. 686 (referring with apparent approval to the *Borkum Island Case*); *Akayesu* Trial Judgment, paras 704-705 (failure of *bourgmestre* to maintain law and order in a commune, and failure to oppose killings and serious bodily or mental harm, found to constitute a form of tacit encouragement, which was compounded by being present at such criminal acts); *Aleksovski* Trial Judgment, para. 88.

<sup>305</sup> *Akayesu* Trial Judgment, paras 704-705.

<sup>306</sup> *Rutaganira* Trial Judgment, paras 76-77.

<sup>307</sup> *Akayesu* Trial Judgment, para. 484; while "aiding" is defined by the ICTR as "giving assistance to someone", abetting is defined as "facilitating the commission of an act by being sympathetic thereto."

186. A superior will be held criminally responsible for the crimes of his subordinates where:

- (1) an offence was committed; (2) there existed a superior-subordinate relationship between the accused and the perpetrator of the offence; (3) the accused knew or had reason to know that the perpetrator (subordinate) was about to commit the offence or had done so; and (4) the accused failed to take the necessary and reasonable measures to prevent the offence or to punish the perpetrator.<sup>308</sup>

#### The Effective Control Test

187. The actus reus consists of the existence of a superior-subordinate relationship, i.e. a hierarchical relationship between the Accused and the perpetrator, in which the former has 'effective control' over the latter.<sup>309</sup> The applicable test to determine whether the accused held superior authority over his or her subordinates is one of "effective control," meaning that the accused possessed the material ability to prevent offences or to punish the offenders.<sup>310</sup> The hierarchical relationship need not be formalised, as it may be derived from the accused's *de facto* or *de jure* position of superiority.<sup>311</sup> As stated by the Appeals Chamber in *Aleksovski*, "it does not matter whether [the accused] was a civilian or a military superior, if it can be proved that [...] he had the powers to prevent or to

<sup>308</sup> *Aleksovski* Appeal Judgment, para. 76; *Čelebići* Appeal Judgment, paras 189-198, 225-226, 238-239, 256, 263; *Strugar* Trial Judgment, para. 358. It is settled that Article 7(3) applies to both international and internal armed conflicts. *Strugar* Trial Judgment, para. 357; *Kordić and Čerkez* Trial Judgment, para. 401.

<sup>309</sup> *Čelebići* Appeal Judgment, paras 197 and 255-6 and 303; *Čelebići* Trial Judgment, para. 378; *Galić* Trial Judgment, para. 173; *Kajelijeli* Appeal Judgment, para. 87; *Orić* Trial Judgment, para 312.

<sup>310</sup> *Čelebići* Appeal Judgment, para. 196; *Strugar* Trial Judgment, para. 362-363; *Kayishema* Appeal Judgment, 302; *Kunarac* Trial Judgment, para. 396; *Kordić and Čerkez* Trial Judgment, paras. 405-406, 416-417; *Krstić* Trial Judgment, paras. 648-649. *Krnjelac* Trial Judgment, para. 93; *Brđanin* Trial Judgment, para. 276; *Čelebići* Trial Judgment, paras 370, 377; *Halilović* Trial Judgment, para 57; *Orić* Trial Judgment, para 307.; This decisive criterion of 'effective control' in terms of the actual possession, or non- possession, of powers of control over the actions of the subordinates, was first established by the Trial Chamber in *Čelebići*: *Čelebići* Trial Judgment, para. 378. For cases upholding this reasoning, see *Čelebići* Appeal Judgment, paras 192 et seq., *Kayishema* Appeal Judgment, para. 294; *Bagilishema* Appeal Judgment, para. 50. For cases following *Čelebići* in principle but occasionally employing different terminology, see *Aleksovski* Trial Judgment, para. 76; *Blaškić* Trial Judgment, para. 301; *Kunarac* Trial Judgment, para. 396; *Kvočka* Trial Judgment, para. 315; *Stakić* Trial Judgment, para. 459; *Krnjelac* Trial Judgment, para. 93; *Naletilić and Martinović* Trial Judgment, para. 67; *Galić* Trial Judgment, para. 173; *Brđanin* Trial Judgment, para. 276; *Blagojević* Trial Judgment, para. 791; *Strugar* Trial Judgment, para. 360; *Bagilishema* Trial Judgment, para. 39; *Niyitegeka* Trial Judgement, 16 May 2003, para. 472; *Kajelijeli* Trial Judgment, para. 773; *Kamuhanda* Trial Judgment, para. 604.

<sup>311</sup> *Čelebići* Appeal Judgment, paras 192-194; *Kordić and Čerkez* Trial Judgment, paras 405-406, 416; *Krnjelac* Trial Judgment, para. 93; *Kunarac* Trial Judgment, para. 396; *Galić* Trial Judgment, para. 173; *Stakić* Trial Judgment, para. 459.

punish [...].”<sup>312</sup> Article 6(3) applies equally to temporary or ad hoc military units if, at the time when the alleged acts occurred, the offenders were under the effective control of the accused.<sup>313</sup>

188. “Effective control” need not take the form of military-style command.<sup>314</sup> The responsibility may be incurred by civilians who are not part of a military structure, such as political leaders, if they *de facto* constitute part of the chain of command.<sup>315</sup> It should be noted that the ICTY held that the existence of *de jure* authority creates a *presumption* that effective control exists.<sup>316</sup> Thus, when the Accused had an official title within an organisation, it is presumed that the Accused had effective control over his subordinates, as restated in the *Hadzihasanovic* case, unless proof of the contrary is produced.<sup>317</sup>

189. A *de facto* superior who lacks formal letters of appointment or commission but has, in reality, effective control over the perpetrators of offences equally incurs criminal responsibility.<sup>318</sup> In the same vein, the mere *ad hoc* or temporary nature of a military unit or an armed group does not *per se* exclude a relationship of subordination between the member of the unit or group and its commander or leader.<sup>319</sup> There is no requirement that the relationship between the superior and the subordinate be permanent in nature.<sup>320</sup>

190. A superior may also be responsible for crimes committed by a subordinate more than one level down the chain of command.<sup>321</sup> In the *Halilovic* case, the Trial Chamber referred to the judgment in the case against the Japanese Admiral Soemu Toyoda tried in the aftermath of World War II:

<sup>312</sup> *Aleksovski* Appeal Judgment, para. 76.

<sup>313</sup> *Strugar* Trial Judgment, para. 362; *Kunarac* Trial Judgment, paras 399, 628.

<sup>314</sup> *Baglishema* Appeal Judgment, para. 55; *Kajelijeli* Appeal Judgment, para. 87.

<sup>315</sup> *Aleksovski* Appeal Judgment, para. 76; *Čelebići* Appeal Judgment, paras 195-197, reaffirming the conclusion of the Trial Chamber in *Čelebići* Trial Judgment, paras 356-363.

<sup>316</sup> The ICTY Appeals Chamber in *Čelebići* held that “[i]n general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced.” *Čelebići* Appeal Judgment, para. 197; this was repeated in *Galić* Trial Judgment, para. 173.

<sup>317</sup> *Hadžihasanović* Trial Judgment, para. 851.

<sup>318</sup> *Brđanin* Trial Judgment, para. 276.

<sup>319</sup> *Kunarac* Trial Judgment, para. 399; *Strugar* Trial Judgment, para. 362; *Halilovic* Trial Judgment, para. 61; *Orić* Trial Judgment, para. 310.

<sup>320</sup> *Limaj* Trial Judgment, para. 522.

<sup>321</sup> *Strugar* Trial Judgment, paras. 363-366; see also ICRC Commentary to the Additional Protocols, p. 1013, para. 3544.



- b. The military tribunal in that case highlighted that subordination does not have to be direct and stated that (*Toyoda* case, p. 5006): “[i]n the simplest language it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, *immediate or otherwise*, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.”<sup>322</sup>

191. The Appeals Chamber in *Blaskić* held that “the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, *or* initiate measures leading to proceedings against the alleged perpetrators where appropriate”.<sup>323</sup>

192. The jurisprudence provides for certain criteria that may be indicative of the existence of authority in terms of effective control.<sup>324</sup> They include the formality of the procedure used for appointment of a superior,<sup>325</sup> the official position held by the accused,<sup>326</sup> the position of the accused within the military or political structure,<sup>327</sup> the actual tasks that he performed,<sup>328</sup> the power of the superior to issue orders whether *de jure* or *de facto*<sup>329</sup> or take disciplinary action,<sup>330</sup> the power to appoint leaders of local groups, and charged specific persons with a specific task<sup>331</sup>, the fact that subordinates show in the superior's presence greater discipline than when he is absent,<sup>332</sup> the fact that the subordinates where

<sup>322</sup> *Halilović* Trial Judgment, para. 63, footnote 149.

<sup>323</sup> *Blaškić* Appeal Judgment, para. 69 (emphasis added); *Akayesu* Trial Judgment, para. 491; *Strugar* Trial Judgment, para. 366; *Halilović* Trial Judgment, para. 63; *Orić*, Trial Judgment, paras 307 et seq. (emphasis added).

<sup>324</sup> *Orić* Trial Judgment, paras 307 et seq.

<sup>325</sup> *Halilović* Trial Judgment, para. 58.

<sup>326</sup> *Kordić and Čerkez* Trial Judgment, paras 418-424.

<sup>327</sup> *Kordić and Čerkez* Trial Judgment, para. 423.

<sup>328</sup> *Kordić and Čerkez* Trial Judgment, para. 424.

<sup>329</sup> *Aleksovski* Trial Judgment, paras 101, 104; *Blaškić* Trial Judgment, para. 302; *Kordić and Čerkez* Trial Judgment, para. 421; *Kajelijeli* Trial Judgment, paras 403-404.

<sup>330</sup> *Blaškić* Trial Judgment, para. 302; *Hadžihasanović* Trial Judgment, paras 83 et seq.

<sup>331</sup> *Orić* Trial Judgment, para. 700.

<sup>332</sup> *Čelebići* Appeal Judgment, para. 206, endorsing the findings of *Čelebići* Trial Judgment, para. 743.

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informing the accused of measures taken,<sup>333</sup> the capacity to transmit reports to competent authorities for the taking of proper measures,<sup>334</sup> the capacity to sign orders,<sup>335</sup> provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others,<sup>336</sup> but that the indicated power is supported by the substance of the document<sup>337</sup> or that it is obviously complied with,<sup>338</sup> an accused's high public profile, manifested through public appearances and statements<sup>339</sup> or by participation in high-profile international negotiations,<sup>340</sup> the fact that witnesses had described his sphere of command, the respect he enjoyed and his widely acknowledge leadership,<sup>341</sup> the fact that an accused had been promoted as commander.<sup>342</sup>

193. The effective control can be admitted even when the superior is not competent to order and/or implement sanctions himself. It has been held that the superior has to order or execute appropriate sanctions<sup>343</sup> or, if not yet able to do so, he or she must at least conduct an investigation<sup>344</sup> and establish the facts<sup>345</sup> in order to ensure that offenders under his or her effective control are brought to justice.<sup>346</sup> The superior need not conduct the investigation or dispense the punishment in person,<sup>347</sup> but he or she must at least ensure that the matter is investigated<sup>348</sup> and transmit a report to the competent authorities for further investigation or sanction.<sup>349</sup> As in the case of preventing crimes, the

<sup>333</sup> *Čelebići* Appeal Judgment, para. 209.

<sup>334</sup> *Aleksovski* Trial Judgment, para. 78; *Blaškić* Trial Judgment, para. 302.

<sup>335</sup> *Čelebići* Trial Judgment, para. 672; *Kordić and Čerkez* Trial Judgment, para. 421; *Naletilić and Martinović* Trial Judgment, para. 67.

<sup>336</sup> *Kordić and Čerkez* Trial Judgment, para. 421.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Naletilić and Martinović* Trial Judgment, para. 67.

<sup>339</sup> *Kordić and Čerkez* Trial Judgment, para. 424; *Stakić* Trial Judgment, para. 454.

<sup>340</sup> *Aleksovski* Trial Judgment, para. 101; *Kordić and Čerkez* Trial Judgment, para. 424; *Strugar* Trial Judgment, para. 398.

<sup>341</sup> *Čelebići* Appeal Judgment, paras 206, 209, endorsing the findings of *Čelebići* Trial Judgment, paras 746-750.

<sup>342</sup> *Čelebići* Appeal Judgment, para. 206.

<sup>343</sup> As for instance, by suspending a subordinate: *Ntagerura* Trial Judgment, para. 650.

<sup>344</sup> *Kordić and Čerkez* Trial Judgment, para. 446; *Brđanin* Trial Judgment, para. 279; *Halilović* Trial Judgment, paras 74, 97, 100.

<sup>345</sup> *Halilović* Trial Judgment, paras 97, 100.

<sup>346</sup> *Strugar* Trial Judgment, para. 378; *Halilović* Trial Judgment, para. 98.

<sup>347</sup> *Halilović* Trial Judgment, paras 99-100.

<sup>348</sup> *Ibid.*, paras 97, 100.

<sup>349</sup> *Blaškić* Appeal Judgment, para. 632; *Blaškić* Trial Judgment, paras 302, 335, 464; *Kordić and Čerkez* Trial Judgment, para. 446; *Kvočka* Trial Judgment, para. 316; *Stakić* Trial Judgment, para. 461; *Brđanin* Trial Judgment, para. 279; *Halilović* Trial Judgment, paras 97, 100.

superior's own lack of legal competence does not relieve him from pursuing what his or her material ability enables him or her to do.<sup>350</sup>

194. The proof of the existence of a superior-subordinate relationship does not require the identification of the principal perpetrators, particularly not by name, nor that the superior had knowledge of the number or identity of possible intermediaries, provided that it is at least established that the individuals who are responsible for the commission of the crimes were within a unit or a group under the control of the superior.<sup>351</sup>
195. There is no requirement that the superior-subordinate relationship be direct or immediate in nature.<sup>352</sup> For example, the relationship between a commander of one unit and troops belonging to other units that are temporarily under his command, constitutes the hierarchic relationship of superior-subordinate.<sup>353</sup> Effective control can exist, whether that subordinate is immediately answerable to that superior or more remotely under his command.<sup>354</sup> A superior may also be responsible for crimes committed by a subordinate more than one level down the chain of command.<sup>355</sup> Thus, whether this sort of control is directly exerted upon a subordinate or mediated by other sub-superiors or subordinates is immaterial, as long as the responsible superior would have means to prevent the relevant

<sup>350</sup> *Aleksovski* Trial Judgment, para. 78; *Blaškić* Trial Judgment, paras 302, 335, 464; *Halilović* Trial Judgment, para. 100.

<sup>351</sup> A first instance of this proviso with regard to identification requirements can be found in relation to the form of the indictment by the Trial Chamber's finding in the *Krnjelac* case that it would be sufficient for the prosecution to identify subordinates who allegedly committed the criminal acts at least by their 'category' or 'as a group' if it is unable to identify those directly participating in the alleged crimes by name: *Prosecutor v. Krnjelac*, IT-97-25-PT, "Decision on the Defence Preliminary Motion on the Form of the Indictment", Trial Chamber, 24 February 1999, para. 46. As may be concluded from the unchallenged reference to this decision by the Appeals Chamber in the *Blaškić* case (*Blaškić* Appeal Judgment, para. 217), to establish superior responsibility, the direct perpetrators of the relevant crimes need not be identified by name, nor must it be shown that the superior knew the identity of those individuals if it is at least proven that they belong to a category or group of people over whom the accused has effective control. See also *Hadžihasanović* Trial Judgment, para. 90.

<sup>352</sup> *Strugar* Trial Judgment, para. 363; *Orić* Trial Judgment, paras 310-311; *Čelebići* Appeal Judgement, para. 252. *Stakić* Trial Judgment, 31 July 2003, para. 459.

<sup>353</sup> This essentially was the view expressed in the post-World War II trial of the Japanese General Tomoyuki Yamashita, by the U.S. Military Commission (subsequently affirmed by the U.S. Supreme Court). *Trial of General Tomoyuki Yamashita Before U.S. Military Commission* (Oct. 7–Dec. 7, 1945), summarized in 4 U.N. War Crimes Commission, Law Reports of Trials of War Criminals 1, 33-35 (1948). Confirmed in the appeal before the U.S. Supreme Court in *In re Yamashita*, 327 U.S. 1 (1945).

<sup>354</sup> *Halilović* Trial Judgment, para. 63.

<sup>355</sup> *Strugar* Trial Judgment, paras 363-366.

crimes from being committed or to take efficient measures for having them sanctioned.<sup>356</sup>

#### The Superior Knew or Had Reason to Know

196. Article 6(3) requires that the superior either (a) knew or (b) had reason to know that his subordinates were about to commit criminal acts or had already done so. Whereas the former requires proof of actual knowledge, the latter requires proof only of some grounds which would have enabled the superior to become aware of the relevant crimes of his or her subordinates.<sup>357</sup>

197. Actual knowledge may be established by way of circumstantial evidence.<sup>358</sup> The superior's position per se is not to be understood as a conclusive criterion<sup>359</sup> but may appear to be a significant indication from which knowledge of a subordinate's criminal conduct can be inferred.<sup>360</sup> For instance, the fact that crimes were committed frequently or notoriously by subordinates of the accused, indicates that the superior had knowledge of the crimes.<sup>361</sup> Circumstantial evidence can in particular be gained from<sup>362</sup> the number, type and scope of illegal acts, the time during which they occurred, the number and type of troops, the logistics involved, the geographical location of the acts, their widespread occurrence, the tactical tempo of operations, the modus operandi of similar

<sup>356</sup> *Orić* Trial Judgment, paras 307 et seq.

<sup>357</sup> *Ibid.*, para. 317.

<sup>358</sup> *Čelebići* Trial Judgment, paras 383, 386; *Kordić and Čerkez* Trial Judgment, para. 427; *Krnjelac* Trial Judgment, para. 94; *Naletilić* Trial Judgment, para. 71; *Galić* Trial Judgment, para. 174; *Brđanin* Trial Judgment, para. 278; *Strugar* Trial Judgment, para. 368; *Halilović* Trial Judgment, para. 66; *Limaj* Trial Judgment, para. 524; *Hadžihasanović* Trial Judgment, para. 94; *Bagilishema* Trial Judgment, para. 46; *Kajelijeli* Trial Judgment, para. 778; *Strugar* Trial Judgment, para. 368; *Aleksovski* Trial Judgment, para. 80; *Blaškić* Trial Judgment, para. 307; these Judgments indicate that the position of authority of the superior over the subordinate is a significant indication in itself that the superior knew of crimes committed by his subordinates.

<sup>359</sup> *Blaškić* Appeal Judgment, para. 57; *Bagilishema* Trial Judgment, para. 45; *Semanza* Trial Judgment, para. 404; *Kajelijeli* Trial Judgment, para. 776.

<sup>360</sup> *Aleksovski* Trial Judgment, para. 80; *Blaškić* Trial Judgment, para. 308.

<sup>361</sup> The Trial Chamber held that "[t]he crimes committed in the *Čelebići* prison-camp were so frequent and notorious that there is no way that [the accused] could not have known or heard about them." *Čelebići* Trial Judgment, para. 770.

<sup>362</sup> This list of criteria is in particular referred to in *Čelebići* Trial Judgment, para. 386; *Blaškić* Trial Judgment, para. 307; *Kordić and Čerkez* Trial Judgment, para. 427; *Galić* Trial Judgment, para. 174; *Brđanin* Trial Judgment, para. 276, footnote 736; *Strugar* Trial Judgment, para. 368; *Limaj* Trial Judgment, para. 524; *Hadžihasanović* Trial Judgment, para. 94; *Bagilishema* Trial Judgment, para. 968; Final Report of the Commission of Experts, Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, p. 17.

illegal acts, the officers and staff involved and the location of the commander at the time.<sup>363</sup> Additionally, the fact that a military commander "will most probably" be part of an organised structure with reporting and monitoring systems has been cited as a factor facilitating the showing of actual knowledge.<sup>364</sup>

198. A superior can be held responsible on the basis of having had reason to know, had he made use of information which, by virtue of his superior position and in compliance with his duties, was available to him, that subordinates were about to commit or had already committed crimes.<sup>365</sup>

199. It is sufficient that the superior be in possession of sufficient information written or oral,<sup>366</sup> or even general in nature, to be on notice of the likelihood of illegal acts by his subordinates, i.e., so as to justify further inquiry in order to ascertain whether such acts were indeed being or about to be committed.<sup>367</sup> Such information must suggest the need for further inquiry into the likely or possible unlawful acts of subordinates and need not be explicit or specific.<sup>368</sup> In particular, with regard to the duty to prevent, the superior need be on notice only of the "risk" or possibility of crimes being committed by his subordinates, not that crimes will certainly be committed.<sup>369</sup> Moreover, the Prosecution submits that where a superior possesses such information, he has an affirmative duty to take reasonable measures to prevent criminal conduct, beyond his duty to investigate the situation.<sup>370</sup>

<sup>363</sup> Orić Trial Judgment, paras 316-324.

<sup>364</sup> Naletilić and Martinović Trial Judgment, para. 73.

<sup>365</sup> Čelebići Trial Judgment, paras 387-389, 393; Blaškić Trial Judgment, para. 332; Bagilishema Trial Judgment, para. 46; Čelebići Appeal Judgment, para. 238; Galić Trial Judgment, para. 175.

<sup>366</sup> Čelebići Appeal Judgment, para. 238; Kvočka Trial Judgment, para. 318; Galić Trial Judgment, para. 175.

<sup>367</sup> Čelebići Trial Judgment, para. 393; Kordić and Čerkez Trial Judgment, para. 437; Strugar Trial Judgment, paras 369-370; Čelebići Appeal Judgment, para. 241; Blaškić Appeal Judgment, para. 62; Kvočka Trial Judgment, para. 318; Krnojelac Trial Judgment, para. 94; Naletilić and Martinović Trial Judgment, para. 74; Galić Trial Judgment, para. 175; Brđanin Trial Judgment, para. 278; Blagojević Trial Judgment, para. 792; Halilović Trial Judgment, para. 68; Kayishema Trial Judgment, para. 228; Semanza Trial Judgment, para. 405; Kajelijeli Trial Judgment, para. 778; Kamuhanda Trial Judgment, para. 609.

<sup>368</sup> Bagilishema Appeal Judgment, para. 28; Čelebići Appeal Judgment, paras 236, 238; Strugar Trial Judgment, para. 369; Kvočka Trial Judgment, paras 317-318; Kordić and Čerkez Trial Judgment, para. 437.

<sup>369</sup> Krnojelac Appeal Judgment, paras 155, 166, 169, 170, 173-180. Krnojelac was held responsible under Article 7(3) for failing to prevent acts of torture that occurred after he witnessed the beating of a man, and for failing to prevent murders that occurred after disappearances of which he had knowledge; Strugar Trial Judgment, paras 370, 416-418.

<sup>370</sup> Kvočka Trial Judgment, paras 317-318; Čelebići Appeal Judgment, para. 238 (notice of the violent or unstable character of subordinates may trigger duty to intervene); Strugar Trial Judgment, para. 373.

200. In *Celebići*, the ICTY Appeals Chamber held that “knowledge may be presumed ... if [the superior] had the *means* to obtain the knowledge but deliberately refrained from doing so.”<sup>371</sup> The superior need not have possessed knowledge of the *specific* details of the crime.<sup>372</sup>
201. This determination does not require the superior to have actually acquainted himself with the information in his or her possession<sup>373</sup>, nor that the information would, if read, compel the conclusion of the existence of such crimes.<sup>374</sup> It rather suffices that the information was available to the superior and that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by subordinates.<sup>375</sup>
202. This does not necessarily mean that the superior may be held liable for failing to personally acquire such information in the first place.<sup>376</sup> However, as soon as the superior has been put on notice of the risk of illegal acts by subordinates,<sup>377</sup> he or she is expected to stay vigilant and to inquire about additional information, rather than doing nothing<sup>378</sup> or remaining 'willfully blind'.<sup>379</sup>

<sup>371</sup> *Čelebići* Appeal Judgment, para. 226. This is also repeated in *Stakić* Trial Judgment, para. 422; In the *Halilović* case, the Trial Chamber has held that knowledge cannot be presumed if a person fails in his duty to obtain the relevant information, but it may be presumed where a superior had the means to obtain the relevant information and deliberately retained from doing so, see *Halilović* Trial Judgment, para. 69.

<sup>372</sup> *Čelebići* Appeal Judgment, para. 238: “[a] showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he ‘had reason to know’ ... This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.” This view was also repeated by the ICTY Trial Chamber in *Galić* Trial Judgment, 5 Dec. 2003, para. 175; *Krnjelac* Appeal Judgment, para. 155.

<sup>373</sup> *Čelebići* Appeal Judgment, para. 239; *Galić* Trial Judgment, para. 175.

<sup>374</sup> *Čelebići* Trial Judgment, para. 393; *Naletilić and Martinović* Trial Judgment, para. 74; *Halilović* Trial Judgment, para. 68; *Hadžihasanović* Trial Judgment, para. 97.

<sup>375</sup> *Čelebići* Trial Judgment, para. 393.

<sup>376</sup> *Čelebići* Appeal Judgment, para. 226; *Blaškić* Appeal Judgment, para. 62; *Halilović* Trial Judgment, para. 69; *Limaj* Trial Judgment, para. 525.

<sup>377</sup> Instead of the “risk” of crimes by subordinates, as used in describing the standard of possible awareness in the case law of this Tribunal (*Krnjelac* Appeal Judgment, para. 155; *Čelebići* Trial Judgment, para. 383; *Strugar* Trial Judgment, para. 416), some judgments speak of “likelihood” (*Kordić and Čerkez* Trial Judgment, para. 437; *Limaj* Trial Judgment, para. 525) or even of “substantial” and “clear likelihood” (*Strugar* Trial Judgment, paras 420, 422). Yet this language, rather than requiring a higher standard, seems merely to express that with such a degree of likelihood the risk test is definitely satisfied. See also *Hadžihasanović* Trial Judgment, paras 98, 102 et seq.

<sup>378</sup> *Strugar* Trial Judgment, para. 416.

<sup>379</sup> *Čelebići* Trial Judgment, para. 387; *Halilović* Trial Judgment, para. 69.

203. Examples of information which have been found to place a superior on notice of the risk of criminal conduct by a subordinate – and consequently that shows that the superior possessed the requisite knowledge – include that of a subordinate having a notoriously violent or unstable character and that of a subordinate drinking prior to being sent on a mission.<sup>380</sup> Similarly, a commander's knowledge of, for example, the criminal reputation of his subordinates may be sufficient to meet the *mens rea* standard required by Article 6(3) of the Statute if it amounted to information which would put him on notice of the "present and real risk" of offences within the jurisdiction of the SCSL.<sup>381</sup>

#### Necessary and Reasonable Measures

204. A superior must take reasonable and necessary measures within his material abilities to prevent the offence or punish the principal offender.<sup>382</sup> There is no rigid definition as to what constitutes reasonable measures;<sup>383</sup> it should be decided on a case-by-case basis in light of the superior's material abilities.<sup>384</sup> Such 'available' measures have been held to include measures which are beyond the legal authority of the superior, if their undertaking is materially possible.<sup>385</sup>

205. Indeed a superior may be held liable despite lacking the formal legal competence to take particular measures to prevent or repress offences committed by subordinates.<sup>386</sup> Such a superior ordinarily can, for example, alert others concerning crimes committed or about to be committed by subordinates.<sup>387</sup>

<sup>380</sup> *Čelebići* Appeal Judgment, para. 238; *Krnjelac* Appeal Judgment, para. 154; *Hadžihasanović* Trial Judgment, para. 100.

<sup>381</sup> *Brđanin* Trial Judgment, para. 278, referring to *Čelebići* Appeal Judgment, paras 223 and 241; *Halilović* Trial Judgment para. 68 footnote 164.

<sup>382</sup> *Strugar* Trial Judgment, para. 372; *Aleksovski* Appeal Judgment, para. 76; *Blaškić* Trial Judgment, para. 335; *Čelebići* Trial Judgment, paras. 377, 395.

<sup>383</sup> *Aleksovski* Trial Judgment, para. 81; *Čelebići* Trial Judgment, para. 394.

<sup>384</sup> *Strugar* Trial Judgment, para. 372, 374, 378.

<sup>385</sup> *Čelebići* Trial Judgment, para. 395. *Stakić* Trial Judgment, para. 461.

<sup>386</sup> *Strugar* Trial Judgment, para. 372; *Čelebići* Trial Judgment, para. 395; *Kordić and Čerkez* Trial Judgment, para. 443.

<sup>387</sup> *Aleksovski* Trial Judgment, para. 78; *Blaškić* Trial Judgment, para. 302. See also Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff, Geneva 1987, para 3562; *Blaškić* Trial Judgment, para. 335. *Stakić* Trial Judgment, para. 461.

206. At the same time, however, mere punishment by the superior of a subordinate, subsequent to having committed the crime, cannot remedy the superior's failure to take 'necessary and reasonable measures' in advance aimed at preventing the crime.<sup>388</sup>
207. The contours of a superior's duty to prevent crimes by subordinates were addressed in the *Strugar* case, stating that "if a superior has knowledge or has reason to know that a crime is being or is about to be committed, he has a duty to prevent the crime from happening and is not entitled to wait and punish afterwards."<sup>389</sup> The Trial Chamber listed several factors considered by the post-World War II tribunals in establishing a superior's responsibility for failure to prevent crimes by his subordinates, including *inter alia* the failure to issue orders aimed at bringing practices into accord with the rules of war, the failure to secure reports that military actions have been carried out in accordance with international law, the failure to protest against or criticise criminal acts, the failure to take disciplinary measures to prevent criminal acts by subordinates, and the failure to insist before a superior authority that immediate action be taken against perpetrators of crimes.<sup>390</sup>
208. The Trial Chamber in *Strugar* also held that "a superior's duty to punish the perpetrators of a crime includes at least an obligation to investigate possible crimes, to establish the facts, and if the superior has no power to sanction, to report them to the competent authorities."<sup>391</sup> The Trial Chamber noted that the post-World War II cases required a superior to conduct an effective investigation and take active steps to ensure that the perpetrators will be brought to justice.

#### Plurality of Superiors

209. More than one superior may be held responsible for their failure to prevent or punish the same crime committed by a subordinate.<sup>392</sup> The fact that an Accused may himself have

<sup>388</sup> *Blaškić* Trial Judgment, para. 336. *Stakić* Trial Judgment, para. 461.

<sup>389</sup> *Strugar* Trial Judgment, para. 373; See also *Blaškić* Trial Judgment, para. 336. Customary international law allows for conviction on the sole basis that the superior failed to prevent the crimes of his subordinates even if the perpetrators were punished after crimes had been committed. *US v Leeb* (High Command Case), 11 TWC 1, 568 (1949); *US v Von List* (Hostage Case), 11 TWC 1, 1298-99.

<sup>390</sup> *Strugar* Trial Judgment, para. 374.

<sup>391</sup> *Strugar* Trial Judgment, para. 376.

<sup>392</sup> *Blaškić* Trial Judgment, para. 303 and *Alekovski* Trial Judgment, para.106; *Krnjelac* Trial Judgment, para. 93.



had superiors does not impact on his own responsibility as a superior. Command responsibility applies to every commander at every level.<sup>393</sup>

210. Finally, an accused who is found guilty under Article 6(1) of the Statute should not also be convicted of the same crime pursuant to Article 6(3); instead, his superior position is considered an aggravating factor in sentencing.<sup>394</sup>

### C. JOINT CRIMINAL ENTERPRISE

211. International jurisprudence has established that persons who contribute to the perpetration of crimes in execution of a common criminal purpose may be subject to criminal liability as a form of “commission” pursuant to Article 6(1) of the Statute.<sup>395</sup>
212. The Three Accused are all charged as participants in a joint criminal enterprise (“JCE”) the plan, purpose or design of which was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone.
213. The key players in the joint criminal enterprise during the relevant time frame included those named in the Indictment as well as other members of the CDF who shared the common design. It is not alleged that every member of the CDF was necessarily a member of the joint criminal enterprise.
214. There are three recognized forms of joint criminal enterprise.<sup>396</sup> The Prosecution has alleged all three of these variants of JCE liability in the Indictment<sup>397</sup> as well as the Pre-

<sup>393</sup> *Halilović* Trial Judgment, paras 61-62. *Blaškić* Trial Judgment, paras 296, 302, 303; *Krnojelac* Trial Judgment, para. 93; *Naletilić and Martinović* Trial Judgment, para. 69.

<sup>394</sup> *Kordić and Čerkez* Appeal Judgment, para. 34 (quoting *Blaškić* Appeal Judgment, para. 91); *Kajelijeli* Appeal Judgment, para. 81-82.

<sup>395</sup> *Tadić* Appeal Judgment, para. 190; *Vasiljević* Appeal Judgment, para. 95; *Prosecutor v. Milutinović et al.*, IT-99-37-AR72, “Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise”, (“*Milutinović Decision on Joint Criminal Enterprise*”) Appeals Chamber, 21 May 2003, para. 20.

<sup>396</sup> *Tadić* Appeal Judgment, paras 195-226; *Vasiljević* Appeals Judgment, paras 96-99.

<sup>397</sup> Amended Consolidated Indictment, 5 February 2004, para. 19.

Trial Brief<sup>398</sup>, and submits that all three may be applicable to the facts proven at trial. The Trial Chamber may rely on the variant or variants of JCE liability which it concludes best fit the facts of this case.

215. The first category or 'basic form' of JCE describes cases where all participants, acting pursuant to a common purpose which amounts to or involves the commission of a crime listed in the Statute,<sup>399</sup> share the same criminal intent. The second category, a variant of the first, is also a basic form, and applies where the accused has personal knowledge of a concerted system of ill-treatment, as well as the intent to further this concerted system of ill-treatment.<sup>400</sup> This second category is frequently used to describe concentration camp cases, but can apply in other cases characterized by the existence of an organized system set in place to achieve a common criminal purpose.<sup>401</sup> In such cases, it is necessary to prove that the accused had personal knowledge of the system and the intent to further the system; it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system.<sup>402</sup> On a proper analysis, the first and second categories may be regarded not as separate 'categories' of joint criminal enterprise liability, but merely as two different ways in which an accused can participate in a joint criminal enterprise under the 'basic form' of liability.<sup>403</sup> The third category or 'extended form' describes cases where all participants share the intention to carry out a common design and where the physical perpetrator commits a crime which falls outside the scope of the original design but which is nevertheless a natural and foreseeable consequence of that design.<sup>404</sup> Regardless of the role played by each participant in the commission of the crime, all of the participants in the joint criminal enterprise are guilty of the same crime.<sup>405</sup>

<sup>398</sup> Pre-Trial Brief, 2 March 2004, para. 154, p. 487.

<sup>399</sup> *Tadić* Appeal Judgment, para. 227.

<sup>400</sup> **Krnojelac Appeal Judgment**, para. 32.

<sup>401</sup> *Ibid.*, para. 89.

<sup>402</sup> *Ibid.*, para. 96.

<sup>403</sup> See *Prosecutor v. Stakić*, IT-97-24-T, "Judgement," 31 July 2003, ("**Stakić Trial Judgment**"), para. 435 ("A person may *participate* in a joint criminal enterprise *in various ways*: (i) by personally committing the agreed crime as a principal offender; (ii) by assisting or encouraging the principal offender in committing the agreed crime as a co-perpetrator who shares the intent of the joint criminal enterprise; (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 it*" (emphasis added)).

<sup>404</sup> *Vasiljević* Appeal Judgment, para. 99.

<sup>405</sup> *Vasiljević* Appeal Judgment, paras 110-111; *Blagojević and Jokić* Trial Judgment, para. 702.

216. The following elements therefore establish liability as a co-perpetrator in a joint criminal enterprise:<sup>406</sup>

- a. A plurality of persons;
- b. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime listed in the Statute; and
- c. The participation of the accused in the execution of the common plan.
- d. Shared intent to commit a crime in furtherance of the common plan, or personal knowledge of a system of ill-treatment and intent to further the criminal purpose of the system;
- e. Where the crime charged was a natural and foreseeable consequence of the execution of the enterprise, participation in the enterprise with the awareness that such a crime was a possible consequence of its execution and willingly taking the risk that the crime might occur.<sup>407</sup>

### Plurality of Persons

217. A joint criminal enterprise can be large or more restricted in size. In the *Karemera* case, the ICTR Appeals Chamber confirmed that it would be incorrect to suggest that liability can arise only from participation in enterprises of limited size or geographical scope”.<sup>408</sup> In the case of a large scale joint criminal enterprise, the participants may change over a period of time, with new members joining, and some persons ceasing to be members.

218. There is no requirement that the plurality of persons be organized in a military, political or administrative structure<sup>409</sup> and membership in the enterprise may be fluid so long as the common aim remains constant.<sup>410</sup> Identification of a perpetrator by category is sufficient if the precise identity is not known.<sup>411</sup> For example, it has been found that a

<sup>406</sup> *Kvočka* Trial Judgement, para. 266; see also *Tadić* Appeal Judgment, para. 227.

<sup>407</sup> *Brđanin* Trial Judgment, para. 265; see also *Tadić* Appeal Judgment, para. 228; *Stakić* Appeal Judgment, paras 64-65.

<sup>408</sup> *Prosecutor v Karemera*, “Decision on Jurisdictional Appeals: Joint Criminal Enterprise”, 12 April 2006, para. 16. See also *Krajisnik* Trial Judgment, para. 876.

<sup>409</sup> *Vasiljević* Appeal Judgment, para. 100.

<sup>410</sup> *Brđanin* Trial Judgement” para. 261; *Tadić* Trial Judgement para. 227; *Blagojević and Jokić* Trial Judgment, paras 700-701.

<sup>411</sup> *Kvočka* Trial Judgment para. 266; *Tadić* Appeal Judgment, para. 227; *Prosecutor v. Rasevic*, IT-97-25/1-PT, “Decision regarding Defence Preliminary Motion on the Form of the Indictment”, Trial Chamber, 28 April 2004, para. 47; *Prosecutor v. Stojan Zupljanin*, IT-99-36-I, “Second amended Indictment”, October 2004.

“group including the leaders of political bodies, the army, and the police who held power in the Municipality of Prijedor” was a plurality of persons, meeting the first element of JCE.<sup>412</sup>

### Common purpose

219. It is necessary to demonstrate the existence of a common plan, design or purpose which amounts to *or involves* the commission of a crime listed in the Statute. While the aim of defeating the enemy and regaining control of territory is not in itself a criminal aim, if the plan involves the commission of crimes against civilians suspected to have collaborated with the enemy in order for what might be legitimate ultimate aims to be achieved, liability may be invoked under the doctrine of JCE.
220. There is no need for the Prosecution to establish that the common plan, design or purpose was expressly or formally agreed between the various members of the joint criminal enterprise, or previously arranged or formulated.<sup>413</sup> Furthermore, the understanding or arrangement may be an unspoken one. The existence of such a common plan, design or purpose may be established by circumstantial evidence, and may be inferred from all the evidence.<sup>414</sup> In particular, the common plan, understanding or agreement may be inferred merely “from the fact that a plurality of persons acts in unison to put the plan into effect or from other circumstances.”<sup>415</sup> For instance, it has been said that “[w]here the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time, the argument that there was no common purpose is plainly unsustainable.”<sup>416</sup>
221. While the physical perpetrator of crimes will often be a member of the enterprise, it is well-established that persons, such as leaders, who may be more removed from the *actus reus* of a crime are not immune from liability. Senior leaders necessarily divide tasks up amongst each other and use the means at their disposal, such as armies, to execute the

<sup>412</sup> *Prosecutor v Stakić*, Appeal Judgment, para. 69.

<sup>413</sup> *Krajisnik* Trial Judgment, para. 883.

<sup>414</sup> *Prosecutor v. Blagoje Simić*, IT-95-9-T, “Judgement”, 17 October 2003, para. 158; *Vasiljević* Trial Judgment, para. 66; *Krnojelac* Trial Judgment, para. 80, footnote 236; *Furundžija* Appeals Judgment, para. 119; *Krnojelac* Appeal Judgment, paras. 81, 96.

<sup>415</sup> *Tadić* Appeal Judgment, para. 227; *Krnojelac* Trial Judgment, para. 80.

<sup>416</sup> *Furundžija* Appeals Judgment, para. 120.

common plan. A commander may use the forces under his control, while another participant makes inflammatory speeches and yet another provides political support. Therefore, it has been held that a JCE may exist even if none or only some of the physical perpetrators are part of the enterprise if they are procured by members of the enterprise to commit crimes which further the common plan.<sup>417</sup> In an interlocutory decision in the *Ojdanic* case, Judge Bonomy considered the question of the membership of the physical perpetrator in the JCE in some detail and concluded in relation to the ICTY/R case law that:

“it is not inconsistent with the jurisprudence of the Tribunal for a participant in a JCE to be found guilty of commission where the crime is perpetrated by a person or persons who simply act as an instrument of the JCE, and who are not shown to be participants in the JCE. There is certainly no binding decision of the Appeals Chamber that would prevent the Trial Chamber from finding an accused guilty on that basis.”<sup>418</sup>

222. In the case of the second category of joint criminal enterprise, the emphasis is on the accused's knowledge of the system and intent to further that system. It is not necessary to prove an agreement between the accused and the physical perpetrators of the crimes, however it must be shown that the accused knew of the system and agreed to it.<sup>419</sup>
223. In the case of a large scale joint criminal enterprise, the participants may change over a period of time, with new members joining, and some persons ceasing to be members. A new and distinct joint criminal enterprise may come into existence if the objective of the enterprise changes, such that the objective is fundamentally different in nature and scope from the original plan. The members of the new joint criminal enterprise may be the same, or alternatively it may be that only some of the original members joined the new enterprise.<sup>420</sup>

### Participation of the Accused

<sup>417</sup> *Krajisnik* Trial Judgment, para. 883.

<sup>418</sup> *Prosecutor v Milutinovic et al.*, “Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration”, 22 March 2006, para. 13.

<sup>419</sup> *Kvočka* Appeal Judgment, para. 118; *Krnojelac* Appeal Judgment, para. 97.

<sup>420</sup> *Blagojević and Jokić* Trial Judgment, paras 700-701.

224. Participation in a joint criminal enterprise need not involve the commission of a specific crime nor indeed of any element of a crime<sup>421</sup> but may take the form of assistance in, or contribution to, the execution of the common purpose.<sup>422</sup> Presence at the scene of the crime is not required.<sup>423</sup> The accused's contribution need not have been substantial or necessary to the achievement of the objective of the enterprise.<sup>424</sup>
225. An accused's contribution to the JCE may take different forms, but a sufficient contribution is clearly made when an accused physically or directly perpetrates a serious crime that advances the goal of the criminal enterprise, or when a person in a position of authority or influence knowingly fails to protest against the commission of such crimes.<sup>425</sup> In the specific context of the second category of JCE liability, the *actus reus* focuses on the accused's participation in the enforcement of a system of ill treatment or repression. The necessary participation can be inferred from, among other factors, the position and functions of the accused.<sup>426</sup>

### Shared Intent

226. As set out by Trial Chamber II, the shared intent in the first form of joint criminal enterprise exists where the accused possess the intent to commit a crime in furtherance of the common plan.<sup>427</sup> This intent to commit a crime can exist even when the accused does not personally commit the crime but nevertheless intends this result.<sup>428</sup>
227. The shared intent to commit crimes in furtherance of the common plan may be inferred from the evidence. When reliance is placed on the state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.<sup>429</sup> Shared intent may, and often will, be inferred from knowledge of the plan and participation in its advancement.<sup>430</sup>

<sup>421</sup> *Kvočka* Appeal Judgment, para. 99.

<sup>422</sup> *Stakić* Appeal Judgment, para. 64.

<sup>423</sup> *Kvočka* Appeal Judgment, paras 112-113.

<sup>424</sup> *Krajisnik* Trial Judgment, para. 883.

<sup>425</sup> *Kvočka* Trial Judgment, para. 309.

<sup>426</sup> *Kvočka* Trial Judgment, para. 272; *Kvočka* Appeal Judgment, para. 101.

<sup>427</sup> *Brima* Decision on Motion for Acquittal, para. 311.

<sup>428</sup> *Tadić* Appeal Judgment para. 196; *Brdjanin* Trial Judgment, para. 264

<sup>429</sup> *Vasiljević* Appeals Judgment, para. 120.

<sup>430</sup> *Kvočka* Trial Judgment, para. 271.

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228. However, if the Trial Chamber is not satisfied that the Accused shared the state of mind required for the commission of the crimes charged pursuant to a joint criminal enterprise, it may nevertheless consider the Accused's responsibility as an aider or abettor.<sup>431</sup>

229. Regarding the second type of JCE, the *Tadić* Judgement stressed that the *mens rea* element comprised: "(i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat the inmates."<sup>432</sup> Personal knowledge of the system of ill treatment can be proven by express testimony or by reasonable inference from the accused's position of authority.<sup>433</sup> The ICTY Appeals Chamber has also stated that the required criminal intent does not require the accused's personal satisfaction, enthusiasm, or personal initiative in contributing to the joint criminal enterprise.<sup>434</sup>

### Crimes as a Natural and Foreseeable Consequence

230. For the application of third category joint criminal enterprise liability, it is necessary to prove that: (a) crimes that were not intended as part of the implementation of the common purpose occurred; (b) these crimes were a natural and foreseeable consequence of effecting the common purpose and (c) the participant in the joint criminal enterprise was aware that the crimes were a possible consequence of the execution of the common purpose, and in that awareness, he nevertheless acted in furtherance of the common purpose.<sup>435</sup> The crime must be shown to have been foreseeable to the particular accused.<sup>436</sup> Although it has been held until now that more than negligence is required, liability attaches where the risk was both a predictable consequence of the execution of the common design and the accused was either *reckless* or *indifferent* to that risk.<sup>437</sup>

<sup>431</sup> *Vasiljević* Trial Judgment, paras 68-69.

<sup>432</sup> *Tadić* Appeals Chamber Judgement, para. 203; *Krnjelac* Appeal Judgment, para. 89; *Kvočka* Trial Judgment, para. 311.

<sup>433</sup> *Tadić* Appeal Judgment, para. 228.

<sup>434</sup> *Kvočka* Appeal Judgment, para. 106.

<sup>435</sup> *Stakić* Appeal Judgment, para. 87.

<sup>436</sup> *Tadić* Appeal Judgment, para. 220.

<sup>437</sup> *Tadić* ACJ para 204, 220, 228.

## **Distinction between Liability pursuant to a Joint Criminal Enterprise and Aiding and Abetting**

231. An aider and abettor carries out acts directed to assist, encourage, or lend moral support to the perpetration of a specific crime and this support has a substantial effect on the perpetration of that crime, while a co-perpetrator in a joint criminal enterprise performs acts which are in some way directed to the furtherance of the common objective through the commission of crimes.<sup>438</sup> An aider and abettor has knowledge that his acts assist the commission of a specific crime, while the co-perpetrator in a joint criminal enterprise intends to achieve the common objective.<sup>439</sup> 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.<sup>440</sup> Where this occurs, the accused will be criminally responsible for aiding and abetting all of the crimes that were committed in the course of that joint criminal enterprise.<sup>441</sup> When, however, an accused participates in a crime that advances the goals of the criminal enterprise, it is often reasonable to hold that his form of involvement in the enterprise amounts to that of a co-perpetrator.<sup>442</sup>

## **THE JOINT CRIMINAL ENTERPRISE IN THE CDF CASE**

### **Plurality of persons:**

<sup>438</sup> *Tadić* Appeal Judgment, para. 229.

<sup>439</sup> *Tadić* Appeal Judgment, para. 229.

<sup>440</sup> *Tadić* Appeal Judgment, para. 229.

<sup>441</sup> *Tadić* Appeal Judgment, para. 229.

<sup>442</sup> *Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, Dragoljub Prcac*, IT-98-30/1-T, 2 November 2001, Judgment, Trial Chamber, at para. 284. "For example, (...)an accountant hired to work for a film company that produces child pornography may initially manage accounts without awareness of the criminal nature of the company. Eventually, however, he comes to know that the company produces child pornography, which he knows to be illegal. If the accountant continues to work for the company despite this knowledge, he could be said to aid or abet the criminal enterprise. Even if it was also shown that the accountant detested child pornography, criminal liability would still attach. At some point, moreover, if the accountant continues to work at the company long enough and performs his job in a competent and efficient manner with only an occasional protest regarding the despicable goals of the company, it would be reasonable to infer that he shares the criminal intent of the enterprise and thus becomes a co-perpetrator. The man who merely cleans the office afterhours, however, and who sees the child photos and knows that the company is participating in criminal activity and who continues to clean the office, would not be considered a participant in the enterprise because his role is not deemed to be sufficiently significant in the enterprise." *Ibid* at para. 285 and 286.



232. Norman, Fofana and Kondewa were the very heart of the CDF organization. This was, perhaps, expressed best by Prosecution insider witness, TF2-008, who said: Norman, Fofana and Kondewa “have the executive power of the Kamajor society. These people....nobody can take a decision in the absence of this group. Whatever happened, they come together because they are the leaders and the Kamajors look up to them.”<sup>443</sup> They were so united in their approach as the three senior leaders of the Kamajor society that they were referred to as the Trinity: the Father, the Son and the Holy Ghost.<sup>444</sup>
233. The Prosecution submits that the element of plurality is satisfied by the evidence of numerous Prosecution witnesses who testified about meetings where all three Accused were present and discussions were had and plans were made to eliminate RUF/AFRC and their supporters and sympathisers.<sup>445</sup> That the element of plurality is met was conceded by the Defence for the Third Accused in their Rule 98 submissions.<sup>446</sup>

**Existence of a common plan, design or purpose:**

234. The evidence, in three specific ways, points to the conclusion that there existed a common plan which involved the commission of crimes: 1) The three Accused held numerous meetings; 2) public announcements were made by Norman and supported by Fofana and Kondewa; and 3) the repetition of crimes targeted specifically at collaborators or sympathizers of the enemy, demonstrates that a plan was in place.
235. The common plan was explicitly expressed by Norman at a War Council meeting at Base Zero where Fofana and Kondewa were also present. Norman said that if the CDF were to take over Freetown, Bo, Kenema and Kono, then they would control Sierra Leone for three years before inviting Kabbah to come back to power. The witness noted that all commanders had this idea in the back of their minds.<sup>447</sup>
236. There is significant evidence about meetings during which all three Accused and various other commanders discussed military issues. Witness TF2-005 and TF2-201 were both at

<sup>443</sup>TF2-008, Transcript 16 November 2004, p. 51.

<sup>444</sup>TF2-011, Transcript 8 June 2005, Closed Session, p. 31; TF2-014, Transcript 11 March 2005, p. 24, TF2-014, Transcript 15 March 2005, p. 28.

<sup>445</sup>TF2-005, TF2-201, TF2-079, TF2-017, TF2-223, TF2-201, TF2-021, TF2-222.

<sup>446</sup>*Norman*, Decision on Motion for Acquittal, para. 63.

<sup>447</sup>TF2-008, Transcript 16 November 2004, pp. 83, 87-90.

a meeting where all three Accused made plans for the Tongo attack.<sup>448</sup> TF2-079 also testified about a meeting at Base Zero where Norman did most of the talking but was later on “supported by the Director of War and the High Priest also followed suit.”<sup>449</sup> At that meeting Norman said that in Tongo civilian collaborators should forfeit all their property and be killed.<sup>450</sup> At Base Zero, Norman, Fofana and Kondewa as well as a select few would attend important and secret meetings held at Walihun I.<sup>451</sup>

237. TF2-014 testified that at a meeting where Fofana and Kondewa were also present, Norman said that the enemies included “sympathisers, collaborators, and those who refused deliberately to leave the AFRC and RUF zones, those were our enemies and that we should kill them, no problem.”<sup>452</sup> According to TF2-017, Norman convened another meeting for commanders, War Council members, Kondewa and Fofana. The attack on Bo Town was planned and Norman said that the Kamajors should attack and kill anyone who has a connection with or accommodated the rebels or AFRC; houses should be burnt down and big shops and pharmacies should be looted.”<sup>453</sup> Additionally, TF2-223, TF2-201, TF2-021, TF2-222 all testified regarding meetings where the three Accused planned various attacks.<sup>454</sup>
238. It is not only the private planning meetings which points to the conclusion that a common plan was in existence, but the public announcements made by Norman and supported by Fofana and Kondewa.
239. TF2-157 testified about a meeting which was held at the court barry in Koribundo. Kamajors required everyone to attend. The witness specifically recalled Norman’s speech: “I said that one [that nothing should be spared] because when the soldiers were here you were here together and you hosted them and you supported them and you have brought a lot of wicked things.”<sup>455</sup> Numerous other witnesses also recalled the public

<sup>448</sup>TF2-005, Transcript February 15, 2005, Closed Session, p. 105; TF2-201, Transcript 4 November 2004, Closed Session, pp.106-107.

<sup>449</sup>TF2-079, Transcript 26 May 2005, p. 53.

<sup>450</sup>TF2-079, Transcript 26 May 2005, p. 55.

<sup>451</sup>TF2-079, Transcript 26 May 2005, p. 39.

<sup>452</sup>TF2-014, Transcript 10 March 2005, p. 37.

<sup>453</sup>TF2-017, Transcript 19 November 2004, Closed Session, pp. 93-94.

<sup>454</sup>TF2-223, Transcript 28 September 2004, Closed Session, pp. 56-58, ; TF2-201, Transcript 5 November 2004, Closed Session, pp. 42-43; TF2-021, Transcript 2 November 2004, p. 62; TF2-222, Transcript 17 February 2005, pp. 102-103.

<sup>455</sup>TF2-157, Transcript 16 June 2004, pp. 20-21.

announcement Norman made regarding the failure of the Kamajors to burn everything and kill everyone in Koribundo.<sup>456</sup> There was no hiding the fact that Norman was not pleased that his plan was not being carried out.

240. At a passing out parade, Norman gave instructions for the attack on Tongo which included killing, burning and looting. Fofana spoke next and warned that any commander who did not perform accordingly or who lost ground should “decide to kill yourself there...” Kondewa was the last to speak and he said: “I give you my blessings; so my boys, go.”<sup>457</sup>
241. TF2-011 also testified about a public meeting held in Bo during which Norman said that Kamajors and AFRC did “bad things,” but that Norman himself took responsibility for what Kamajors had done.<sup>458</sup>
242. Finally, the repeated targeting of anyone collaborating, suspected of collaborating or even sympathising with the enemy suggests that a joint enterprise that required the commission of crimes in order to make the ultimate plan of regaining power a reality, existed.
243. TF2-035 testified about how one thousand civilians were detained at a checkpoint at the Telama junction. After the Kamajors searched people and their belongings, the Loko, Limba and Temne people were told to form a queue. Keikula Kamaboty passed an order that “they all should be killed” and the one hundred and fifty people in that line were hacked to death with cutlasses. The stomach of one of the victims’ was slit open and his entrails were taken.<sup>459</sup>
244. TF2-159 testified regarding an incident at the Koribundo Junction where he saw Kamajors with five Limba people. The Kamajors said that the Limba people were junta; two were killed with guns and three were killed with a cutlass.<sup>460</sup> Numerous other

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<sup>456</sup>TF2-162, Transcript 8 September 2004, pp. 29-30; TF2-198, Transcript 15 June 2004, pp. 37-38; TF2-012, Transcript 21 June 2004, pp. 26-27; TF2-159, Transcript 9 September 2004, pp. 51-55; TF2-032, Transcript 13 September 2004, pp. 61-62.

<sup>457</sup>TF2-222, Transcript 17 February 2005, pp. 110-115, 119-120.

<sup>458</sup>TF2-011, Transcript 8 June 2005, pp. 32-33.

<sup>459</sup>TF2-035, Transcript 14 February 2005, pp. 13-20

<sup>460</sup>TF2-159, Transcript 9 September 2004, pp. 28-31.

witnesses all gave evidence regarding screenings for and crimes committed against suspected collaborators, junta, or sympathisers.<sup>461</sup>

245. The crimes were never committed in secret, they took place in public areas and on occasion people in the crowds were asked to point out rebels or suspected collaborators.<sup>462</sup>

246. The Prosecution submits that there was a policy of targeting people who were in any way connected with the enemy. Those people were killed, subjected to physical violence and their property was looted and burned. The way in which these crimes were repeatedly carried out against a specific target, anyone having anything to do with the enemy or suspected of having anything to do with the enemy, demonstrates that these were not random acts.

### **Participation in the execution of the common plan:**

247. The three Accused all participated in criminal activities in various essential ways to give effect to the common plan. As the above-mentioned evidence indicates, each accused participated in the joint criminal enterprise by attending and participating in CDF planning meetings and public announcements. Additionally, the three Accused gave orders.<sup>463</sup> The three Accused were involved in providing and distributing supplies, including weapons, for the war.<sup>464</sup> The three accused were involved in recruitment, training and movement of Kamajor troops.<sup>465</sup> The evidence of TF2-223, specific to an

<sup>461</sup>TF2-027, Transcript 18 February 2005, pp. 94, 102-104; TF2-144, Transcript 24 February 2005, p. 65; TF2-048, Transcript 23 February 2005, pp. 23-26; TF2-079, Transcript 26 May 2005, pp. 23, 83; TF2-053, Transcript 1 March 2005, pp. 82-85; TF2-151, Transcript 22 September 2004, pp. 12-18, 27-29; TF2-159, Transcript 9 September 2004, pp. 29-31; TF2-014, Transcript 10 March 2004, p. 53-54; TF2-223 Transcript 28 September 2004, Closed Session, pp. 62, 72-73; TF2-154, Transcript 27 September 2004, pp. 52-53; TF2-058; TF2-056, Transcript 6 December 2004, pp. 71-72.

<sup>462</sup> TF2-027, Transcript 18 February 2005, p. 94; TF2-053, Transcript 1 March 2005, pp. 82-83.

<sup>463</sup>TF2-014, Transcript 10 March 2005, pp. 52-53, 63, 70-79; TF2-017, Transcript 19 November 2005, Closed Session, p. 93-95; TF2-079, Transcript 26 May 2005, p. 20-22; TF2-223, 28 September 2004, Closed Session, pp. 37, 100-102; TF2-222, Transcript 17 February, 2005, pp. 110-111; TF2-201, Transcript 4 November 2004, Closed Session, p. 107; TF2-041, Transcript 24 September 2004, p. 22; TF2-021, Transcript 2 November 2005, p. 67; TF2-011, Transcript 8 June 2005, Closed Session, p. 29; TF2-119, Transcript 23 November 2004, pp. 109-112; TF2-190, Transcript 10 February 2005, p. 35; TF2-173, Transcript 4 March 2005, p. 55; TF2-118, Transcript 31 May 2005, pp. 15-16; TF2-073, Transcript 2 March 2005, p. 35-36.

<sup>464</sup>TF2-201, Transcript 4 November 2004, Closed Session, pp. 87, 96-98, 107; TF2-022, Transcript 11 February 2005, p. 54; TF2-223, Transcript 28 September 2004, Closed Session, p. 37; TF2-190, Transcript 10 February 2005, p. 37; TF2-005, Transcript 15 February 2005, Closed Session, p. 101; TF2-079, Transcript 26 May 2005, p. 42.

<sup>465</sup>Organizing and/or participating in initiation: TF2-189, Transcript 3 June 2005, p. 15; TF2-080, Transcript, 6 June 2005, p. 27; TF2-011, Transcript 8 June 2005, Closed Session, p. 20; TF2-017, Transcript 19 November 2004,

attack on SS Camp, also provides insight into the participation, generally of the three Accused in the execution of the common plan. According to this witness, Fofana and Kondewa would deliver the logistics, brought in by Norman with specific instructions how they were to be distributed, prior to the attack, Kondewa would perform an initiation ceremony.<sup>466</sup> Each accused participated in the joint criminal enterprise by using radio communications to coordinate troop and supply movements and supplying status reports; coordinating or directing troop movements; coordinating or directing weapons and supply distribution; organizing financial and resource support; and organizing and/or participating in the initiation processes.

248. The three Accused also participated in the joint criminal enterprise by committing crimes themselves.<sup>467</sup>

**Shared intention:**

249. The evidence set out above with respect to the planning and participation of the three Accused in the execution of the joint criminal enterprise also provides proof of the shared intention of Norman, Fofana and Kondewa to control the territory of Sierra Leone by whatever means necessary, including through criminal acts.
250. Numerous Prosecution witnesses testified regarding the reports they made to Norman, Fofana and Kondewa about what was happening in battles throughout Sierra Leone.<sup>468</sup> For example, TF2-201 was present when a situation report was made to the three Accused indicating that Tongo had fallen after four days<sup>469</sup> and TF2-222 testified that when reports came back to Base Zero, the fighters would first go to Kondewa, then Fofana and would finally report to Norman.<sup>470</sup>

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Closed Session, pp. 9-10; TF2-140, Transcript 14 September 2004, p. 74-76; TF2-079, Transcript 26 May 2005, p. 11; TF2-021, 2 November 2004, pp. 38-39; Training, organising and deploying troops: TF2-189, Transcript 3 June 2005, p. 14-15; TF2-223, Transcript 28 September 2004, Closed Session, pp.22-23, 35-37; TF2-011, Transcript 8 June 2005, Closed Session, pp. 47, 54-55; TF2-005, Transcript 15 February 2005, Closed Session, p. 101; TF2-222, Transcript 17 February 2005, pp. 92-93.

<sup>466</sup>TF2-223, Transcript 28 September 2004, Closed Session, pp. 38, 39, 57-58.

<sup>467</sup>TF2-014, Transcript 10 March 2005, p. 18; TF2-096, Transcript 8 November 2004, pp. 24-27; TF2-017, Transcript 19 November 2004, Closed Session, p. 29-33.

<sup>468</sup>TF2-190, Transcript 10 February 2005, p. 40; TF2-014, Transcript 10 March 2005, pp. 62-64; TF2-027, Transcript 18 February 2005, pp. 98-99; TF2-079, Transcript 26 May 2005, p. 25-26.

<sup>469</sup>TF2-201, Transcript 4 November 2004, Closed Session, pp. 110-113.

<sup>470</sup>TF2-222, Transcript 17 February 2005, pp. 121-122.

## C O N F I D E N T I A L

251. Additionally all three accused knew about the commission of crimes because they themselves had ordered the commission of these crimes on a number of occasions.
252. The only reasonable inference to be drawn from the entirety of the evidence is that the three Accused not only shared and intended to participate in a joint criminal enterprise, but in fact did participate in and had knowledge of the crimes being committed in furtherance of the common plan. The full extent of the crimes may also be regarded as forming part of a system of ill-treatment of civilians suspected of being RUF/AFRC collaborators or sympathisers.
253. Alternatively, if the Trial Chamber should find that some or all of the crimes charged in the Indictment were not intentionally committed as part of the implementation of the common plan, those crimes were a natural and foreseeable consequence of the implementation of that plan. Thus, the full extent of the crimes committed by Hinga Norman, his co-accused and individual Kamajors was objectively a natural and foreseeable consequence of the common plan to instil fear in the population and use criminal means to wipe out the RUF/AFRC and those perceived to be sympathizers.

**PART III****ASSESSMENT OF INDIVIDUAL ACCUSED**

254. The following submissions relate to the individual accused. Again it must be noted that there is a strong commonality of evidence between the accused and the offences, so that, in one regard, it is an artificial exercise seeking to allocate the evidence in a manner that does not recognize the intrinsic closeness of the accused with each other, and their direct connection to the offences committed by persons under their authority.

## I. HINGA NORMAN:

### I. Hinga Norman

#### A. Norman's Position of Authority

255. Norman served in the Armed Forces of the Republic of Sierra Leone from about 1959 to 1972 rising to the rank of Captain. In 1966 he graduated from the Mons Officer Cadet School in Aldershot, United Kingdom. Norman was a leading political figure in the Republic of Sierra Leone.
256. In 1997, Norman became National Coordinator of the CDF.<sup>472</sup> As such he was the principal force in establishing, organizing, supporting, providing logistical support to, and promoting the CDF. Norman was also the leader and Commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of the Kamajors.<sup>473</sup>
257. The sources of Norman's power were twofold. In the first place, Norman possessed power by virtue of the political positions he occupied both at the municipal level (chiefdom spokesman) and national level (Deputy Minister for Defence). In the second place, Norman was entrusted with political power directly by the President. Norman oversaw the portfolio of the Ministry of Defence and was in charge of the security of the nation. Norman's power was consolidated with his appointment as National Coordinator of the CDF.<sup>474</sup>
258. On 15 September 1997, Norman landed at Talia in a helicopter at Talia, Yawbeko Chiefdom, which later came to be known as 'Base Zero'. Norman likened the place to the base of generals and field marshals in war.<sup>475</sup> At Talia, Norman "co-ordinated the activities of the Kamajors."<sup>476</sup> Norman was not only the ostensible leader of the Kamajors, but was in fact the very heart of its existence as its key figure. In the public eye, it was Norman who personified the Kamajors.<sup>477</sup> It was up to Norman to organise or summon people to attend a meeting whenever he felt the need. During such meetings

<sup>472</sup> TF2-008, Transcript, 16 November 2004, p. 82.

<sup>473</sup> Ibid., p. 51.

<sup>474</sup> Accused Sam Hinga Norman, Transcript, 26 January 2006, p. 6.

<sup>475</sup> Ibid, p. 17.

<sup>476</sup> Ibid.

<sup>477</sup> BBC Radio Broadcasts, TF2-222, Transcript 17 February 2005, pp. 104-107.

Norman played a crucial and central role. At such gatherings, Norman would chair the meetings and very often propose conclusions.<sup>478</sup> During Norman's stay at Talia, no one was above him;<sup>479</sup> he was the final arbiter. All these were further important indicators that Norman was indeed the driving force behind the Kamajors.

259. Norman agreed with the Prosecution evidence that he was the person who gave the final approval for the appointment of Battalion Commanders and above, until the setting up of the National Coordinating Committee on 29 January 1999.<sup>480</sup>
260. It was also at Talia that Norman organized rudimentary training for Kamajors. After the successful training of Kamajors, Norman would make a public address at the Field in Talia and admonish Kamajors. Norman instructed his commanders not to spare anyone working or mining for the Junta.<sup>481</sup>
261. At Base Zero, in a meeting with commanders, Norman gave instructions for the attack on Koribundo.<sup>482</sup> It is the evidence that Norman instructed the Commanders present, "that when you proceed to attack Koribundo, don't leave any living thing and burn down houses if there was resistance. Commanders should only spare the Mosque, the School, and the Barry."<sup>483</sup>
262. By virtue of his position as National Coordinator of the CDF and particularly as the key figure of the Kamajors and the driving force behind its decisions, international monitors and negotiators on the ground between 1997 and 2001 were in contact with Norman as the representative voice of the Kamajors.<sup>484</sup>
263. The evidence indicates that the prime leadership and effective control of the CDF was in the hands of Norman as National Coordinator, Fofana as Deputy Director of War, and Kondewa as High Priest. All three accused persons if not members of the War Council had the authority to sit with the War Council when they chose to be present at the deliberations of that body.
264. The War Council provided advice to Norman, which he could accept or reject. The War Council discussed political and military issues. including military operations, welfare

<sup>478</sup> TF2-008, Transcript 16 November 2004, pp. 88-90.

<sup>479</sup> Accused Sam Hinga Norman, Transcript 6 February 2006, p.108 (line 8).

<sup>480</sup> Ibid, p. 42.

<sup>481</sup> TF2-222, Transcript 17 February 2005, p. 110.

<sup>482</sup> Ibid, p. 79.

<sup>483</sup> Ibid.

<sup>484</sup> Exhibit P109: Unicef Monthly Report, 31 July 1999.



and discipline of the Kamajors. The War Council did not consist of persons with military training.

265. Witness TF2-005 gave evidence that it was the duty of the National Coordinator, Director of War and his Deputy, Director of Operations and his Deputy, and the High Priest to plan how the war was fought, which included the planning and ordering of the Black December operation. The commanders who carried out this operation were under the direct orders of Norman.<sup>485</sup>
266. Reports on how the war was being fought were submitted to the War Council. This body was gradually marginalized in terms of the real planning and was sidelined by Norman in March 1998. Indeed, prior to that time it had no effective control over the Kamajors or other groups within the umbrella of the CDF.
267. It was at Base Zero that the First Accused planned, coordinated, directed, trained and commanded the attacks on Tongo, Bo, Koribundo and Kenema.<sup>486</sup> Witness TF2-005 gave evidence of the First Accused was present in a meeting at Base Zero, together with Moinina Fofana, Allieu Kondewa, Musa Junisa, Abu Konuwa and Vandi Songo where plans for the Tongo attack were discussed. In that Meeting, the First Accused was reported to have said “whoever takes Tongo and keeps it wins the war...and therefore Tongo should be taken at all costs.”<sup>487</sup>
268. The witness further testified that the First Accused ordered Fofana to dish out the ammunition.<sup>488</sup> Another witness who was present at a meeting when the planning for the attack on Tongo was discussed described how Norman had convened the meeting, and was present together with Fofana, Kondewa, some members of the War Council and some commanders. Norman wrote out the requirements for the commanders who were to go to Tongo and supplies were provided to the commanders.<sup>489</sup>
269. Witness TF2-201 testified that he was present at a planning meeting together with First Accused, Moinina Fofana and Allieu Kondewa, the chairman of the War Council and many others of the Council. Norman said that they had to go for an all-round attack on

<sup>485</sup> TF2-005, Transcript 15 February 2005, Closed Session, p. 102.

<sup>486</sup> TF2-005, TF2-008, TF2-011, TF2-014, TF2-079, TF2-082, TF2-190, TF2-201, TF2-222

<sup>487</sup> TF2-005, Transcript 15 February 2005, Closed Session, p. 106 (line 12).

<sup>488</sup> Ibid, (lines 24-25).

<sup>489</sup> TF2-201, Transcript 4 November 2004, Closed Session, pp. 106-107.

Bo and Kenema together, and they would have to join ECOMOG.<sup>490</sup> The witness was told by Norman to go to Kenema and set up a Kamajor Base.<sup>491</sup>

270. The evidence establishes that there was an agreement between the three accused and subordinate members of the Kamajors to use any means necessary, including the terrorization of the civilian population through killings, serious physical and mental injury, collective punishment and pillage, to meet the objective of eliminating the RUF/AFRC and its supporters and sympathizers. The plan included the use of child soldiers. The evidence shows that the National Coordinator, Director of War and the High Priest were at the centre of the implementation of Kamajor plans.<sup>492</sup> The three accused utilised the CDF structure to achieve the strategic objectives of the CDF, in particular the Kamajors, in holding meetings and planning military operations with subordinates from Base Zero. Norman gave orders to subordinates that were carried out, and he received reports from subordinates about the execution of these orders.<sup>493</sup>
271. The objectives of what was portrayed as a defensive policy and strategy could only be realised through the commission of war crimes and attacks against civilians amounting to crimes against humanity. This is evident from the widespread nature of the campaign of terror and the manner in which it was directed from Base Zero and organized from district to district.
272. When the evidence is looked at in its entirety, the control of the organisation becomes apparent. No one within the CDF had authority over Norman; that is admitted by Norman. Norman needed positive assistance in running the CDF and that assistance was provided by Fofana and Kondewa. Further, as the evidence discloses, Norman would give an order, such as to how the Kamajors were to deal with Koribundo, and the people of that township describe the effect of that order as do the Kamajors who carried out the orders. Then Norman arrives to confirm his orders.
273. It must be noted that when Norman gave orders, as described in the testimony of many witnesses, he was not giving orders to sophisticated, highly trained soldiers. He was giving orders to hunters and villages who accepted orders in a literal sense. Their loyalty

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<sup>490</sup> TF2-201, Transcript 5 November 2004, Closed Session, p. 43.

<sup>491</sup> Ibid, p. 56.

<sup>492</sup> TF2-008, Transcript 16 November 2004, p. 82.

<sup>493</sup> TF2-014, TF2-017, TF2-079, TF2-223

and obedience was obtained and secured through the efforts of Kondewa and supported and enforced by Fofana.

274. Witness TF2-222 gave evidence that Norman addressed a passing out parade of Kamajor fighters, in the presence of Fofana and Kondewa, in which he stated that no Junta Forces or their collaborators must be spared in Tongo, since Tongo determines who wins the war.<sup>494</sup> Witness TF2-008 gave evidence that Norman, Fofana and Kondewa were seen as being at the centre of administering the affairs of the Kamajors and because of this, the Kamajors relied on these three men.<sup>495</sup>

## ***B. Norman's Personal Liability Under Art. 6.1***

### **1. Counts 1 and 2: Unlawful Killings**

#### ***a) Tongo Field***

275. The evidence indicates that the First Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of the unlawful killings as charged. The experiences related by the witnesses were consistent with the evidence given by TF2-005; that is, the orders issued in respect of Tongo were carried out by the Kamajors to the detriment of the people in Tongo.
276. At the meeting to plan Tongo, Norman, Fofana and Kondewa and Junisa, Knouwa and Songo were present. Everyone contributed including Fofana and Kondewa. Norman said, at the meeting, "anybody found walking with the junta there or mining for them should not be spared."<sup>496</sup>
277. It must be observed, as mentioned elsewhere, that Norman and his co-accused understood their subordinates. All three men came from Sierra Leone, from villages in the country and it is submitted had the knowledge and experience to appreciate the level of understanding of the Kamajors to the orders given and their capacity to carry out such orders. For example, specific instructions were given by Norman regarding the Tongo attack. He told the men after they had been trained that the attack on Tongo would determine who the winner or the loser of the war would be and that they should be

<sup>494</sup> TF2-222, Transcript 17 February 2005, p. 110.

<sup>495</sup> TF2-008, Transcript 16 November 2004, p. 51.

<sup>496</sup> TF2-005, Transcript 15 February 2005, pp. 106 (lines 18-20).

ready. He told them to bear in mind that when they went to Tongo there is no place to keep captured persons or war prisoners like the juntas, let alone their collaborators.<sup>497</sup>

278. As witness TF2-222 articulated, "Giving such a command to a group that was 95 percent illiterate who had been wronged is like telling them an eye for an eye, go in there for that reason. So I look at the command to be a bit not too comfortable to be given by a commander to your men for that means you were not going to even spare the vulnerables."<sup>498</sup>

279. Evidence of the physical acts of killing, which constitute the actus reus for the offence of unlawful killings for the Tongo crime base, is contained in the testimonies of witnesses TF2-013, TF2-015, TF2-016, TF2-022, TF2-027, TF2-035, TF2-047, TF2-048, and TF2-144. For example, Witness TF2-047 gave evidence that a Kamajor commander called Kamabote said to him, "you are the sanitary officer. I know you. To-day you are going to bury a lot of corpses until you become tired."<sup>499</sup> The witness saw people being killed by the Kamajors and Kamabote told him to get a wheelbarrow and bury the corpses in a pit. Bodies were lying in the compound. The witness observed that some of them had their heads chopped off, and he never saw their heads.<sup>500</sup> 150 corpses were buried.<sup>501</sup>

280. A woman called Fatmata Kamara was chopped to death with machete by Kamabote, for allegedly cooking for the Junta Forces. "I had three corpses in the wheelbarrow, which I went to bury. So when I came...he has struck her dead." The same witness buried 150 corpses.<sup>502</sup> He buried 25 junta corpses burnt with tyres at Olumatic.<sup>503</sup> Another witness, TF2-015 stated that, "Some men were fired in amongst the people in the lines as we were going (to Bumie)." The Kamajors killed them. "They would look at you as you're in the line. They will just call you and kill you. They fired at them."<sup>504</sup>

281. The planning for the Tongo attack was done through the meetings that the First Accused convened and he supplied arms and ammunition to the commanders.<sup>505</sup> A radio

<sup>497</sup> TF2-222, Transcript 17 February 2005, p. 110.

<sup>498</sup> Ibid, p. 111.

<sup>499</sup> TF2-047, Transcript 22 February 2005, p. 53.

<sup>500</sup> Ibid, p. 58.

<sup>501</sup> Ibid, p. 61.

<sup>502</sup> TF2-047, Transcript 22 February 2005, p. 61.

<sup>503</sup> Ibid, p. 66.

<sup>504</sup> TF2-015, Transcript 11 February 2005, p. 8.

<sup>505</sup> TF2-201, Transcript 4 November 2004, Closed Session, pp. 106-107; TF2-005, Transcript DD February 2005, Closed Session, p. 23.

announcement was made by the First Accused alerting the world and warning civilians about the attack. Situation reports were received by him from the Tongo battlefield.<sup>506</sup> Witness TF2-027 heard the Kamajor operator ask to speak to Chief Hinga Norman and say, 'Chief, chief, we have taken Tongo' or 'held Tongo.'<sup>507</sup>

282. TF2-201 was present at a meeting (at Talia) when the planning of the attack on Tongo was discussed; Norman had convened the meeting. Present were Norman, Fofana, Kondewa, some members of the War Council and some commanders.<sup>508</sup> Norman wrote out the requirements of the commanders who were to go to Tongo. The supplies were provided (ammunition, food and herbs, RPG bombs, 60 millimetre bombs, AK47 and shotgun cartridges, money) to the commanders. The witness said that Kondewa prepared herbs to make the Kamajors bullet-proof.<sup>509</sup>

283. The evidence indicates that Norman intended to kill or inflict grievous bodily harm on civilians in Tongo in reckless disregard for human life.<sup>510</sup> Witness TF2-222 stated that the First Accused said, on the air, that people who did not move away from the strongholds of the junta, "be prepared to suffer any consequence that would meet them...you decided to stay in Sierra Leone you'll be looked upon as a collaborator or an effective participant of the junta rule."<sup>511</sup>

284. Witness TF2-079 testified that on the return of Kamajors from Gendema, Norman sent a message that "all those chiefs who are not in favour of the Kamajors should be killed."<sup>512</sup> He also sent a message "that civilian collaborators, those who are sympathizing with the AFRC/RUF rebel should also be killed. And the paramount chiefs who are not in favour of the Kamajors should also be killed."<sup>513</sup> The witness added that the paramount chief of Dama Chiefdom, Chief Dassama, was killed by Kamajors following the First Accused's orders.<sup>514</sup>

<sup>506</sup> TF2-201. Transcript 4 November 2004, Closed Session, pp. 106-107; TF2-222 Transcript 17 February 2005, p. 122.

<sup>507</sup> TF2-027, Transcript 18 February 2005, pp. 97-99.

<sup>508</sup> TF2-201, Transcript 4 November 2004, p. 106.

<sup>509</sup> TF2-201, Transcript 4 November 2004, p. 107.

<sup>510</sup> TF2-005, TF2-079, TF2-201, TF2-222

<sup>511</sup> TF2-222, Transcript 17 February 2005, p. 105.

<sup>512</sup> TF2-079, Transcript 26 May 2005, p. 20.

<sup>513</sup> Ibid.

<sup>514</sup> TF2-079, Transcript 26 May 2005, p.23.

285. The Prosecution maintains that in the course of the pursuit of that military objective (legitimate or otherwise), and, notably, after its fulfillment, crimes against humanity were committed, particularly unlawful killings.<sup>515</sup> The Prosecution maintains that where the First Accused (National Coordinator) of the Kamajor militia, with its membership largely illiterate<sup>516</sup> provides logistical support, coupled with instructions not to spare AFRC, RUF and collaborators (persons not necessarily engaged in active hostilities) this clearly amounts to support of unlawful killings which may result from the pursuit of such a command. The First Accused had knowledge of the risk of unlawful killings when he placed in the hands of the Kamajor militia, ammunition for attacking cities, such as Tongo, (a mining town with strong civilian presence) and accepted the consequences of that risk.<sup>517</sup>
286. The Prosecution further maintains that the First Accused had actual knowledge of the unlawful killings by the Kamajors prior to his ordering and providing logistical support for the Tongo attack. Exhibit 86, which is a situation report inclusive of an incident of an unlawful killing, was shown to and read by the First Accused.<sup>518</sup>

#### **b) Kenema**

287. The Prosecution submits that Norman's command position in the context of the conflict and the nature of the orders given are far removed from an administrative position, or a person holding clerical status. Witness TF2-041 testified that Kamajors said to him when he was arrested during the Kenema attack, that they were taking him to the ground commander at Blama, and was then told that Hinga Norman had instructed them to kill the Police, their wives and their children.<sup>519</sup> Under cross-examination, this piece of evidence was not challenged.
288. This evidence is consistent with evidence of police killings in Bo in pursuance of the First Accused's command,<sup>520</sup> and when the evidence is viewed as a whole, it is submitted that the only reasonable inference is that the Accused did give orders for these killings to be committed.

<sup>515</sup> Statute for the Special Court, Art. 2(a) and 3(a) (Counts 1 and 2).

<sup>516</sup> TF2-222, Transcript 17 February 2005, p. 11.

<sup>517</sup> See footnote 10

<sup>518</sup> TF2-079, Transcript 26 May 2005, pp. 27-36.

<sup>519</sup> TF2-041, Transcript 24 September 2004, p. 23.

<sup>520</sup> TF2-001, TF2-014

289. Witness TF2-014 gave evidence that at Base Zero, general and specific orders came from the First Accused. "It's from him that all directives emanated."<sup>521</sup> Orders were distributed to the Kamajors.<sup>522</sup> In these general orders, the First Accused was said to have identified who were the enemies of the Kamajors – "All AFRC fighters were our enemies, and collaborators and sympathizers who were also enemies."<sup>523</sup> There is also evidence that the First Accused said that the enemies included "sympathizers, collaborators, and those who refused deliberately to leave the AFRC and RUF zones, those were our enemies and that we should kill them, no problem".<sup>524</sup> There is evidence that Norman said that the police officers who used to work under the AFRC junta, they were all to be killed.<sup>525</sup>
290. There is evidence of Kamajors carrying out their orders in Kenema. For example, Witness TF2-223 described the shooting of Mohammed Tarawalie, a diamond merchant. A woman pointed out Tarawalie as someone who bought diamonds from the junta; he ran away but was caught by a Kamajor and was shot.<sup>526</sup> Other incidents included when a soldier by the name of Barbor Pain ran away. Witness TF2-223 went to his house and searched it and looted property. The soldier's brother, Alusine, was found and he was taken outside, beaten and shot.<sup>527</sup> His father came out of hiding, asking that his son not be shot. He too was shot. Both bodies were burnt, as there was no place to bury them.<sup>528</sup>
291. Many other witnesses testified as to the acts of the Kamajors in killing civilians. Such acts could only have occurred, in view of their widespread nature, without any attempt of concealment, without, at the least, being condoned by the three accused men. As another example, witness TF2-021 described capturing collaborators and tying them with FM rope; they were then taken to the Yamorto; they were taken there to be eaten.

<sup>521</sup> TF2-014, Transcript 10 March 2005, p. 35.

<sup>522</sup> TF2-014, Transcript 10 March 2005, p. 35.

<sup>523</sup> TF2-014, Transcript 10 March 2005, p. 37.

<sup>524</sup> TF2-014, Transcript 10 March 2005, p. 37.

<sup>525</sup> TF2-014, Transcript 10 March 2005, p. 76.

<sup>526</sup> TF2-223, Transcript 28 September 2004, Closed Session, pp. 71-73.

<sup>527</sup> TF2-223, Transcript 28 September 2004, Closed Session, p. 75.

<sup>528</sup> TF2-223, Transcript 28 September 2004, Closed Session, pp. 75-77.

292. The person would be choked with a bayonet, “then he will die. ‘When he die, then the heart, the liver, and other parts in his stomach we remove and the legs. Then the head, we find a stick and put it on it.’”<sup>529</sup>

**c) Bo District**

293. The following evidence, as examples, establishes the elements for direct responsibility and also supports the allegation of superior responsibility. According to TF2-201 the planning for the attack on Bo and Kenema was done at Talia when Norman came from Liberia; Norman called the meeting. Present at the meeting were Norman, Fofana and Kondewa, the chairman of the War Council and other members of the Council.<sup>530</sup>

294. The Prosecution submits that there is evidence to conclude that unlawful killings occurred in pursuance of the orders of the Accused.<sup>531</sup> Witness TF2-014 stated that Norman ordered him to destroy life and property. He instructed the witness to “kill PC Veronica Bagni of Valunia Chiefdom, the home town of—chiefdom of Chief Hinga Norman, because ‘that woman was against our movement.’”<sup>532</sup> Norman said that the witness should kill Joe Kpundoh Boima III, Paramount chief of Bo Kakua. He should also kill Tuma Alias, chairlady of Bo Town council, because she used to collect the market dues, therefore she was a collaborator. The witness was also instructed to kill Lansana Koroma who was there as Provincial Secretary.<sup>533</sup>

295. Witness TF2-014 further testified that as Director of Operations, he was ordered by the First Accused to kill every living thing and destroy all properties at Koribundo. The witness gave evidence that Norman labeled residents of Koribundo as spies and collaborators and that the witness should ensure that no one should be left alive and houses should be burnt. Petrol was given for that operation.<sup>534</sup> The witness was given further instructions by the First Accused to kill any soldier who had surrendered. The witness sent a message to Norman regarding a plea made to spare a surrendered soldier.

<sup>529</sup> TF2-021, Transcript 2 November 2004, p. 76.

<sup>530</sup> TF2-201, Transcript 5 November 2006, Closed Session, pp. 41-42

<sup>531</sup> TF2-012, TF2-032, TF2-157, TF2-159, TF2-162 and TF2-198

<sup>532</sup> TF2-014, Transcript 10 March 2005, pp. 71-72.

<sup>533</sup> TF2-014, Transcript 10 March 2005, pp. 71-72.

<sup>534</sup> TF2-014, Transcript 10 March 2005, p. 78.



Norman sent four Kamajors to kill the surrendered soldier in response. The surrendered soldier's head was cut off.<sup>535</sup>

296. Witness TF2-008 testified that at a meeting at Base Zero, Norman instructed the commanders present, that when they proceeded to attack Koribundo, they should not leave any living thing and should burn down houses if there was resistance. Commanders were told only to spare the mosque, the school, and the barry.<sup>536</sup> The witness also gave evidence that in the middle of 1998, a meeting was convened in Bo Town Hall wherein some senior members of the CDF were present including Moinina Fofana, in which Hinga Norman made a declaration to the effect that "I am personally responsible for the excesses and atrocities of the Kamajors."<sup>537</sup> Norman could not have made his position and power any clearer; other evidence supports Norman statement.
297. Witness TF2-082 testified that he was the Commander appointed by the Accused to lead the attack on Koribundo.<sup>538</sup> Exhibit 10 of the Court Records is a Letter of Appointment signed by the Accused dated February 20, 1998, appointing the witness as Battalion Commander for the Five Chiefdoms.<sup>539</sup> Norman also ordered them to kill any rebels they captured.<sup>540</sup> At the Court Barri in Koribundo, the Accused told the people not to curse the Kamajors but to curse him, because he was the one who sent the Kamajors.<sup>541</sup> Under cross-examination, the witness confirmed that Norman gave him instructions to attack Koribundo and burn and kill everything there.<sup>542</sup>
298. The Prosecution submits that it is inconceivable that issuing direct orders to kill and burn, and target the civilian population of Koribundo, could be viewed as an administrative act. The evidence shows orders given by the Accused, the execution of those orders and the acceptance of responsibility for the outcome by the Accused himself.
299. Witness TF2-017 gave evidence that he was directed by the Accused to attack Kebi town, Bo, and he led a group of 38 Kapras and 270 Kamajors and launched an attack on

<sup>535</sup> TF2-014, Transcript 10 March 2005, pp. 85-86.

<sup>536</sup> TF2-008, Transcript 16 November 2004, p. 79.

<sup>537</sup> TF2-008, Transcript 16 November 2004, pp. 116-117.

<sup>538</sup> TF2-082, Transcript 15 September 2004, Closed Session, p. 7.

<sup>539</sup> TF2-082, Transcript 15 September 2004, Closed Session, p. 60.

<sup>540</sup> TF2-082, Transcript 15 September 2004, Closed Session, p. 39.

<sup>541</sup> TF2-082, Transcript 15 September 2004, Closed Session, p. 50.

<sup>542</sup> TF2-082, Transcript 15 September 2004, Closed Session, pp. 92-93.

the town, killing soldiers.<sup>543</sup> Witness TF2-007 testified that in 1998, he was arrested in the bush by Kamajors who took him to town where he witnessed the killing of his father.<sup>544</sup> Exhibit 37 is the document with the name of witness' town (Fengehun).<sup>545</sup> Witness TF2-088 testified that in April 1999, at a Kamajor checkpoint he saw a letter, which said that his son was to be killed immediately for his ash to be used in last initiation in Mongeray (Mongere) town in Hinga Norman's compound. The letter was addressed to a number of checkpoint commanders. On the 24<sup>th</sup> April 1999 the body was burned by Kamajors.<sup>546</sup>

300. Perhaps the most persuasive evidence establishing the culpability of the three accused men is to be found in the testimony relating to the killing of unarmed Police officers. Such killings could only have taken place with the approval of the three accused; even if they did not know the specifics of the killings it is not possible they did not become aware of such killings. The evidence clearly establishes that the Police officers were killed whilst unarmed; indeed only the SSD contingents of the Police were armed during the conflict. The Police were killed on the orders of Norman, supported by Fofana and Kondewa.

#### **d) Moyamba District**

301. Witnesses TF2-014, TF2-073, TF2-165, TF2-166, TF2-167, TF2-168, TF2-173 gave evidence of unlawful killings that occurred at the Moyamba crime base, carried out by the CDF under the leadership, direction and control of Norman.
302. Witness TF2-017 gave evidence that during the Black December operation, the witness was given orders by Norman to block the Bo-Moyamba highway. Norman gave the witness instructions that if he was at the highway and saw a vehicle with civilians and they refused to stop, he should fire at them, and that if he finished attacking a vehicle that was loaded with civilians and the civilians resisted, he should also fire at them.<sup>547</sup>
303. Witness TF2-014 testified that he told Norman and Fofana about the killing of the Chiefdom speaker of Ribbi Chiefdom, by Kamajor commander Abu Bawote. Norman

<sup>543</sup> TF2-017, Transcript 19 November 2004, Closed Session, p. 97.

<sup>544</sup> TF2-007, Transcript 2 December 2004, pp. 57-58.

<sup>545</sup> Exhibit P37: Place of Birth and Place of Residence of the Witness, 2 December 2004.

<sup>546</sup> TF2-088, Transcript 26 November 2004, pp. 49-50.

<sup>547</sup> TF2-017, Transcript 19 November 2004, Closed Session, pp. 82-84.

replied that since the speaker was a collaborator he got what he deserved.<sup>548</sup> The witness further gave evidence that he was sent by Moinina Fofana to investigate alleged killing, looting and burning of houses by Kamajors in Moyamba, but the mission was frustrated by the intervention of Hinga Norman. The witness reiterated that Hinga Norman released all the Kamajors implicated in the alleged excesses.<sup>549</sup>

304. Witness TF2-014 testified that he received direct orders from Norman. He also conveyed arms and ammunition to Kamajors at the battlefield. The witness then submitted reports from the battlefield to Moinina Fofana for the attention of Norman.<sup>550</sup>

**e) Bonthe**

305. Witnesses TF2-014, TF2-016, TF2-071, TF2-086, TF2-096, TF2-108, TF2-109, TF2-133, TF2-147, TF2-187, TF2-188, TF2-189 gave evidence of unlawful killings that occurred at the Bonthe crime base carried out by the CDF under the leadership, direction and control of Norman.
306. Witness TF2-014 testified that he knew Mustapha Fallon who was executed in the Poro Bush at Talia, in the presence of Hinga Norman, Moinina Fofana, Allieu Kondewa and others. Mustapha Fallon who was also a Kamajor was killed because Allieu Kondewa wanted human sacrifice in order to guarantee the protection of the fighters. The brother of Mustapha Fallon pleaded for his life with Norman but to no avail. Hinga Norman gave three hundred thousand Leones to the deceased brothers appealing to them not to tell anyone what transpired.<sup>551</sup>
307. Witness TF2-014 gave further testimony about the direct commission of murder in his presence by the First Accused. Defence cross-examination was unable to undermine or dispute the occurrence. In his testimony, the witness said that he knew Alpha Dauda Kanu, a Kapra. He was killed in a palm oil plantation when going towards Mokusi. Kanu was killed by Dr Allieu Kondewa, Hinga Norman and Moinina Fofana. "He was hacked to death, and we took off his skin." The witness was present. Some of Kanu's body parts were taken and "[t]hey said that they are going to prepare a garment and a walking stick

<sup>548</sup> TF2-017, Transcript 19 November 2004, Closed Session, p. 57.

<sup>549</sup> TF2-017, Transcript 19 November 2004, Closed Session, pp. 58-59.

<sup>550</sup> TF2-017, Transcript 19 November 2004, Closed Session, p. 86.

<sup>551</sup> TF2-017, Transcript 19 November 2004, Closed Session, p. 86.

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for Chief Hinga Norman and a fan, which is called a “controller”, so as to use those things in order to become very powerful.”<sup>552</sup>

308. Witness TF2-017 testified that in December 1997, the witness went with 40 Kapras to Base Zero. On the second day of training one of the Kapras was missing. The witness searched and found a corpse (Dauda Alpha Kanu) near a palm kernel plantation where he met Kondewa, two herbalists and four Kamajors guarding the place. Kondewa said to him that if he had any questions they should be directed towards Norman. The witness went with Norman back to the corpse. Norman pointed at the corpse and said, “The person that is lying down there, this is one of the things you should do for the war to come to an end.” Norman pointed to the corpse and said, “that corpse that is lying down there, they will remove some parts from it, which the Karamokohs would use to make some concoctions and herbs when he wears that particular shirt so that he will become powerful.”<sup>553</sup>
309. Witness TF2-071 gave evidence that the Chief of Mobayei (Mobayeh) Keinechawa, told him that Kamajors led by one Momoh Sitta had attacked the town of Mobayei and killed an old woman, Musu Fai and a pregnant woman, Jebbeh Kpaka who were unable to escape.<sup>554</sup> Witness TF2-109 testified that saw the killing of Lahai Lebbie, Baggie, Ngor Jusu. They were killed near Makosi (Makose), on the way to Talia. Lahai Lebbie was killed by the Kamajors-he was tied up and a tire was used to burn him.<sup>555</sup>
310. The Prosecution has presented detailed evidence of the composition and structure of the CDF.<sup>556</sup> Even the Defence through cross-examination had confirmed the nexus between the CDF and the Kamajor militia, and how the movement had undergone systemic changes over the years. Thus, the Prosecution submits that it is clear that the issue is the criminal responsibility of Norman and his co-accused, as the key superiors who held most of the power of the CDF in their hands.

<sup>552</sup> TF2-014, Transcript 10 March 2005, p. 55.

<sup>553</sup> TF2-017, Transcript 19 November 2004, Closed Session, pp. 58-77.

<sup>554</sup> TF2-071, Transcript 11 November 2004, p. 70.

<sup>555</sup> TF2-109, Transcript 30 May 2005, p. 34.

<sup>556</sup> TF2-005, TF2-008, TF2-014, TF2-017, TF2-068, TF2-079, TF2-190, TF2-201, TF2-222

## 2. Counts 3-4: Physical Violence and Mental Suffering

311. The Prosecution submits that evidence has been presented from many witnesses who made specific mention of the First Accused in relation to the offences charged under Counts 3 and 4, in particular, witnesses TF2-005, TF2-014, TF2-017, TF2-079, TF2-222. These witnesses gave evidence of direct orders from the First Accused for the attack on civilian collaborators of the AFRC/RUF.
312. There is clear, unambiguous and unchallenged evidence before the Court from Prosecution witnesses who indicate that the First Accused gave orders directly to subordinates for various attacks on locations across the Southern and Eastern Provinces, and that he specifically ordered subordinates to kill captured AFRC/RUF combatants, their agents, friends, families and sympathisers, otherwise known as “collaborators.” These orders to kill captured enemy combatants and civilians carry with them the requisite mental element for the infliction of serious bodily harm and physical suffering on victims who survived the assaults. The testimonies of Witnesses TF2-005, TF2-014, TF2-017, TF2-079, TF2-222, TF2-223, referred to earlier apply.
313. The evidence of any physical violence or mental suffering in Kamboma emanates from the unchallenged evidence of witness TF2-015 about killings in Kamboma. The witness (the 65<sup>th</sup> victim) was the only survivor. The witness testified that he still bears visible scars of the machete blows he received during that attack, which he showed to the court.<sup>557</sup>
314. Many other witnesses described how they suffered at the hands of the Kamajors and the evidence indicates the widespread nature of the attacks. Witness TF2-006 testified to inhumane acts when he said that during the Bo attack, Kamajors used a cutlass to amputate his fingers. The Court observed that four out of the five fingers were amputated.<sup>558</sup> Witness TF2-007 gave evidence that at Fengehun, he saw Kamajors tie his father with a rope and part of his right ear was cut.<sup>559</sup> Witness TF2-041 gave evidence that Kamajors during the Kenema attack put a knife to his neck and stabbed him all over. They left him believing he was dead.<sup>560</sup> Witness TF2-073 stated that as the

<sup>557</sup> TF2-015, Transcript 11 February 2005, p. 16.

<sup>558</sup> TF2-006, Transcript 9 February 2005, pp. 11-12.

<sup>559</sup> TF2-007, Transcript 2 December 2004, p. 51.

<sup>560</sup> TF2-041, Transcript 24 September 2004, pp. 27, 30-31.

Kamajors intensified their looting spree around the towns and villages surrounding Moyamba, his brother-in-Law was beaten severely by Kamajors and he later died as a result.<sup>561</sup> TF2-157 gave evidence that on a Sunday, during the Kamajor attack, he saw a lot of people mutilate two persons, 'mutilating them, individually and sequentially.' Those persons had cutlasses, dressed in Kamajor clothing. The persons killed were Sarah Binkolo and Sarah Lamina.<sup>562</sup>

### 3. Count 5: Looting and Burning

315. The Prosecution submits that there is evidence that Norman is criminally responsible by way of orders and instigating, and the expressed intention for looting and burning. The requisite elements for establishing the superior responsibility of Norman for the acts of the Kamajors will be set out at the end of the section. It was not contested that there were a number of lootings and burnings in the evidence within the relevant period in the Indictment.
316. While witnesses TF2-001, TF2-144, TF2-152 and TF2-154 do not mention Norman expressly, they all made statements of lootings and burnings in their townships, caused by Kamajors – the physical perpetrators - and therefore described the crime base for which the First Accused is responsible under one or more of the relevant modes of participation.
317. The Prosecution submits that there is evidence of a direct nexus between the acts of the First Accused and the offences as charged. Witness TF2-005 gave evidence that the First Accused ordered an attack on Tongo which would determine the winner of the war.<sup>563</sup> At this time the Accused authorized and ordered the commandeering of properties.<sup>564</sup> Direct criminal responsibility for looting and burning for the Bo crime base were made manifest in the testimonies of several witnesses.<sup>565</sup> In Koribuno, at least two meetings were held by the First Accused where he admonished the Kamajors for not

<sup>561</sup> TF2-073, Transcript 2 March 2005, pp. 38-39.

<sup>562</sup> TF2-157, Transcript 16 June 2004, p. 15.

<sup>563</sup> TF2-005, Transcript 17 February 2005, Closed Session, p. 110.

<sup>564</sup> TF2-014, Transcript 10 March 2005, p. 66 (lines 4-6), where witness stated, "[w]e got the Honda from the Jiamia Bongor Chiefdom from Africare. We commandeer it and took it from there, from the NGOs. That was done on an order."

<sup>565</sup> These are about Bo, not Koribundo. TF2-198, Transcript 15 June 2004, pp. 37-38; TF2-157, Transcript 16 June 2004, pp. 20-22.

having burnt down the entire village of Moribund, except three specific premises. He took full responsibility for their actions.<sup>566</sup>

318. The hand of command of the First Accused was apparent in the evidence that Norman gave direct orders to burn down houses and loot big shops and pharmacies in Bo.<sup>567</sup> There is evidence that the First Accused said at a parade in Bo, that the Kamajors deceived him as he was told they had burnt down the barracks, but now there were still barracks left.<sup>568</sup> There is evidence that Norman encouraged the Kamajors by releasing them after they had been apprehended for alleged killings, lootings and burnings of houses.<sup>569</sup>
319. Witness TF2-032 clearly testified that he attended a meeting in the Court Barry, Koribundo, where the Accused said, *inter alia*, “and if they were to spare anything, it could be the mosque, the barri and that house at the junction, but they did not do that.”<sup>570</sup>
320. The Prosecution submits that there is evidence that TF2-012, TF2-157, TF2-159, TF2-162 and TF2-198 attended a meeting called by the Accused where he accepted responsibility for the atrocities the Kamajors wreaked on the civilian population of Koribundo. The meeting was not convened in order to attend to administrative matters of Koribundo or the welfare of the residents, but rather to showcase a stamp of conquest and ensure the dominance of the Kamajors over the civilian population of Koribundo.
321. The evidence shows that witness TF2-082, a commander in charge of the attack, stopped some attacks and passed a law that “[w]hosoever burnt this place just because Pa Norman has said we should burn this place; that whosoever burnt this place or loot anything, I will capture you and deal with you.”<sup>571</sup> The witness also stated that not all commanders followed his “new orders”<sup>572</sup> which clearly indicates that the First Accused’s effective control was still intact. The fact that a commander in charge

<sup>566</sup> TF2-157, TF2-159, TF2-032, TF2-162

<sup>567</sup> TF2-017, Transcript 19 November 2004, Closed Session, p. 94; see also TF2-014, Transcript 10 March 2005, pp. 70-71, where witness relates First Accused saying: “[w]hen you go down to Bo the southern pharmacy should be looted and bring all the medicines to me.”

<sup>568</sup> TF2-001, Transcript 14 February 2005, p. 99.

<sup>569</sup> See Evidence given by TF2-014, Transcript 10 March 2005, p. 64; TF2-021, Transcript 2 November 2004, p. 105, where witness insisted no punishment was meted out to him or other Kamajors for looting homes and killing civilians.

<sup>570</sup> TF2-032, Transcript 13 September 2004, p. 62.

<sup>571</sup> TF2-082, Transcript 15 September 04, Closed Session, pp. 34-36.

<sup>572</sup> TF2-082, Transcript 15 September 04, Closed Session, p. 35.

suddenly backslides during a specific military operation, does not imply automatically the lack of command responsibility in respect of the Accused.

**4. Counts 6-7: Terrorizing the Civilian Population and Collective Punishments**

322. The Prosecution submits that the evidence indicates that the First Accused planned, instigated or otherwise aided and abetted in the planning, preparation, or execution of terrorizing and collectively punishing the civilian population. Evidence from insider witnesses such as TF2-005, TF2-008, TF2-014, TF2-079, TF2-082, TF2-190, TF2-201, and TF2-222 substantiated the Prosecution submission of individual criminal responsibility with regards to the offences as charged in the Indictment.
323. Evidence of physical acts of terrorizing the civilian population and collective punishment through means of violent threat of intimidation, physical violence, mental suffering and looting was presented through the testimony of witnesses TF2-014, TF2-022, TF2-033, TF2-039, TF2-040, TF2-041, TF2-079, TF2-151, TF2-154, TF2-159, and TF2-176.
324. In his testimony, TF2-022 gave evidence that while in an open field at the NDMC headquarters, the Kamajors had people in line. There were 20 people who the Kamajors said were captured SLA soldiers and four women who were the wives of soldiers. The witness knew one of the soldiers as Cobra. The Kamajors took these people to an open place, to an area called MP office, "they took them one after another and they hacked all of them." After they were hacked they were all dead.<sup>573</sup> He further testified that the day after the attack, the civilians were told to go to Kenema by the Kamajors. One CO had told them to leave and he left. Then another CO turned up and gave the order that they should be shot, and so the Kamajors opened fire. The shooting had been random, without aiming, but as there were so many people they were struck by bullets. The firing stopped and the witness saw a Kamajor chop a person who had been hit by a bullet; that person died.<sup>574</sup>
325. Witness TF2-159 testified that on Sunday, during the Kamajor attack on Koribundo, the witness went to the Koribundo junction, where he saw the Kamajors with five Limba

<sup>573</sup> TF2-022, Transcript 11 February 2005, pp. 51-53.

<sup>574</sup> TF2-022, Transcript 11 February 2005, p. 57.



people. The witness knew them as they used to sell palm wine. They were Sofiana, Sarrah, Momoh, Kamara and Karoma. The Kamajors said the five persons were junta; they were cut into pieces and some were shot with guns. Two were killed with guns and 3 with cutlasses. Sarrah and Momoh had their heads cut off.<sup>575</sup> On the following Monday, he went to Koribundo again, from his hiding place in the bush, to go to the Kamajor HQ, to see Joe Timedie. At HQ he saw Kamajors singing, as they had captured 8 people. There were 5 men and 3 women; witness knew the women as the wives of soldiers – Amie, Jainaba and Esther. “They were singing on them, they were taking them to be killed.” Witness followed the Kamajors along Blama Road; they were beating them and mutilating them and telling them they were going to be killed. Two of the women were killed by a stick (“right through them”) and one by a gun (and by a cutlass, her head was cut off). The men, four were killed by a gun and one man by a cutlass to his neck. He saw them disembowel the women and place the entrails in a bucket. Their entrails were turned into a checkpoint.<sup>576</sup>

326. Witness TF2-033 gave evidence that Jambawai, a Kamajor leader was chief coordinating officer. Jambawai said that the reason Kamajors were killing Police was “you were in the bush fighting (for) the RUF”. Witness was told that there had been spies taking their names.<sup>577</sup> On the 15<sup>th</sup> February 1998 the Kamajors came into town, down the street, Hangha Road. They were armed with guns, knives and cutlasses. The witness went to his barracks and he saw Sgt. Mason running, being chased by two Kamajors, armed with a gun and cutlass. The witness was about 30 metres away when he saw Mason shot and when he was on the ground and the other Kamajor chopped his hand and head.<sup>578</sup> He further testified that from the veranda of a friend’s house, the witness saw Corporal Fandai going to his home, with a bible. Two Kamajors approached him and told him they wanted to kill him. Fandai asked to pray and when he said ‘Lord if it is thy will, let it be done’, he was shot three times.<sup>579</sup>

327. Witness TF2-079 testified that, on the return of Kamajors from Gendema, Norman sent a message that “all those chiefs who are not in favour of the Kamajors should be killed.”

<sup>575</sup> TF2-159, Transcript 9 September 2004, p. 32.

<sup>576</sup> TF2-159, Transcript 9 September 2004, pp. 33-38.

<sup>577</sup> TF2-033, Transcript 20 September 2004, p. 30.

<sup>578</sup> TF2-033, Transcript 20 September 2004, p. 12.

<sup>579</sup> TF2-033, Transcript 20 September 2004, p. 14 (lines 21-23).

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Norman also sent a message “that civilian collaborators, those who are sympathising with the AFRC/RUF rebel should also be killed. And the paramount chiefs who are not in favour of the Kamajors should also be killed.”<sup>579</sup> The witness said also, that paramount chief at Dama Chiefdom, Chief Dassama, was killed by Kamajors following Norman’s orders.<sup>580</sup>

328. Witness TF2-187 presented evidence that the Kamajors made preparation for Norman’s visit. Kondewa’s boys captured pregnant women and took them to the court barri. The women were tied up standing. When they heard the sound of the plane, the Kamajors slit the stomach of the women and then the cut off the head of the fetus. That was done one after another. The Kamajors put each of the heads on a separate stick. The three women died. The three sticks with the heads were tied together; when that was done it was like a flag and was placed at the junction to Mattru. When the women were killed at the barri, there were civilians present as well as Kamajors. Bombowai was present. When the pole was planted at the junction, Norman came by helicopter. Norman came out of the helicopter and the witness saw rice, medicine, bullets and arms taken from the helicopter. After the items were taken from the helicopter, the ‘flag’ was taken to the barri and the heads were removed. After the women had been killed, “they smeared the blood on their bodies, on their faces and they took their corpses and buried them in one grave.” The Kamajors then sang a song that they had got their medicine from pregnant women.<sup>581</sup>

### 5. Count 8: Use of Child Soldiers

329. Child soldiers were sourced by the CDF by initiating or enlisting children under the age of 15 years into armed forces or groups and in addition, or in the alternative, using them to participate actively in hostilities.<sup>582</sup> Nonetheless, the Prosecution witnesses TF2-004, TF2-021, TF2-140 gave unchallenged viva voce evidence of coercive recruitment and direct participation in active hostilities. Norman’s modes of liability under this count include aiding and abetting, and instigating. Norman also had direct knowledge of CDF enlistment of children under 15 years and in addition used them to participate actively in

<sup>579</sup> TF2-079, Transcript 26 May 2005, p. 20.

<sup>580</sup> TF2-079, Transcript 26 May 2005, p. 23.

<sup>581</sup> TF2-187, Transcript 2 June 2005, pp. 17-37.

<sup>582</sup> *Prosecutor v. Norman, Fofana, Kondewa*, “Indictment”, March 5, 2004.

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hostilities.<sup>584</sup> Norman, once in possession of such knowledge, failed to take necessary and reasonable measures to prevent the commission of the offence as charged.

330. Witness TF2-014 gave unchallenged evidence that at Base Zero, which was Norman's main base between September 1997 and early March 1998, there were Kamajors as young as six years of age.<sup>585</sup> Witness knew a Kamajor called Junior Spain, who was between twelve to fifteen years old. Kamajors would go to war at an early age, so long as they had been initiated into the Kamajor society.<sup>586</sup>
331. The Prosecution submits that there is evidence that the First Accused had actual knowledge of children engaged in active hostilities by the Kamajors. TF2-021 gave evidence that after fighting he went back to Base Zero. There is evidence that the Accused came to Base Zero to say they should go to Freetown.<sup>587</sup> A few days later the witness went in a helicopter with GA Gobey, which went to Freetown. They disembarked at Cockerill. It was the First Accused' secretary, Moses, who took down their names and gave them guns. They went to Congo Cross where there was heavy firing and then to the Brookfield's Hotel.<sup>588</sup>
332. According to the evidence, in Koribundo, the witness arrived just after the attack. The witness then spoke about going to the first checkpoint at Koribundo, and then onto HQ. He saw houses on fire and corpses of persons who had been beheaded. He was told the corpses were rebels.<sup>589</sup> Kamajor Joe Tamidey had four boys as securities, who were younger than the witness.<sup>590</sup> Whilst at Bo, he met Moinina Fofana, his former commander, and Chief Norman was also there. Witness joined the security.<sup>591</sup> On his return to Freetown, he stayed at 13 Spur Road, with Hinga Norman. There were a number of small boys younger than the witness, one 11 years old being guarded. Witness said, "shortly after we left Guinea, Chief Norman had a decision to say that all small

<sup>584</sup> See Exhibit 104A, 105A, 105C,

<sup>585</sup> TF2-014, Transcript 11 March 2005, p. 15.

<sup>586</sup> TF2-014, Transcript 11 March 2005, p. 16

<sup>587</sup> TF2-021, Transcript 2 November 2004, p. 84.

<sup>588</sup> TF2-021, Transcript 2 November 2004, p. 86.

<sup>589</sup> TF2-021, Transcript 2 November 2004, p. 78.

<sup>590</sup> TF2-021, Transcript 2 November 2004, p. 83.

<sup>591</sup> TF2-021, Transcript 2 November 2004, p. 86.

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boys were exempted from the war and, as such, he was trying to re-organize us in our numbers so that he could hand us over to programs.”<sup>592</sup>

333. Witness TF2-218 testified that he observed a small boy, certainly less than 10 years of age, who was dressed in Kamajor clothes and who was carrying a tall stick. He was informed that the boy was carrying an object known as the commander and that it was the responsibility of this boy to carry this stick in the lead as the Kamajors went into combat. Daru was an active combat zone. The entire barracks could be said to be in preparation for combat. There was some form of drilling taking place. The Kamajors appeared to be fully armed. Adults and the children were being drilled. The witness asked Colonel Abu Bakar why children were being used in combat. He said that the elders like to use them in combat because they obey orders.<sup>593</sup>

334. On the 25th of June 1998, the witness attended a meeting at UNOMSIL headquarters; there were a number of diplomats present, and the First Accused. The Accused reconfirmed his commitment to the demobilization of child soldiers. Then he said a moment after that that, the whole issue would depend on how the war went. If the war went well, children would be disengaged and demobilized, or if the war went badly, that might not be possible.<sup>594</sup>

335. Evidence of use of child soldiers by the CDF was also portrayed in the course of the evidence of witness TF2-EW2. The witness was asked about, at the time of her arrival, what was the estimate of the number of children working with the CDF – that is under the age of 15 years. The witness said that the statistical information that there were 1,000 child soldiers with the CDF. The witness traveled throughout Sierra Leone and saw children under the age of 15 years.<sup>595</sup> In and around the southern area the child soldiers were sometimes armed, sometimes they were not armed. The witness received information from a number of sources about how the CDF recruited child soldiers.<sup>596</sup>

336. Witness TF2-EW2 gave further evidence that according to a table, which formed part of her report tendered as Exhibit 100, 5.2% of the CDF were child soldiers. That is

<sup>592</sup> TF2-021, Transcript 2 November 2004, p. 96.

<sup>593</sup> TF2-218, Transcript 7 June 2004, Closed Session, p. 17.

<sup>594</sup> TF2-218, Transcript 7 June 2004, Closed Session, p. 19.

<sup>595</sup> TF2-EW2, Transcript 16 June 2005, Closed Session, p. 17.

<sup>596</sup> TF2-EW2, Transcript 16 June 2005, Closed Session, p. 18.

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approximately 8,500 CDF soldiers were demobilized in that period.<sup>596</sup> The witness personally verified 50 CDF child soldiers.<sup>597</sup> The witness said that it was her belief initiation was a stepping stone to recruitment as a soldier.<sup>598</sup>

337. It is instructive to note that part of the case for the Prosecution included Exhibit 105A, a UN Report to the UN Secretary General-12 August 1998, in which the CDF were accused of human Rights violations, looting, and confiscation of vehicles.<sup>599</sup> It significantly referred to the CDF Commitment to end recruiting and initiating child soldiers.
338. Exhibit 107, another UN Report, details frequent reports that children were being sent into a combat environment notwithstanding indications from ECOMOG commanders refusing to allow CDF underage children to serve under them.<sup>600</sup>
339. Exhibit 108, a UN Report, detailed the continued widespread recruitment of children in the Southern and Eastern provinces by the CDF, especially in Kenema.<sup>601</sup> This piece of evidence was corroborated by Exhibit 111C which contained the experiences of a Kamajor girl fighter from Kenema. It stated that many children joined the Kamajors with the approval of their parents. In Kenema township where the Kamajors were most active during the war, the burned homes are not the result of rebel activities instead they belong to families that did not contribute a family member to the Kamajors, suspected rebel sympathizers. According to Ramatu T. a girl fighter with the Kamajors, a common practice of the Kamajor males was to enter a village, capture an adult civilian, cut his throat and turn the corpse upside down to drain the blood. The blood will be collected in a bucket. All members of the fighting party including women and girls would then drink the blood so they would not be afraid during the attack.
340. Witness TF2-017 testified that the Second Accused was present at a meeting at Base Zero where Hinga Norman praised the child combatants for doing better on the battle

<sup>596</sup> TF2-EW2, Transcript 16 June 2005, Closed Session, p. 68.

<sup>597</sup> TF2-EW2, Transcript 16 June 2005, Closed Session, p. 82.

<sup>598</sup> TF2-EW2, Transcript 16 June 2005, Closed Session, p. 91.

<sup>599</sup> Exhibit P105A:

<sup>600</sup> Exhibit P 107:

<sup>601</sup> Exhibit P 108: