

complaint was forwarded to the Senior District Officer in Kenema for disrupting a dance and misbehaving to the chiefs. Mr Kallon was investigated and sent to the state prison.³⁸⁰

281. According to Dr. Joe Demby, the government investigated the killing of civilians at the checkpoint, allegedly committed by Kamajors, but that their investigation came to a different conclusion.³⁸¹ Also investigated was information that the CDF killed their captives but the investigation showed that there were detention centres at the Islamic College, Magburaka.³⁸² The witness further testified that reports were made to President Kabbah that Kamajors had seized houses belonging to other people. The President asked that the Minister of Local government and himself to go to Bo and Kenema to investigate and to see that the people got their houses. This was after the return of the government.³⁸³ Also investigated was the allegation that the Kamajors locked up people and burnt them in their houses.³⁸⁴

282. Various witnesses also testified how the War Council at Talia investigated and disciplined Osman Vandi for alleged misconduct.³⁸⁵ TF2-011's testimony that the War Council took decisions to punish Kamajors but they were never followed or carried must be viewed in light of other testimony which suggested that there were instances where the War Council investigated and disciplined the Kamajors.³⁸⁶

283. ECOMOG also investigated and disciplined Kamajors who allegedly committed crimes. In the case of Exhibit 89³⁸⁷, the ECOMOG Commander for Kenema under whom the CDF operated investigated a CDF member.

284. There is equally the case of Exhibit 145 whereby a police officer was investigated by ECOMOG in September 1998, for alleged atrocities committed during

³⁸⁰ Transcript, Arthur Koroma

³⁸¹ Transcript, Dr Demby p.33, Feb. 13 2006

³⁸² Ibid.

³⁸³ Ibid pp.33-34.

³⁸⁴ Ibid p.31.

³⁸⁵ Transcript, Hinga Norman, p.34, Jan 30 2006; Transcript Brima Tarawally, p.53, October 5.

³⁸⁶ Transcript, Brima Tarawally, pp. 53-54, October 5 2006.

³⁸⁷ 20/26 Dec. 1998, entitled 'Handing over of Mr KBK Magona National Task Force Commander Civil Defence Force and the Report of Investigation carried out on his Activities in Kenema'

the junta era. In the above cases the ECOMOG commander put the Vice President on notice by providing some specific information.

285. From the above analysis one can conclude that the Kamajors and the CDF were under the ‘*overall control*’ of the government of Sierra Leone and ECOMOG forces. In *Tadic*, the Appeal Chamber ruled that:

“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct by the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law”.³⁸⁸

Communication with Commanders in the field:

286. The Accused moved to Talia, Base Zero in October 1997 and stayed there until the end of 1998 with intermittent shuttle between Talia, Monrovia and Conakry. The Accused had no satellite communication facility between him and the Kamajor commanders in the field who were working with ECOMOG Commanders.³⁸⁹ The Accused testified that it “took one to know what was going on as long as it took somebody to walk” -- anything between five to seven days.³⁹⁰

287. In his evidence defence expert witness Dr Hoffman, testified that communication capacity did not exist.³⁹¹ Dr. Hoffman further testified that as a general rule, communication was extremely difficult, and it was generally done by individual couriers as there was no functioning phone system in rural communities.³⁹² Communication was extremely difficult to the extent that while at Talia, the First Accused was only made aware that ECOMOG was in Sierra Leone beyond being

³⁸⁸ Tadic Appeal Judgment, July 15, 1999, para 131.

³⁸⁹ Transcript, Hinga Norman, p.2, Jan. 30 2006

³⁹⁰ Transcript, Hinga Norman, p. 107, Feb. 6 2006

³⁹¹ Transcript, Daniel Hoffman, p. 99, October 9 2006

³⁹² Ibid, p.107

based at Lungi through the BBC. There was no radio link between ECOMOG and the First Accused. The First Accused also received information from runners who came from Kenema and Tongo and told him the extent to which ECOMOG had advanced.³⁹³

288. In his evidence, the Prosecution's Military Expert testified that there were very few, if any radios being used, so the communications had to be run by hand. This could either be by motor bike or moped in the areas controlled by the CDF, or on foot through the jungle in other areas.³⁹⁴ However, the expert also testified that communications throughout this period and throughout this region were good and that the high command in Talia understood what was happening on the ground.³⁹⁵ This is inconsistent and implausible. As defence expert witness Dr Hoffman puts it "logistically it wasn't possible. The only mode of communication that had any chance of reaching a broad audience was the BBC's Focus on Africa programme. It's the only outlet to a large number of the Kamajors had simultaneous access".³⁹⁶

289. The Accused testified that a satellite phone was provided for him at Base Zero by President Kabbah to facilitate communication between the Accused and the President and the ECOMOG Chief of Staff in Liberia. Hinga Norman arrived in Talia in September 1997 and the phone arrived in around November 1997³⁹⁷. Hinga Norman said that he communicated with President Kabbah regularly to communicate operations that were going on to reinstate his government and democracy in Sierra Leone. The President stated that his concern was whenever a need arose for logistical support he should be immediately informed.³⁹⁸ There was no satellite communication facility between the Accused and the commanders in the field who were working with ECOMOG commanders and were out of his reach.

290. The Defence is calling upon the Trial Chamber to look at the logistics involved if any, the location of the accused in Talia, the officers and the staff, the tactical tempo of operations and the geographical location of the alleged acts which

³⁹³ Transcript, Hinga Norman, p.98, Feb 6 2006.

³⁹⁴ Transcript, Col Richard Iron, p. 33, June 14, 2005.

³⁹⁵ Ibid, p.35.

³⁹⁶ Transcript, Daniel Hoffman, p.99, Oct.9 2006.

³⁹⁷ Transcript, Hinga Norman, pp. 25-26, Feb. 6 2006.

³⁹⁸ Transcript, Hinga Norman, p.5, Jan.30 2006.

are all indicia pointing to one conclusion: the accused had no knowledge of the crimes allegedly committed by the Kamajors and the CDF. To decide otherwise will be obliging the accused to perform the impossible. When illegal acts are committed in a location “physically distant,” the presumption of knowledge becomes far weaker in the “absence of other indicia”.³⁹⁹ Knowledge of the nature of the “general situation that prevailed,” however, does not amount to knowledge that one’s subordinates are likely to commit crimes.⁴⁰⁰

The Prosecution Military Expert Col. Richard Iron

291. The first issue to be discussed is whether an expert may be permitted to give an opinion on the ‘*ultimate issue*’, in the case, i.e., to give an opinion on the very issue that the court has to determine.⁴⁰¹ As pointed out by *May & Wierda* it is not for the expert to give an opinion on the ultimate issue that the Court has to determine.⁴⁰² The ultimate issue in this case is the alleged command responsibility of the first accused. This question has arisen in the ICTY in relation to military experts who have sought to comment on the command responsibility of the accused. In *Kordic* the Trial Chamber excluded the evidence on the basis that the witness indeed was drawing conclusions on the very matters upon which the Trial Chamber was required to decide, thus invading its province.⁴⁰³

292. The Military Expert Col. Richard Iron testified that he was to determine the extent to which command was effective and whether there was a clear connection between strategic, operational and tactical levels⁴⁰⁴ within the CDF.⁴⁰⁵ Colonel Iron said the CDF was a territorial force dispersed in chiefdoms controlled by CDF.⁴⁰⁶ He further testified that there was a large number of CDF units based in Talia on a hierarchical structure and that the commander was Hinga Norman.⁴⁰⁷ This piece of evidence was challenged by Dr Hoffman who testified that there simply was nobody

³⁹⁹ *Aleskovski, Judgment*, para. 80.

⁴⁰⁰ *Bagilishema, Judgment*, para. 42.

⁴⁰¹ *May & Wierda, International Criminal Evidence* (2002), p. 200.

⁴⁰² *May & Wierda*, p. 200.

⁴⁰³ *Ibid*, p. 200.

⁴⁰⁴ Transcript, Col. Richard Iron, p.23, June 14 2005.

⁴⁰⁵ *Ibid* p. 24.

⁴⁰⁶ *Ibid* p. 29.

⁴⁰⁷ *Ibid* p.30.

in a position to make declarations that would be considered the word for the movement as a whole and there was no communication capacity.⁴⁰⁸

293. According to the military expert, at the tactical level command tended to be less effective because of their inexperience and lack of training.⁴⁰⁹

294. Col Richard Iron also testified that the CDF had a recognisable military hierarchy and structure⁴¹⁰ and that the CDF had effective command and the person who welded the ultimate power in a military sense within the CDF was Hinga Norman.⁴¹¹ Under cross examination, this witness testified that there was evidence to demonstrate difficulties over command and the relationship between ECOMOG and the CDF.⁴¹² The witness agreed that ECOMOG and CDF operated together after ECOMOG intervention.⁴¹³ Defence Expert witness Dr Hoffman who testified as to whether the CDF constituted a military organisation and what kind of structure it had, described the CDF as a militarised social network, or militarised social movement.⁴¹⁴

295. The Military expert merely interviewed seven people, and read witness statements and testimonies – all provided for him by the Prosecution. The witness said he interviewed two members of the War Council who were high ranking officials while writing his report (their names were written in Exhibits 98 and 99). The witness agreed that the names of those seven people interviewed were provided by the Prosecutor⁴¹⁵ and that he did not independently verify the source of his information.⁴¹⁶ This in itself is a problem and as defence expert witness Dr Hoffman said methodologically, he is concerned with the very limited number of people spoken to and their location and position within the CDF, and concerned about the very limited amount of time that was spent in preparation of the report. As Dr Hoffman stated “there are a lot of social nuances that are incredibly important for understanding the

⁴⁰⁸ Transcript, Daniel Hoffman Ph.D, p.99, October 9 2006.

⁴⁰⁹ Transcripts of Col. Richard Iron, p.30, June 14, 2005.

⁴¹⁰ Ibid p.39.

⁴¹¹ Ibid p.40.

⁴¹² Ibid p.47.

⁴¹³ Ibid p. 49.

⁴¹⁴ Transcript, Daniel Hoffman, p.112, October 9 2006.

⁴¹⁵ Ibid p.59.

⁴¹⁶ Ibid p.60.

dynamics of the CDF...nobody could possibly pick up talking to seven people within a period of 14 days".⁴¹⁷

296. Col Richard Iron testified that he would classify the CDF as an unconventional army.⁴¹⁸ In his evidence, Lt. General David Richards testified that the CDF is at best a militia and that a militia is best characterized as a citizen army but it does not exhibit in his mind many of the traits of a conventional army, for the training is far less thorough, their chain of command is much looser, their discipline is less good.⁴¹⁹

The Complete Absence of any features of an organised military

297. Kamajors were often identified in the evidence by the "ronko" that they were wearing. These outfits were based on traditional hunting clothes and were variously described. The traditional attire could hardly qualify as a "uniform"⁴²⁰, did not have insignias identifying Kamajors to any particular unit or rank, there was no standing kamajor force,⁴²¹ there were no barracks⁴²², Kamajors received no salaries – there were no features of an organised structure. For particular attacks, commanders would converge with their Kamajors and there would be no one person who had overall command.⁴²³

298. People could come and go from groups of fighters as they pleased. Although military terminology was sometimes used to describe groupings of Kamajors and there were an overwhelming number of people with the designation of "commander",

⁴¹⁷ Ibid p.111.

⁴¹⁸ Ibid p. 79.

⁴¹⁹ Transcript, Lt. General David Richards, p.56, Feb. 21 2006.

⁴²⁰ Transcript, TF2-162 8 September 2004 pg 22 lines 7-17: Q. Can you describe how they were dressed? 7 A. Yes. Q. What were they wearing? Were they wearing uniforms or any other kind of clothes? A. They had no uniform on. In fact, the clothes that they had on was torn and tattered. They didn't have any proper dress on - no uniform. They never had a uniform on; no, it was not a uniform that they had on.

⁴²¹ Transcript, Arthur Koroma, 4 May 2006 pg 18 line 28 – page 20 line 15.

⁴²² Transcript, Arthur Koroma, 4 May 2006, pg 20 lines 13-15: So it was very difficult to actually put a stop to Kamajor activities because of that decentralised nature of the organisation.

⁴²³ For example, the attack on Koribundo: Transcript, TF2-082 pg 34 lines 14-28: Q. So you met other Kamajors in Koribundo? A. Yes. When we entered there we met Kamajors there. Q. Were there any other Kamajor commanders in Koribundo that you met? A. Yes. Q. And who are these commanders that you met on the ground when you entered Koribundo? A. I first saw Siro (phonetic) Lamina when I entered. Q. You saw Siro (phonetic) Lamina and who else? A. And Bobo Toka, and Lahai George. Q. So did you have command over these other commanders? A. At times they would listen to me, but you know in that Kamajor not everybody could listen to me, except those that I actually brought, because they were much more than us in number.

this usage was so arbitrary and widespread and did not correspond to any military reality.

The role of the First Accused as the Deputy Minister of Defense did not enhance the capability or effectiveness of the CDF as a fighting force

299. The Prosecution further alleges that the Accused, “as Deputy Minister of Defense...was able to enhance the capability and effectiveness of the CDF as a fighting force”.⁴²⁴

300. No witness confirmed the alleged enhanced capability and effectiveness of the CDF by virtue of Mr Norman’s position as the deputy minister of defence. In fact, the evidence shows that if the effectiveness and capability of the CDF was enhanced by anyone it was by the Minister of Defence, President Kabbah. While there was certainly a dimension of personal politics at play in the relationship between the President and Mr Norman it does not detract from the fact that it was the Minister of Defence who ultimately had the ability to ensure that the CDF played a legitimate and significant role in his government’s reinstatement.

Ability to Implement International Humanitarian Law

301. The Prosecution submits that the Accused and all members of the CDF were required to abide by International Humanitarian Law (IHL) and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.⁴²⁵ However the Prosecution has failed to demonstrate that the CDF had the ability to implement international humanitarian law as required for the application of Additional Protocol II.

302. There was a significant amount of evidence as to the rules of being a kamajor but these rules certainly never included rules pertaining to IHL. Certainly within the

⁴²⁴ PTB, para 269.

⁴²⁵ Indictment, para 8

rules that did exist, there was no system of ensuring implementation of those rules, let alone any capacity for implementation of IHL.⁴²⁶

303. The evidence demonstrates that there was no dissemination of principles of IHL at during the period relevant in the indictment or thereafter.⁴²⁷ One witness testified to having a ICRC booklets on “how to treat war victims”⁴²⁸ but this evidence is hardly indicative of an ability of CDF to implement IHL.

Allegations under Article 6(3) have not been proven

304. Having examined customary law on superior responsibility the Appeals Chamber in *Celebici* ruled that ‘*sufficient influence*’ is not an element of superior responsibility.⁴²⁹ In *Semanza*, the Trial Chamber ruled that effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.⁴³⁰ This requirement is not satisfied by a showing of general influence on the part of the accused⁴³¹. Should the first accused be held responsible because he was a well known personality as a Deputy Minister of Defence and National Coordinator? The Norman Defence submits that the Trial Chamber should answer this question in the negative.

305. From the legal evaluation of the facts, the accused cannot be held for superior responsibility under Article 6(3) of the Statute, for superior responsibility must not be seen as responsibility for the act of another person. Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation.⁴³² In *Aleksovski*, the Trial Chamber ruled that:

⁴²⁶ For example, TF2-013 testified that Kamajors were instructed not to kill innocent civilians or to loot property; but certain unmanageable Kamajors ignored such rules. Transcript, TF2-013, 24 February 2005 page 30 line 28–page 31 line 1.

⁴²⁷ Transcript, General David Richards, 21 February 2006 page 63 lines 11-23 “Now, General, in the British Army I take it that there are rules of engagement, no doubt? A. Yes. Q. And are these rules made known to every military personnel? A. Yes, very strictly. Q. Very strictly. And naturally you would expect strict adherence? A. It's a disciplinary offence not to adhere to them. Q. Thank you very much. In your strategising with General Khobe, General Shelpidi, were you at any time told about rules of engagement for the CDF? A. Not to my knowledge. I can't remember any discussion of them

⁴²⁸ Transcript, TF2-223, 28 September 2004 page 35 lines 2-16.

⁴²⁹ *Celebici Appeals Judgment*, paras 258-264.

⁴³⁰ *Semanza, Judgment* (TC), para. 402, cited in *Ntagerura et al.*, (TC), para. 628.

⁴³¹ *Semanza, Judgment* (TC), para. 402, para. 402.

⁴³² *Aleksovski Judgment*, para. 72

“Within the meaning of Article 7(3), a person is obliged to act only if it has been established that he was a superior of the perpetrators of the offence and also knew or had reasons to know that a crime was about to be committed or had been committed. Should such be the case, the person against whom the claim is directed is obliged to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.”⁴³³

306. The Prosecutor has not established sufficient reliable or credible evidence to determine that Hinga Norman was in command and control of the Kamajors and the CDF. Therefore the accused cannot be held criminally responsible as a superior under Article 6(3) of the Statute for the alleged acts of the Kamajors and the CDF because the Prosecutor has not established the existence of a superior-subordinate relationship. There is also lack of sufficient reliable evidence to determine whether the accused knew or should have known that the Kamajors and the CDF were allegedly committing offences. In *Blaskic*, the Appeals Chamber concluded that:

“[Blaskic] “lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on April 16, 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility [were] not satisfied”.⁴³⁴ On the basis of the above the defence submits that the Prosecution has failed to demonstrate that the Accused is liable for any of the Counts in the indictment pursuant to Article 6(3) superior responsibility liability.

Responsibility of the First Accused pursuant to Article 6(1)

Elements of Individual Responsibility under Article 6(1)

307. The Prosecution has stated that it imputes guilt to Mr Norman in relation to each count of the indictment pursuant to Article 6.1 of the Statute. The Prosecution alleges that Mr Norman bears individual responsibility for those crimes the Prosecution alleges that he planned, instigated, ordered, committed or in whose planning, preparation or execution he otherwise aided and abetted. It is further

⁴³³ Ibid para 72.

⁴³⁴ *Blaskic, Appeals Chamber*, para 421.

alleged that the Accused with his co-Accused participated in a joint criminal enterprise.

308. For criminal responsibility to attach by virtue of Article 6(1) the Prosecution must first prove each of the elements of the crimes for counts 1-8 as set out above beyond a reasonable doubt. If it succeeds in doing so for any crime, then the Prosecution must prove each of the following elements of individual responsibility in relation to that crime, again beyond a reasonable doubt. The Defence would also note here that while Article 6(1) covers various stages of the commission of a crime, with respect to making a finding of criminal participation pursuant to Article 6(1), the Accused can only incur criminal responsibility if the offence is completed⁴³⁵.

Planning

309. Planning implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phase.⁴³⁶ The *actus reus* of “planning” requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.⁴³⁷ The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.⁴³⁸ An accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed.”⁴³⁹

Instigating

310. In the jurisprudence of the Tribunals, “instigating” is defined to mean “prompting another to commit an offence”.⁴⁴⁰ It must be shown that there is a causal relationship between the instigation and the fulfilment of the *actus reus* of the

⁴³⁵ *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment and Sentence, 2 September 1998, para 473.

⁴³⁶ *Brdanin Trial Judgment*, para 268; *Krstic Trial Judgment* para 601; *Stakic Trial Judgment*, para 443, *Limaj Trial Judgment*, para 513, *Blaskic Trial Judgment*, para 279; *Rutaganda, (Trial Chamber)*, December 6, 1999, para. 37; *Musema, (Trial Chamber)*, January 27, 2000, para. 119; *Akayesu, (Trial Chamber)*, September 2, 1998, para. 480:

⁴³⁷ *Kordic Appeal Judgment*, para 26 citing *Kordic Trial Judgment* para 386.

⁴³⁸ *Bagilishema, (Trial Chamber)*, June 7, 2001, para. 30; *Semanza, (Trial Chamber)*, May 15, 2003, para. 380.

⁴³⁹ *Kordic and Cerkez, (Trial Chamber)*, February 26, 2001, para. 386.

⁴⁴⁰ *Krstic, (Trial Chamber)*, August 2, 2001, para. 601; *Blaskic, (Trial Chamber)*, March 3, 2000, para. 280; *Akaseyu Trial Judgment* para 482; *Blaskic Trial Judgment* para 280.

crime.⁴⁴¹ Further, the *actus reus* requires a clear contribution to the act of the other person.⁴⁴² To establish the *mens rea* for instigating it must be proved that the accused directly intended to provoke 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.⁴⁴³

Ordering

311. Ordering' entails a person in a position of authority using that position to convince another to commit an offence.⁴⁴⁴ No formal superior-subordinate relationship is required for a finding of 'ordering' so long as it is demonstrated that the accused possessed the authority to order.⁴⁴⁵ With regard to the *mens rea*, the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.⁴⁴⁶

312. With respect to planning, instigating or ordering, the Prosecution has attempted to argue that to find guilt of the Accused, it is not necessary to prove that the Accused planned, instigated or ordered the specific crime, or each of the specific crimes, alleged in the indictment.⁴⁴⁷ In making this argument [with respect to the Second Accused], the Prosecution states that "it would be open to a reasonable trier of fact to conclude on the basis of all of the evidence that all of the crimes alleged in the Indictment were committed pursuant to a single campaign of which the Second Accused was one of the planners and instigators, and which the Second Accused gave orders to implement. On that basis, the Prosecution submits that it would be open to a reasonable trier of fact to conclude that the Second Accused is guilty of planning, instigating and ordering all of the crimes alleged in the Indictment."⁴⁴⁸ The Defence submits that this proposition is legally incorrect, and that the Prosecution must

⁴⁴¹ *Blaskic*, (Trial Chamber), March 3, 2000, paras. 278, 280.

⁴⁴² *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60.

⁴⁴³ *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 387; *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60; *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 252.

⁴⁴⁴ *Krstic*, (Trial Chamber), August 2, 2001, para. 601.

⁴⁴⁵ *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 388.

⁴⁴⁶ *Blaskic Appeals Judgment*, para 42, *Kordic Appeals Judgment* para 30, *Brdanin Trial Judgment* para. 270.

⁴⁴⁷ *Prosecutor v Norman et al.*, SCSL-04-14-T-469, Public Version of the Prosecution Response to Fofana Motion for Judgment of Acquittal, 27 September 2005, SCSL-14-T-469, para. 79.

⁴⁴⁸ *Ibid.*

demonstrate the elements for each specific alleged crime before there can be a finding of criminal responsibility pursuant to Article 6(1).

Committing

313. Committing a crime “covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”⁴⁴⁹ “‘Committing’ refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.”⁴⁵⁰ Any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the International Tribunal’s Statute with the requisite knowledge.⁴⁵¹ The requisite *mens rea* for committing a crime is that, as in other forms of criminal participation under Article 6(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.⁴⁵²

Aiding and Abetting

314. “Aiding and abetting” has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.⁴⁵³ Strictly, “aiding” and “abetting” are not synonymous. The term ‘aiding’ means assisting or helping another to commit a crime, and the term ‘abetting’ means encouraging, advising, or instigating the commission of a crime.⁴⁵⁴ However, these forms of liability have consistently been considered together in the jurisprudence of the Tribunals.⁴⁵⁵

315. The *actus reus* of aiding and abetting is that the support, encouragement or assistance of the aider and abettor has a substantial effect upon the perpetration of the crime.⁴⁵⁶ The acts of the accused must be direct and substantial.⁴⁵⁷ Mere presence

⁴⁴⁹ *Krstic Trial Judgment* para 601, *Tadic Appeals Judgment* para 188, *Kunarac Trial Judgment* para 390.

⁴⁵⁰ *Semanza*, (Trial Chamber), May 15, 2003, para. 383.

⁴⁵¹ *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 376; *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 251; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 62.

⁴⁵² *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 251.

⁴⁵³ *Kordic Appeals Chamber* para 28 citing *Kordic Trial Judgment* para 388.

⁴⁵⁴ *Semanza*, (Trial Chamber), May 15, 2003, para. 384; *Akayesu*, (Trial Chamber), September 2, 1998, para.

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⁴⁵⁵ *Limaj*, Trial Judgment, para 516

⁴⁵⁶ *Blaskic Appeals Judgment* para 48; *Furundzija Trial Judgment*, para 249,

constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*.⁴⁵⁸ However, an individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime.⁴⁵⁹

316. To establish the *mens rea*, an accomplice must *knowingly* provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal. Additionally, the accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.⁴⁶⁰

Allegations of planning:

317. The Indictment does not provide any information as to material facts that allege that the First Accused planned any of the alleged crimes in Counts 1-8. The Pre-Trial Briefs also do not provide the Defence with any more specific material facts relating to particular crimes the Accused is alleged to have planned. While it is not for the Defence nor the Trial Chamber to have to guess what the Prosecution's allegations are, given the nature of the pleading in the Indictment and the sparseness of detail in Pre-Trial briefs the Defence has no other option than to attempt to decipher the material facts as set out in the PTB.

318. With respect to "planning", the Prosecution states that criminal responsibility of the Accused for Counts 1-8 can be inferred on the basis that:

- The CDF high command, repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo; Bo; Moyamba,, Kenema, Bonthe⁴⁶¹;

⁴⁵⁷ *Tadic*, (Trial Chamber), May 7, 1997, para. 691, *Bagilishema*, (Trial Chamber), June 7, 2001, para. 33; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 70.

⁴⁵⁸ *Aleksovski*, (Trial Chamber), June 25, 1999, para. 64 .

⁴⁵⁹ *Aleksovski*, (Trial Chamber), June 25, 1999, para. 65.

⁴⁶⁰ *Bagilishema*, (Trial Chamber), June 7, 2001, para. 32; *Blaskic*, (Trial Chamber), March 3, 2000, para. 286; *Furundzija*, (Trial Chamber), December 10, 1998, para. 245, 249.

⁴⁶¹ PTB para 275 (a), para 292 (b), para 300 (b), para 331 (b), para 374 (b).

- Samuel Hinga Norman was physically present in war planning meetings at the issuing of directives and commands to the CDF for the capture of Tongo; Kenema; Bo, Bonthe, Moyamba⁴⁶²;
- It was at Base Zero that Samuel Hinga Norman, Moinana Fofana, and Allieu Kondewa, forming a tripartite CDF leadership, together with other persons, planned, coordinated, directed, trained and commanded the attacks on Bo, Kenema, Moyamba, Bonthe, Koribundo and Tongo as well as the other locations specified in the indictment;⁴⁶³

The evidence

319. The Defence would firstly note that no dates are provided in the PTB as to when any meetings were held and the only indication of where these meetings were held is “Base Zero”. The Defence would also note that there are inconsistencies between the Counts with respect to planning for attacks in particular geographic areas. For example, the Prosecution alleges that for Counts 1 and 2, the Accused can be found criminally responsible for planning because “the CDF high command, repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo,⁴⁶⁴ Bo,⁴⁶⁵ Moyamba⁴⁶⁶.” However, for Counts 3 and 4, the Prosecution only alleges criminal responsibility for planning on the basis that “the CDF high command, led by Samuel Hinga Norman repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo Field,⁴⁶⁷ for Kenema,⁴⁶⁸ Moyamba,⁴⁶⁹”. While the Prosecution has failed to specifically cite their material facts towards proof of planning, it is also unclear whether the Prosecution is alleging planning only occurred for specific counts in specific geographic locations. The Defence submits that the Trial Chamber should bear in mind this pervading vagueness in examining the evidence.

320. The Defence would submit that these allegations as set out in the Pre-Trial Brief do not assist the Defence in knowing the case against the Accused. There is no information provided as to when these meetings were, and the fact that “discussions were held together and with each other” is illogical and unhelpful. There is also a

⁴⁶² PTB para 276 d, para 285 (c) para 293 (d), para 309 (d), para 382 (d) para 395 (d).

⁴⁶³ PTB para 307 (b), para 351 (d), para 373 (c).

⁴⁶⁴ PTB para 275 (a).

⁴⁶⁵ PTB para 292 (b).

⁴⁶⁶ PTB para 300 (b).

⁴⁶⁷ PTB para 324 (b).

⁴⁶⁸ PTB para 331 (b).

⁴⁶⁹ PTB para 345 (b).

conspicuous lack of mention of the War Council anywhere in the Prosecution's material facts.

321. Regardless, with respect to the evidence that was presented, the Prosecution relies extensively on its allegations that it was at meetings predominately at Base Zero (Talia) where "battle plans" were discussed. As set out above, to be criminally responsible for planning, there must be evidence of planning to commit one of the crimes which is in the Indictment and the plan must have been carried out. Further it must be demonstrated that the Accused directly or indirectly intended that the crime be committed."

322. There is a paucity of evidence relating to specific planning for any of the crimes that the Accused has been charged. The evidence that does exist is very general, and provides no indication of specific plans, beyond generally discussing "attacks". Further within this general planning evidence, there are indications of planning by the War Council and Mr Norman being the one carrying the results of the planning through to the commanders.

323. With respect to planning for the attack on Tongo, TF2-201 stated that the meeting took place at Talia and that Mr Norman directed that the "hydro" at Dodo should be destroyed.⁴⁷⁰ This same witness also testified that the planning for the planning for the Bo and Kenema attacks was done in February 1998 at Talia. He further testified that Norman stated that it would be an "all-round attack" on Bo and Kenema together and that the Kamajors would join ECOMOG who would "lead the attack."⁴⁷¹

324. TF2-008 testified that the planning for the taking of Koribundo and Sembehun was done by the War Council and made the recommendation to Norman. Norman accepted this recommendation and passed on the instructions of the War Council to the commanders.⁴⁷² TF2-008 further testified that in 1998 the War Council met and

⁴⁷⁰ Transcript, TF2-201, November 4 2004 pg 106 lines 4-29.

⁴⁷¹ TF2-201, 5 November 2004 page 41 lines 12-19, page 42 lines 4-12, page 42 line 15, page 43 lines 7-11, page 43 lines 13-25, page 44 lines 15-18, page 44 lines 23-24, page 46 lines 22-24, page 51 lines 2-8, page 53 lines 24-28; page 54 lines 1-8, page 83 lines 3-7.

⁴⁷² TF2-008, 16 November 2004 page 78 line 12- page 79 line 24.

recommended to Norman that Bo should be the next target and that the attack should be done in consultation with Maxwell Khobe.⁴⁷³

325. TF2-190 said that he attended a meeting at Talia in 1998 to “arrange strategies to launch an all-out offensive on the juntas.”⁴⁷⁴ TF2-005 merely stated that the responsibility for planning how the war was to be fought was with Norman, Fofana and his deputy, Director of Operations and his deputy, and Kondewa⁴⁷⁵ though he also states that it was the War Council who chose where to attack.⁴⁷⁶ TF2-014 stated that he was the one who did all the planning for the Koribundo attack.⁴⁷⁷ Finally, there is absolutely no evidence that demonstrates that there was ever any “planning” with respect to the use of child soldiers.

326. Therefore the Defence submits that on the basis of the lack of evidence with respect to planning of any specific crimes, the Accused cannot be held criminal liability under Article 6(1) for planning any alleged crimes under Counts 1-8.

Allegations of Instigating

327. Again the Defence submits that it is impossible to know what the allegations relating to “instigating” specifically are as the PTB and the Indictment never make this clear. Regardless, from what the Defence can piece together from the PTB, the Prosecution appears to allege that criminal responsibility through instigating for Counts 1-8 can be inferred on the basis that:

- In December 1997 at a Base Zero meeting attended by all Commanders in the Tongo axis, Samuel Hinga Norman said that all people in Tongo should be regarded as the enemy and should be treated as such; that civilians living in Tongo were Kamajor enemies because they were mining diamonds which were used by the rebels to buy weapons and that therefore all Tongo residents remaining in the town after its capture by the CDF should be regarded as enemies and should be killed;⁴⁷⁸
- Addressed a meeting of the CDF at Base Zero and supported directives for the attack on Bonthe Town during which collaborators were to be killed;⁴⁷⁹

⁴⁷³ F2-008, 16 November 2004 page 80 line 8-28, page 81 lines 1-6, page 81 lines 20-27, page 82 lines 1-11.

⁴⁷⁴ TF2-190, 10 February 2005 page 43 line 28– page 48 line 4.

⁴⁷⁵ TF2-005, 15 February 2005 page 93 line 29– page 94 line 5.

⁴⁷⁶ TF2-005, 16 February 2005 page 10 lines 3-7.

⁴⁷⁷ Transcript, TF2-014, 10 March 2005 page 64 lines 16-18.

⁴⁷⁸ PTB para 276 (e).

⁴⁷⁹ PTB para 309 (e).

- in February of 1998 addressed a meeting of the CDF at Base Zero where he supported directives for the attack on Bonthe Town; that those orders included instructions that collaborators should be killed; that many civilians were seriously injured in the attack;⁴⁸⁰
- at a meeting in Base Zero, while addressing the CDF before the attack on Bo, said that the CDF should feed themselves; that this statement was understood as giving a free hand to CDF to loot property and that in effect, widespread looting followed the attack on Bo and was pervasive in Bonthe District as well.⁴⁸¹

The Evidence

328. The Defence submits firstly that it is unable to find any testimony relating to a meeting at Base Zero in February 1998 where Bonthe District was discussed. Further the defence submits that the Prosecution has failed to demonstrate a casual relationship in any of the evidence between any alleged instigation and the fulfilment of the *actus reus* of the crime. For example there is no evidence which shows a nexus between alleged looting that occurred in Bo by Kamajors and any meeting with the Accused is alleged to have “instigated” such activity. Further one witness gave testimony about a meeting where Tongo was discussed⁴⁸² but when this meeting is alleged to have occurred is never made clear. On this basis liability pertaining to instigating under Article 6(1) fails.

Allegations of Ordering

329. The Prosecution has not specifically made clear what exactly the Accused is said to have “ordered”, alleging all actions pertaining to the First Accused fall within the rubric of Article 6(1) responsibility. However, and again, through a process of attempting to decipher the Prosecution’s case, it appears that the Prosecution makes a number of allegations in its Pre-Trial Brief as the evidence of the Accused’s alleged ordering. No evidence was presented for the bulk of these allegations or the allegations pertain to geographic areas that were no longer a part of the Indictment.⁴⁸³

⁴⁸⁰ PTB para 353 (g).

⁴⁸¹ PTB para 375 (d).

⁴⁸² Transcript, TF2-005 15 February 2005 pg 105 lines 20-25, page 106 line 10– page 107 line 3.

⁴⁸³ This includes allegations at PTB 293 (e), PTB para 339 (b), PTB para 339 (c), PTB para 339 (d), PTB para 346 (f), PTB para 368 (g), PTB para 368 (h), PTB para 373 (d), PTB para 382 (f), PTB para 293 (g), PTB para 309 (h), PTB para 325 (f).

Tongo PTB Allegations

- In January 1998 after the CDF had taken Tongo, Samuel Hinga Norman gave instructions that all those found remaining in Tongo following the capture of the area were to be killed, that no one was to be spared⁴⁸⁴;
- In January 1998 CDF combatants fighting in Tongo spoke of a CDF order that all houses were to be searched and that anyone who had a gun or ammunition in their house were to be killed; that anyone in a uniform or who was an occupant in a house where a gun or uniform was found, was to die;⁴⁸⁵
- [Hinga Norman was] the commander who, in December 1997, said in a meeting at Base Zero, attended by all Commanders in the Tongo axis, that all people in Tongo should be regarded as the enemy, that he further said that civilians living in Tongo were Kamajor enemies because they were mining for diamonds which were used by the rebels to buy weapons and that therefore they should be killed;⁴⁸⁶

Evidence

330. TF2-005 is that only witness who gave testimony that Norman had said that Tongo should be taken “at all costs” and anybody found “walking with the juntas or mining for them should not be spared”.⁴⁸⁷ This is the only witness who gave testimony relating to the allegations as set out in the PTB related to Tongo. This testimony was not corroborated by any other witness.

331. Also as stated above, the ICTR has stated that the Accused can only incur criminal responsibility if the offence is completed.⁴⁸⁸ The Defence submits that there is no evidence which shows a nexus between what TF2-005 alleges that Hinga Norman ordered and what unidentified kamajor perpetrators are alleged to have done in Tongo.

Kenema PTB Allegations

- The CDF launched an attack on Kenema town on February 1998 upon the directives and instructions of the CDF high command, of which Samuel Hinga Norman was the National Coordinator and that during this attack an unknown number of civilians were killed;⁴⁸⁹

⁴⁸⁴ There was no evidence presented to support this allegation.

⁴⁸⁵ There was no evidence presented to support this allegation.

⁴⁸⁶ PTB para 325(e), There was no evidence presented of such a meeting at Base Zero in December 1997 to support this allegation.

⁴⁸⁷ TF2-005, 15 February 2005 pg 105 lines 20-25, pg 106 line 10 - page 107 line 3.

⁴⁸⁸ *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment and Sentence, 2 September 1998, para 473.

⁴⁸⁹ PTB 283 (a).

- Ordered the CDF to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses;⁴⁹⁰
- Following reports received at Base Zero that police were involved in the fighting on the side of the Junta, ordered CDF to treat the police as their enemies and thereafter police officers were specifically targeted and killed at the Police Barracks in Kenema in February 1998.⁴⁹¹
- The commander who ordered the CDF to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses;⁴⁹²

Evidence

332. TF2-201 testified to a meeting at Talia where he alleged that the planning for the capture of Bo and Kenema took place. According to the witness, Norman announced that it would be an “all-round attack” on Bo and Kenema together and that the Kamajors would join ECOMOG who would be moving from Liberia and would “lead the attack”.⁴⁹³ There was no evidence that Hinga Norman ordered the CDF to “kill all captured rebels and collaborators and seize or burn their houses”.

333. TF2-041 testified that an unidentified kamajor said to him “He said -- Hinga Norman said, “When you come, that we should kill the police, their wives and their children, so we're taking you straight to the ground commander in Blama.”⁴⁹⁴ However there is no evidence of Hinga Norman actually ever giving such an order to specifically target police and such an order cannot be implied based on this testimony alone.

Koribundo PTB Allegations

- At a meeting in which Samuel Hinga Norman participated, commands and orders were given for the attack on Koribundo in the Bo District; that those commands included orders not to “spare any living thing” during the attack;⁴⁹⁵
- In January/February 1998 after various failed attempts to capture Koribundo, while addressing the CDF before an attack on the town, ordered them to capture Koribundo “at all costs”; that he specifically ordered the CDF to destroy Koribundo;⁴⁹⁶

⁴⁹⁰ PTB 285 (d).

⁴⁹¹ PTB 285 (f).

⁴⁹² PTB para 323 (b), para 361 (e).

⁴⁹³ Transcript TF2-201, 5 November 2004 pg 41 lines 12-19, page 42 lines 4-12, page 42 line 15, page 43 lines 7-11, page 43 lines 13-25, page 44 lines 15-18, page 44 lines 23-24, page 46 lines 22-24, lines 51 lines 2-8, page 53 lines 24-28.

⁴⁹⁴ Transcript, TF2-041 24 September 2004 page 20 line 10– page 31 line 2.

⁴⁹⁵ PTB 291 (a)

⁴⁹⁶ PTB para 293 (j), para 337 (a), para 339 (e), para 368 (e)

- Ordered that all the houses – except 4 were to be destroyed because every house had given sheltered (sic) rebels and soldiers;⁴⁹⁷

Evidence

334. TF2-014 was the only “commander” who gave evidence of having received any orders prior to the attack on Koribundo from Hinga Norman. The remainder of the evidence relates to witness testimony of attending either one or both meetings held at the court barri in Koribundo where Hinga Norman allegedly said that he had ordered that all the houses in Koribundo were to be burnt.⁴⁹⁸ There cannot be liability under Article 6(1) for ordering when it is the Accused who self-incriminates himself in stating that he did the ordering. Further these statements were made after the fact, without any further evidence to demonstrate that he gave the order and that the order subsequently was carried out. Further the Defence would submit that the credibility of the testimony of TF2-014 must be closely examined. This is explained in greater detail in the paragraph below.

335. Further TF2-008 testified that it was the War Council who gave the orders for Koribundo and that Hinga Norman accepted the recommendation and passed on the instructions to the commanders.⁴⁹⁹ Hinga Norman was merely a conduit for passing on information from the War Council to the commanders and cannot be held liable for “ordering”.

Bo PTB Allegations

- In early February 1998 at Base Zero before the attack on Bo, ordered that prominent people, including the former District Officer, Provisional Secretary, and those who stayed in Bo Town during the rebel occupation were to be executed;⁵⁰⁰
- Gave specific instructions to commanders during the Bo attack to kill police officers because they did not support the Kamajor cause;⁵⁰¹

⁴⁹⁷ PTB para 368 (f)

⁴⁹⁸ Transcript. TF2-198, 15 June 2004 pages 37-39, TF2-157, 16 June 2004 pages 19-22, TF2-012, 21 June 2004 pages 27-28, TF2-162, 8 September 2004 page 30, TF2-032, 10 September 2004 pages 55, 62, TF2-082, 15 September 2004 page 49.

⁴⁹⁹ TF2-008, 16 November 2004 page 78 line 12– page 79 line 24

⁵⁰⁰ PTB para 293 (f)

⁵⁰¹ PTB para 293 (h)

- In January 1998 at Base Zero where he instructed the CDF to kill captured rebels and rebel collaborators or anyone who worked for the rebels or who lived in an area occupied by rebels;⁵⁰²
- In a meeting at Base Zero, Samuel Hinga Norman ordered that all shops and pharmacies in Bo Town were to be looted and that all property in Bo Town “belonged” to the CDF;⁵⁰³

336. TT2-014 gave the bulk of the evidence that supports these allegations. The Defence would submit that the credibility of TF2-014 should be carefully inspected by the Trial Chamber. Though TF2-014 was adamant in wanting to speak the truth, after having been reassured that he himself would not be prosecuted for his participation in a number of atrocities⁵⁰⁴, he quite deliberately misled the Trial Chamber with his evidence. TF2-014 provided the court with great detail of the targeting of a Joseph Lansana, stating that he participated in his torture and that he cut off his ear.⁵⁰⁵ This was blatantly untrue as Joseph Lansana himself appeared as a Defence witness with both of his ears intact.⁵⁰⁶ While the Trial Chamber felt it necessary to thank the witness for his role in “ensuring lasting peace” in Sierra Leone,⁵⁰⁷ it is clear that the credibility of the witness was significantly impeached when it is clear on a significant allegation he clearly chose not to tell the truth.

Allegations of Committing

337. As stated above, given the requirement of increased specificity in the Indictment where the Prosecution alleges that the Accused “committed” a crime, the Defence has proceeded on the basis that no such allegations are made in this case as the Indictment contains no such allegations. Further through examination of the PTB the Defence can find no specific allegations of committing there either. With respect

⁵⁰² PTB para 309 (f)

⁵⁰³ PTB para 366 (b)

⁵⁰⁴ TF2-014, Transcript, March 11 2005, line 6-17, page 45: “Yes, Mr Witness, you said you had a clear understanding that those who received commands would not be apprehended, if I am correct. From whom did you get this understanding? A. It was from Radio Sierra Leone, then the people – the prosecutors -- that went around me. They said they wanted the truth. If you do not bear any of the greatest responsibility, you say the truth, nothing but the truth, nothing will be done to you. I thought for some time; I pondered over it, and I thought within myself that until we say the truth -- until we say the truth -- we get everlasting peace in this country. That is why I am here today, to say the truth so that we get everlasting peace in this country.”

⁵⁰⁵ TF2-014, Transcript, March 11 2005, page 48, lines 22-23

⁵⁰⁶ Transcript, Joseph Lansana,

⁵⁰⁷ TF2-014, Transcript, March 15 2005 pg 70 line 24 – page 71 line 1 page 45 PRESIDING JUDGE: It has been long, but it has revealed many things which will assist the Chamber to determine the truth in this matter. THE WITNESS: Yes, My Lord. PRESIDING JUDGE: I think the Chamber would like to commend one thing. and that is that you came to testify in order to ensure that there is, you know, lasting peace in this country.

to Count 8 the Defence submits that there is no evidence which demonstrates that the Accused himself recruited or used child soldiers.

Allegations of Aiding and Abetting

338. The Prosecution appears to allege that the liability of the Accused with respect to aiding and abetting can be inferred predominately from evidence that:

- Samuel Hinga Norman was responsible for sending ammunition to the CDF in the field as well as providing other logistics to CDF commanders and combatants;⁵⁰⁸
- Samuel Hinga Norman was physically present in war planning meetings and at the issuing of directives and commands to the CDF;⁵⁰⁹
- Samuel Hinga Norman provided the commanders with arms and ammunition;⁵¹⁰

Evidence

339. TF2-201 testified that Hinga Norman would write orders for distribution of ammunition on paper and pass them to the Second Accused.⁵¹¹ TF2-201 also testified that at a meeting at Talia concerning the attack on Tongo, Norman announced that he would supply the commanders with ammunition and food.⁵¹² This witness also stated that at a meeting at Talia regarding Koribundo TF2-082 asked for a certain amount of ammunition, food, and money, and Norman wrote out an order for supplies.⁵¹³ TF2-017 testified that it was the Second Accused who distributed arms and ammunition to attack Kebi Town.⁵¹⁴ This same witness testified that it was the Second Accused who also distributed the weapons for the Black December operation.⁵¹⁵ He further stated that around the second week of February 1998 the final order to attack Bo came from Norman and “they” gave arms and ammunition to all the commanders.⁵¹⁶

⁵⁰⁸ PTB para 276 (c).

⁵⁰⁹ PTB Tongo, para 276 (d), Kenema para 285 (c), Bo para 293 (d), Moyamba para 301 (d), Bonthe para 309 (d).

⁵¹⁰ PTB Tongo para 276 (f), Bo para 293 (c), Moyamba para 301 (c), Bonthe para 309 (c).

⁵¹¹ Transcript, TF2-201, 4 November 2004 page 97 lines 14-26.

⁵¹² Transcript, TF2-201, 4 November 2004 page 106 lines 4-29.

⁵¹³ Transcript, TF2-201, 4 November 2004 page 113 line 1– page 114 line 20

⁵¹⁴ Transcript, TF2-017, 19 November 2004 page 92 line 26– page 94 line 29, page 95 – 97 line 18.

⁵¹⁵ Transcript, TF2-017, 19 November 2004 page 82 lines 17-22

⁵¹⁶ TF2-017, 19 November 2004 page 98 line 4– page 101 line 14

340. The Defence submits that the testimony of TF2-017 must not be given any weight as this witness himself stated that “it is acceptable to invent facts about which one is unsure” and also admitting to not telling the truth to OTP investigators.⁵¹⁷

341. TF2-190 stated that he participated in the attack on Koribundo and that he organised his own men and supplied their ammunition as he had his own. He also stated that TF2-082 had been given ammunition by orders from Norman at Talia.⁵¹⁸ TF2-005 gave general evidence stating that Norman was in control of giving out ammunition and that the Second Accused also was responsible for distributing ammunition.⁵¹⁹ TF2-014 testified that part of his role was to distribute arms and ammunition.⁵²⁰

342. The *mens rea* for aiding and abetting is not the criminal intent of the perpetrator; rather it involves the accessory having the knowledge that his actions assist the perpetrator in the commission of the crime. However, the accessory must also be aware of the essential elements of the crime, including the *mens rea* of the principle.⁵²¹ The evidence fails to establish this.

343. The defence submits that Mr Norman was not aware of the essential elements of any of the crimes that were committed, especially the *mens rea* of the alleged perpetrators. While it may be unclear whether certain unidentified members of the CDF were conducting military operations with the intent to commit any of the crimes charged in the Indictment, Mr Norman, as a potential aider and abetter was certainly unaware of such hypothetical intentions. Accordingly he cannot be held indirectly responsible for any of the acts alleged in the Indictment.

Joint Criminal Enterprise

344. The Prosecution alleges a theory of criminal liability that inculpates Norman for those criminal acts which were perpetrated as a part of a joint criminal enterprise

⁵¹⁷ TF2-017, 22 November 2004 page 38 lines 25-27, page 44 lines 9-12

⁵¹⁸ TF2-190, 10 February 2005 page 47 lines 21 - 29

⁵¹⁹ TF2-005, 15 February 2005 page 91 lines 12-19, page 101 lines 15-16

⁵²⁰ TF2-014 10 March 2005 page 33 lines 15-18

⁵²¹ Prosecutor v Tadic, (AC), para 229, Prosecutor v Blaskic (AC), para 50.

in which he participated.⁵²² The Prosecution alleges that this joint criminal enterprise was “to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone.” At the outset the Defence submits that this simply does not amount to criminal behaviour. It is a legitimate goal of any party to an armed conflict and certainly in this instance, where the objective was the reinstatement of the democratically elected government of President Kabbah.

345. Joint criminal enterprise liability is a form of criminal responsibility. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.⁵²³ It can exist whenever two or more people participate in a common criminal endeavour.⁵²⁴ This form of criminal liability does not exist in the Statute of the Special Court but rather it is a concept that exists as customary international law.⁵²⁵

Categories of Common Purpose Doctrine

346. The notion of common purpose encompasses three distinct categories of collective criminality. The first such category is represented by cases where all co-defendants, acting pursuant to common design, possess the same criminal intention, for instance the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design.⁵²⁶

347. The second distinct category of cases embraces the so-called “concentration camps” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps i.e. by groups of persons acting pursuant to a concerted plan.⁵²⁷

⁵²² Indictment para 20.

⁵²³ Tadic (AC) 1999 para. 190.

⁵²⁴ Kvočka et al (Trial Chamber) ICTY November 2 2001 para. 307.

⁵²⁵ Tadic (AC): “the notion of common design as a form of ... liability is firmly established in customary international law.”

⁵²⁶ Tadic (Appeals Chamber) para. 195-196

⁵²⁷ Tadic (Appeals Chamber) para. 202-204