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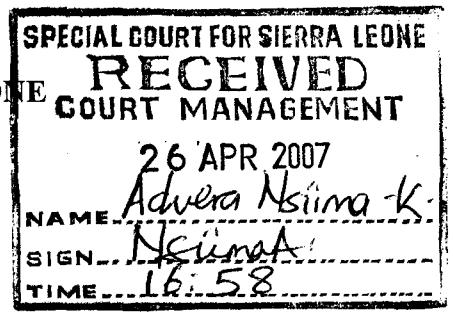

THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 26 April 2007

Case No.: SCSL-2003-01-PT

THE PROSECUTOR

–v–

DAHKPANNAH CHARLES GHANKAY TAYLOR

PUBLIC

RULE 73 *bis*

TAYLOR DEFENCE PRE-TRIAL BRIEF

Office of the Prosecution
Mr. Stephen Rapp
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
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Mr. Karim A. A. Khan
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I. Introduction

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1. The Defence for Charles Taylor ("Defence") file this Defence Pre-Trial Brief in accordance with the "Scheduling Order for a Pre-Trial Conference Pursuant to Rule 73*bis*," dated 2 February 2007,[1] wherein the Trial Chamber ordered that "The Defence shall on or before 26 April 2007 file a statement of admitted facts and law and a Pre-Trial Brief addressing the factual and legal issues."[2] This Defence Pre-Trial Brief is also filed in the context of the Prosecution's "Rule 73*bis* Pre-Trial Conference Materials Pre-Trial Brief," dated 4 April 2007.[3]

2. The Defence recall its "Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief," dated 5 February 2007, in which it respectfully submitted that the Chamber should not set a date for the Defence Pre-Trial Brief "prior to hearing and giving due consideration to any submissions from the parties on that issue".[4] Specifically, the Defence argued that having to file a Defence Pre-Trial Brief just three weeks after the Prosecution filed its Pre-Trial Brief would be insufficient time and would be prejudicial to Mr. Taylor's right to adequately prepare his defence.[5]

3. The Defence respectfully maintain that three weeks has not been enough time, given the myriad demands of this case, to carefully analyze and formulate a response to the Prosecution Pre-Trial Brief, including the summaries of core and backup witnesses, the names of proposed expert witnesses, the nature and substance of exhibits, and the general Prosecution theory.[6] It must be emphasised that various Reports of apparently important Prosecution expert witnesses have not been disclosed to the Defence. Accordingly, and as such, they cannot be commented upon, nor inform the Defence as to the exact nature of the case against Mr. Taylor. Similarly,

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[1] *Prosecutor v. Taylor,* SCSL-03-01-PT-171, Scheduling Order for a Pre-Trial Conference Pursuant to Rule 73 *bis*, 2 February 2007 ("Pre-Trial Brief Order").
[2] Pre-Trial Brief Order, pg.3.
[3] *Prosecutor v. Taylor,* SCSL-03-01-PT-218, Rule 73*bis* Pre-Trial Conference Materials Pre-Trial Brief, 4 April 2007 ("Prosecution Pre-Trial Brief").
[4] *Prosecutor v. Taylor,* SCSL-03-01-PT-172, Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief, 5 February 2007, para. 2 ("Motion to Reconsider Date for Defence Pre-Trial Brief").
[5] Motion to Reconsider Date for Defence Pre-Trial Brief, paras. 8 and 9.
[6] Motion to Reconsider Date for Defence Pre-Trial Brief, para. 8.

the statements of key Prosecutions witnesses remain heavily redacted which further hampers the Defence in understanding the detail of the case against Mr. Taylor.

4. Notwithstanding these stated difficulties, the Defence submits the present Defence Pre-Trial Brief in compliance with the Trial Chamber's "Decision on Urgent Defence Motion to Vacate Date for Filing of Defence Pre-Trial Brief," dated 5 March 2007.[7] A joint filing with the Prosecution on agreed issues of facts and law was filed separately,[8] also in compliance with the order of the Trial Chamber.

II. Burden of Proof

5. The Prosecution has the burden of proving beyond a reasonable doubt all elements of the crimes charged, the underlying acts, and the modes of liability, absent any admissions or statements of agreed facts and/or law.[9] This is consistent with case law.[10] It is therefore self – evident that it is for the Prosecution to prove the charges against Mr. Taylor and not for the Defence to prove the innocence of Mr. Taylor in regard to these charges.

6. At the conclusion of the case, the Accused is entitled to the benefit of the doubt as to whether the offence has been proved".[11] This principle of *in dubio pro reo*, by virtue of which doubt must be resolved in favour of Mr. Taylor[12] requires that a finding of guilt must be "the only conclusion available".[13] The Prosecution has a heavy burden and the high standard of proof necessary emanates from the statutory right of Mr. Taylor to be presumed innocent pursuant to Article 17(3) of the SCSL Statute, as well the principle under Rule 87(A) of the Rules of

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[7] Decision on Date for Defence Pre-Trial Brief, pg. 5.
[8] *Prosecutor v. Taylor,* SCSL-03-01-PT-227, Joint Filing by the Prosecution and Defence Admitted Facts and Law, 26 April 2007 ("Admitted Facts and Law").
[9] Prosecution Pre-Trial Brief, para 1.
[10] *Prosecutor v. Delalic et al*, IT-96-21, *Judgment*, 16 November 1998,, para. 599; *Prosecutor v. Brdjanin*, IT-99-36, *Judgment*, 1 September 2004, para. 22; *Prosecutor v. Kunarac*, IT-96-23&32-1, *Appeals Chamber Judgment*, 12 June 2002, paras. 63 and 65
[11] *Prosecutor v. Delalic et al*, IT-96-21, *Judgment*, 16 November 1998, para. 601.
[12] *Prosecutor v. Brdjanin*, IT-99-36, *Judgment*, 1 September 2004, para. 21; *Prosecutor v. Tadic*, IT-94-1, *Sentencing Judgment*, 11 November 1999, para. 31.
[13] *Celibici Appeals Chamber Judgment*, para. 458 [emphasis added].

Procedure and Evidence that "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

7. The Defence is not required to make any admissions at any stage of proceedings in a criminal trial. This is a corollary to the presumption of innocence. Be that as it may, any decision by the Defence not to expressly or implicitly address or rebut, in the present filing, any aspect of the Prosecution's case theory or evidence, as detailed in the Prosecution Pre Trial Brief and / or in the Amended Indictment,[14] should not be considered to be an acceptance of any fact alleged or law propounded by the Prosecution, or a concession in any respect, unless expressly and unambiguously stated to the contrary.

III. Factual Background

8. The Defence has engaged in a dialogue with the Prosecution and the facts agreed by both parties have been filed separately in a joint filing.[15] It stands to reason, therefore, that all facts not currently agreed by the parties, are in dispute and need to be proved by the Prosecution at trial as far as they are material to the indictment, save to the extent that further facts are agreed by the parties in due course.

IV. Territorial and Temporal Limitations of the Amended Indictment

9. The charges against Mr. Taylor are set out in the Amended Indictment. These charges must fall within the territorial and temporal jurisdiction of the Special Court. The Prosecution Pre-Trial Brief and Pre-conference materials disclose numerous examples where the Prosecution are apparently relying upon alleged facts pre-dating the indictment period and alleged conduct said to have been committed outside the territory of Sierra Leone. The Defence would urge the Trial Chamber to be vigilant in ensuring that there is no expansion of the territorial or temporal jurisdiction of the Court via the back door under the guise of Rule 93 of the Special Court's Rules of Procedure and Evidence.

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[14] *Prosecutor v. Taylor,* SCSL-03-01-I-75, Amended Indictment, 16 March 2006.
[15] Agreed Facts and Law.

10. Rather than precisely focusing on the temporal jurisdiction of the indictment, the Prosecution seek to cobble together alleged conduct geographically and temporally separated in a bid to establish its case. The Defence submit that the manner in which it seems the Prosecution intend to put its case is impermissible and should, in any event, viewed with circumspection. The Prosecution, for example, state that Mr. Taylor's alleged culpable conduct resulting in the crimes allegedly committed by the RUF, Junta, AFRC/RUF and Liberian fighters, detailed in the Amended Indictment and Prosecution Pre-Trial Brief, occurred "[p]rior to and throughout the conflict in Sierra Leone".[16] The only relevant test, of course, is whether any alleged crimes were committed in the period of the indictment.

11. Similarly, the Prosecution Pre-Trial Brief includes a number of allegations concerning the civil war in Liberia. For example, in paragraph 11 of the Prosecution Pre-Trial Brief, it is alleged that "from the beginning of the conflicts in Liberia and Sierra Leone, both the NPFL and the RUF engaged in ongoing widespread crimes against the civilian populations of those countries."

12. The Defence submits that this claim is wholly improper. The Prosecutor of the Special Court of Sierra Leone has no mandate, authority or jurisdiction to allege crimes anywhere other than in Sierra Leone. By making this assertion, he is action *ultra vires* to his authority. The attempt to rely upon evidence outside the territorial and temporal jurisdiction of the Special Court, in relation to another States' affairs, is wholly unwarranted and unacceptable as a matter of law. With respect, it exposes a fundamental misconception of the Prosecution in the theory it seeks to advance.

13. Similarly, in relation to the use of child soldiers, the Prosecution alleges that the "[t]he RUF brought this practice to Sierra Leone from Liberia, where the NPFL engaged in the same criminal conduct".[17] To substantiate this allegation, and to be probative, the Prosecution will have to produce evidence to establish beyond a reasonable doubt that child soldiers were used

[16] Prosecution Pre-Trial Brief. For examples of this and other overbroad language, see paras. 6, 16, 18, 21, 24, 42, 45, 50, 54, 58, 61, 62, 63, and 64.
[17] Prosecution Pre-Trial Brief, para. 18.

in the Liberian war; that, (contrary to well known reality) that the use of "child soldiers" did not pre-date the Liberian conflict, nor was it practiced throughout Africa and many other regions where civil wars and armed insurrections have taken place; and that the use of child soldiers was not independently adopted in Sierra Leone for reasons which had nothing at all to do with the alleged practices in the Liberian civil war in general or Mr. Taylor in particular. Such a convoluted theory is legally dubious and antithetical, in the respectful submission of the Defence, to a fair, concise and focused trial.

14. The Prosecution is allowed to present evidence of a consistent pattern of conduct only if it falls within the scope of Rule 93(A), which provides that:

> "evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the statute may be admissible in the interests of justice".

If the Prosecution intends to present evidence of allegations outside the territorial and temporal jurisdiction of the Special Court and outside the scope of the Amended Indictment, the Trial Chamber is invited to consider the parameters already set by the Special Court's sister tribunals.

15. The scope of Rule 93 has been determined by the ICTR case of *Bagosora et al*, where the Prosecution sought to introduce evidence from a period pre-dating the temporal jurisdiction of the Tribunal. The Trial Chamber held that the Prosecution was only allowed to do so if the alleged events were relevant to and probative of, crimes committed during the time-period of the temporal jurisdiction. Even if relevant and probative the Trial Chamber would still exclude the evidence if unduly prejudicial.[18]

16. The Trial Chamber noted three possible instances when evidence of acts occurring prior to the temporal jurisdiction of the Tribunal (1994) might be relevant and admissible. First, it stated that evidence of acts occurring prior to the mandate year may be relevant to an offence which

[18] *Prosecutor .v Bagosora et al*, ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY, 18 September 2003, paras. 8, 16, 17.

continues into the mandate year. Second, the Court considered that evidence of pre-1994 events providing background or context and *which do not form part of the crimes charged*, could be admissible. Finally, the Trial Chamber considered that evidence of pre-1994 events could be admitted as "similar fact evidence". [19]

17. The Appeals Chamber affirmed the Trial Chamber's ruling in *Bagosora*, holding that under Rule 93, pattern evidence may be relevant to serious violations of international humanitarian law, but even where pattern evidence was relevant and probative, the Appeals Chamber held that the Trial Chamber could still decide to exclude the evidence *in the interests of justice* when its admission could lead to *unfairness* in the trial proceedings, such as *when the probative value of the proposed evidence is outweighed by its prejudicial effect*, pursuant to the Chamber's duty to ensure a fair trial.[20] In that case, the Trial Chamber had determined that the introduction of prior criminal acts of Mr. Taylor would be inadmissible for the purpose of demonstrating "a general propensity or disposition" to commit the crimes charged.[21]

18. In light of the Trial Chambers decision in *Bagosora*, confirmed on appeal, it is submitted that the Prosecution can only introduce evidence of alleged prior criminal acts of Mr. Taylor if they point to the existence of a common plan or design. The Defence reserve the right to object to the admission of any such evidence where its prejudicial effect outweighs its probative value. One of the primary considerations for the Trial Chamber, it is suggested, will be the time lapse between the event(s) cited and the beginning of the indictment and whether the alleged previous act or relationship can be said to be probative on a *continuing* criminal common plan during the indictment period.

19. In relation to all the other allegations of criminal conduct prior to the Amended Indictment period, the Defence contend that these are not relevant to the charges in the Amended

[19] *Ibid,* relying on Judge Shahabuddeen's Opinion as discussed in para. 19.
[20] *Prosecutor v. Bagosora et al*, ICTR-98-41-AR93 & ICTR-98-41-AR93.2, Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003. para. 2.
[21] *Ibid*, para. 14.

Indictment and only go to demonstrate "a general propensity or disposition" to commit the crimes charged.[22]

20. The same reasoning applies to allegations of criminal conduct said to have taken place in regions outside the territorial scope of the Amended Indictment and the Special Court's jurisdiction. Allegations of serious criminal conduct in Liberia in particular have no bearing on the alleged criminal conduct in Sierra Leone, not only because the conflicts occurred in different time frames, but also because they involved a different cast of alleged perpetrators. Evidence of the war in Liberia, therefore, similarly only goes to demonstrate "a general propensity or disposition" to commit the crimes charged, and should not be admitted in the present proceedings.

21. A trial on alleged activities in Liberia, by proxy, would be a violation of Mr. Taylor's right to a fair trial, and a disservice not only to the people of Sierra Leone but indeed to the citizens of Liberia who have the right to make their own decisions on issues of post-conflict justice.

22. Should the Prosecution be permitted to adduce evidence of extra-territorial acts predating the Amended Indictment period, and in countries other than Sierra Leone, the result will be a series of "trials within a trial" of subsidiary issues, such as the use of child soldiers in the Liberian civil war and alleged conduct by the NPFL and other groups, allegedly committed in the course of a conflict that lasted for several years. The Defence cannot emphasise strongly enough that it has not investigated these matters and that it does not have the means and facilities to conduct investigations into these allegations that fall outside the scope of the Amended Indictment or which do not relate to Sierra Leone.

23. In accordance with the right of Mr. Taylor to have adequate time and facilities to prepare a defence pursuant to Article 17(4)(b), the Defence would require a substantial allocation of additional resources and a very significant period of time to prepare a defence for a case that will have changed complexion beyond all recognition to that pleaded in the Amended Indictment. The introduction of evidence relating to crimes allegedly committed in the war in

[22] *Ibid*, para. 14.

Liberia will necessarily prolong the length of the trial and may render predictions that the trial phase of these proceedings can be completed within 18 months wholly redundant. The Defence pre-trial preparation, already subject to difficult, if not impossible, time constraints, will have to be completely re-assessed with regard to the need for more manpower and resources, which the Defence does not have available to it at present, to be deployed to Liberia and the alleged conduct in that civil war.

V. Context: The Conflict and Charges in the Indictment

A. Context: The Overthrow of the Regime of Samuel Doe and Mr Taylor's Election

24. The Prosecution attempt to portray Mr. Taylor as a brutal dictator or leader who participated in a common plan or design formulated, according to some Prosecution witnesses in the late 1980's, with its purpose to use "criminal means to achieve and hold political power and physical control over the civilian population of Sierra Leone".[23] In understanding his motivations, agenda and conduct, and in assessing the Prosecution's characterisations of Mr. Taylor, it is perhaps relevant to understand the situation which existed in Liberia before the entry of NPFL forces in Liberia in 1989, as well as the background to Mr Taylor's landslide victory in the 1997 democratic elections. It will be seen that Mr. Taylor's rise to power did not involve ousting a democratic Government or one based on the rule of law. It involved the Liberian people, with the help of Mr. Taylor, removing a tyrannical and oppressive regime and after that, winning a resounding democratic mandate at the polls, internationally verified as being "free and fair".

25. Samuel K Doe and a group of disgruntled soldiers seized power in 1981 coup against then President Tolbert, during which they "stormed the Executive Mansion in Monrovia, captured President Tolbert in his pyjamas and disembowelled him."[24] The group subsequently detained thirteen of Tolbert's cabinet members, placed them on trial, and sentenced them to death. The cabinet members were then taken to the beach, tied to telephone poles, and executed by a

[23] Prosecution Pre-Trial Brief, paras. 6-7.
[24] Bill Berkeley, *The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa,* Basics Books, 2001, pg. 31. [Annex A]

drunken firing squad.[25] Shortly thereafter, Doe ordered his troops to storm the French Embassy to seize Tolbert's son, who was also murdered.

26. As the highest ranking non-commissioned officer of the group, Samuel K Doe became Chairman of the People's Redemption Council (PRC) that took power after the coup. During the ensuing years of his administration, until well after 1990 "Doe's soldiers committed the most atrocious human rights abuses ever committed in West Africa."[26] In October 1985 Doe staged civilian elections in accordance with his promise to bring an end to military rule. The polls were characterised by electoral "malpractice[27]" and were held "after two political parties had been banned and prevented from running in the election, after a year preceding the poll when opposition leaders had been imprisoned, after a massacre of students at Monrovia University on Doe's orders on 22 August 1984 following agitation by students and academics.[28]" Doe's party succeeded in "winning" 51% of the vote and the result was accepted by the United States Government, which continued to provide Doe with substantial foreign aid. US aid quickly increased during Doe's tenure so that "by the time of the 1985 election the US had given Doe $400 million. By the outbreak of war in 1989, this had risen to £500 million."[29]

27. Shortly after the election Doe's former ally and one of the founders of the NPFL, Commanding General Thomas Quiwonkpa, led an armed invasion into Liberia from Nimba County. The plot failed and the aftermath of the coup was described by one commentator thus:

> Quiwonkpa was captured, tortured, castrated, dismembered and parts of his body publicly eaten by Doe's victorious troops in different areas of the city. The plotters who had remained in Freetown fled...A mass slaughter then took place. In reprisal for the coup, Gio and Mano civilians, soldiers, government officials and police officers were rounded up by the Executive Mansion Guard and slaughtered. Civilians who celebrated in the streets of Monrovia when they thought the coup had been successful were later rounded up by Doe's troops and driven to the beaches outside the city and massacred. Truck-loads of bodies sped through the city from

[25] Ibid.
[26] Mark Huband, *The Liberian Civil War,* Routledge, 30 June 1998, pg. 36. [Annex B]
[27] Huband, pg. 37.
[28] Ibid.
[29] Huband, pg. 42.

the grounds of the presidential mansion, from where Doe could observe the slaughter, to mass graves outside Monrovia on the road to Robertsfield airport.

28. It was in this environment that Mr. Taylor emerged as the leader of the NPFL from a group of anti – Doe dissidents forced to flee Liberia and exiled predominantly in West Africa and the United States. These dissidents included the current President of Sierra Leone, Ellen Johnson-Sirleaf, a key member of the NPFL at this time. The NPFL attracted a broad base of support both inside and outside of Liberia not out of coercion, but from a shared and real sense of grievance with the Doe regime and a desire for change. Indeed within seven months of their first incursion into Liberian territory on 24 December 1989, NPFL forces gathered sufficient support to begin their advance on Monrovia.

29. Seven years later, at the conclusion of the Liberian Civil War, the first universally acknowledged free and fair elections in Liberian history took place. 600,000 of the 700,000 registered voters of Liberia finally cast their ballots to elect a president on Saturday, 19 June 1997. The election was overseen by more than 500 members of an international observer team led by former U.S. President Jimmy Carter. Mr Taylor received 75.3% of the vote while his nearest rival, Ellen Johnson-Sirleaf received only 10% of the vote.. Taylor's party, the National Patriotic Party (NPP) won 49 of the 64 seats in the Liberian House of Representatives and 21 of the 26 seats in the Senate. The circumstances of Mr Taylor's election, - his democratic mandate, the re-commitment to the Rule of Law, and his appointment of broad based, multi-ethnic, cross- party cabinet, and a real attempt to unify a war torn State, are in stark contrast to the 1985 elections presided over by Samuel Doe.

B. Context: Internal and External Challenges to Mr. Taylor's Presidency

30. Mr. Taylor was inaugurated on 2 August 1997, at which time Foday Sankoh was in prison in Nigeria, and the AFRC junta was already in power in Freetown. After seven years of a bitter civil war involving five warring factions, divided on tribal, ethnic and political lines the prospects for Liberia were fraught with uncertainty. On the date of his inauguration, Mr. Taylor could not be said to be in complete control of Liberian territory as evidenced, perhaps most visibly, by the continued presence of thousands of ECOMOG peacekeepers.

31. Consequently, Mr. Taylor took charge of a nation facing both external and internal security threats. Internally, it was apparent that many members of the former warring factions who remained within the country had not fully complied with the disarmament process. All of these forces were capable of reigniting the conflict in Liberia. Other participants in the conflict, dismayed at the result of the election, had fled the country and taken refuge outside its borders, including Sierra Leone. From the date of Mr. Taylor's election onwards these forces were engaged in preparing their own plans for further insurrection. An already onerous job of governing, rebuilding and galvanising a war torn state was to be made very much more difficult, and as matters transpired, perhaps impossible.

32. The border area of the Mano River Union states has long been the focal point for rebel groups preparing armed insurrection against their respective governments. Given the difficulties of completely securing the remote borders of a developing country during a time of regional conflict, it is likely that Liberians, Sierra Leoneans, Guineans and others were able to cross their respective borders in the absence of usual border controls. Even today, under the Western- and UN-supported democratically-elected government of Liberian President Ellen Johnson-Sirleaf, the borders between Liberia, Sierra Leone and Guinea are not secure or closed. Speaking in regard to the civil strife currently ongoing in Guinea, Sirleaf has admitted, "If anything happens to Guinea, it could spill over. All our borders are porous."[30] UNMIL, a 15,000 strong presence, also admits that it struggles to effectively secure and protect Liberia's remote borders.[31] Furthermore the porous nature of the border is reflected in the shared linguistic, ethnic and cultural characteristics of the Kissy and other people in the region.

33. In the face of these security threats, from both external and internal forces, the Defence contend that it would have been contrary to the interests of the Government of Liberia to allow military personnel, scarce arms, and ammunition to be diverted, for the purposes of committing international crimes, to a conflict in another country. These resources were required to

[30] BBC News, Guinea MPs terminate martial law, 23 February 2007. Online: http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/africa/6389609.stm.
[31] Global Policy Forum, "UN Investigating Recruitment of Liberian Mercenaries in Côte d'Ivoire", 30 March 2005. Online: Http://www.globalpolicy.org/security/issues/ivory/2005/0330libcombat.htm.

maintain domestic stability in Liberia. The Defence submit that any action taken by the Liberian Government to secure arms for itself was entirely consistent with a long established principle in international law that a state has the right to defend its territorial integrity.

C. Context: Role of Mr. Taylor in Peace Process for Sierra Leone

34. Mr. Taylor played an instrumental role in promoting the peace process in Sierra Leone. In 1998 Mr Taylor was appointed as Chair of a Committee of Five Heads of State tasked with engaging the RUF in dialogue and bringing peace and security to the region. The following remarks were made by Mr. Taylor on the 2 October 1999, as part of the statements made by the parties to the four days of mediation talks aimed at harmonising relations between the RUF and the AFRC under the auspices of the Government of Liberia, with the support of ECOWAS. Mr. Taylor summarised his position regarding the inter-dependence of the people of Sierra Leone and Liberia for their regional security thus:

> "...the Liberian contribution had thus been based on the strength of their conviction that they are one people with a common destiny, that there cannot be peace and progress in Liberia without corresponding peace and progress in Sierra Leone."[32]

35. Should the Defence be required or otherwise choose to call a Defence after the end of the Prosecution case, it is anticipated that senior RUF witnesses will testify that Mr. Taylor encouraged them to leave the bush by giving them a safe corridor through Liberia to travel. After drafting the Lome Agreement, the RUF leaders left Lome, stopped in the Ivory Coast and then Liberia for a day before heading to Sierra Leone to show a draft copy to the RUF/AFRC commanders in the bush. While in Liberia for a short time, Mr. Taylor provided the RUF leadership with access to a photocopier machine and encouraged them to cooperate with the peace agreement. All these endeavours were consistent with Mr Taylor's mandate and the objectives set out in his statement of 2 October 1999.

36. Other West African Presidents also helped the RUF during the peace process. For instance, the Togolese President provided the jet for most of the RUF leadership to travel to Lome, and he,

[32] Focus on Sierra Leone, online: www. focus-on-sierra-leone.co.uk./Monrovia_Speeches_2oct99.html.

of course, hosted the RUF in his country during the signing of the Lome Peace Agreement. The Nigerian government frequently provided aircraft and other facilities to transport RUF delegates. Mr. Obasanjo, the outgoing President of Nigeria, personally met with RUF representatives, as did other heads of states, to ensure their continuing compliance with the peace process. The role, link, and interaction of other West African leaders with the RUF is clear. That the Prosecution has not indicted such leaders is evidence, in the respectful submission of the Defence, that such conduct and interaction that Mr. Taylor accepts he had with the RUF does not give rise to any international criminal responsibility.

D. Context: Arms Trade in and Military Support to West Africa

37. The Defence contend that an illegal trade in arms is widespread in West Africa. Arms and ammunition are supplied predominantly by non state actors from across the globe and the proliferation of these weapons is such that that any armed group can easily obtain arms without the knowledge and involvement officers at the highest levels of Government. This trade flourishes in the face of international instruments, treaties and conventions. During the conflict, weapons came into Sierra Leone, Liberia and surrounding states, from the non state actors based in United States, Europe, and other countries. Typically, these weapons were then captured and traded among armed factions throughout West Africa. In this context it is overly simplistic, and a distortion of the truth, for the Prosecution to allege, in the absence of compelling evidence, that Mr. Taylor played a role entailing the "greatest responsibility" in regard to supplying arms to the RUF.

38. A 2000 UN Panel of Experts Report on Sierra Leone Diamonds and Arms acknowledges that the RUF acquired weapons from numerous sources and lists at least eight countries that provided arms to the RUF: Burkina Faso, Bulgaria, Cote d'Ivoire, Guinea, Liberia, Libya, the Slovak Republic and Ukraine. Most weapons destined for RUF fighters originated in Eastern Europe, but they also came from Belgium, Germany, the United Kingdom, and the United States.[33]

[33] UN Security Council, S/2000/1195, Report of the Panel of Experts on Sierra Leone Diamonds and Arms (2000), 19 December 2000, paras. 17-18. Online: www.globalsecurity.org/military/library/report/2000/s-2000-1195.pdf.

39. Evidence shows that the RUF typically acquired weapons (especially in the pre-Indictment period) by capturing them from SLA[34] and ECOMOG[35] troops. In 2000, the RUF obtained weapons from captured UNAMSIL units.[36] The RUF also bartered with the Guinean Soldiers along the Sierra Leonean/Guinean border. In exchange for ammunition, the RUF would trade palm oil, food, and goods like tapes, cars, videos, and refrigerators.

40. Various countries also shipped weapons into Sierra Leone in order to support the CDF and the Sierra Leonean government. The CDF acquired weapons from Guinea, Egypt, Nigeria, Romania, Russia, Ukraine, Bulgaria, China, and the United Kingdom.[37] Additionally, the Sierra Leonean government resorted to hiring private military companies such as the Gurkha Security Guards Limited 27 and Executive Outcomes (from South Africa),[38] and Sandline International (from the United Kingdom). It seems likely that weapons initially intended for the CDF or the government also ended up in the hands of the RUF.

V. Defence Submissions Regarding the Specific Allegations

41. The Prosecution contend that Mr. Taylor is allegedly guilty of all eleven counts specified in the Amended indictment. These include being responsible for 5 counts of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, 1 count of Other Serious Violations of International Humanitarian Law, and 5 counts of Crimes Against Humanity, in violation of Articles 2, 3, and 4 of the SCSL Statute, individually or cumulatively charged in the Amended Indictment, dated 16 March 2006.

42. For each of those charges, the Prosecution must prove, beyond reasonable doubt:

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[34] Small Arms Survey, Eric Berman, Re-Armament in Sierra Leone: One Year after the Lome Peace Agreement, Occasional Paper Series No. 1, Geneva (2000), pg. 17 ("Small Arms Survey"). Online: http://www.smallarmssurvey.org/files/sas/publications/o_papers_pdf/2000-op01-sierraleone.pdf.

[35] Gibril Gbanabone, "ECOMOG Sold Weapons to Rebels Arnold Quainoo," Africa News Service, 20 January 1999. Online: http://www.nisat.org/west%20africa/news%20from%20the%20region/ecomog_sold_weapons_to_rebels_ar.htm

[36] Small Arms Survey, pgs. 18-20.

[37] Small Arms Survey, pgs. 21-23.

[38] Dr. Robert Bunker and Steven Marin, Resource Guide of Open Documents Concerning EO, "The Executive Outcomes: Mercenary Corporation OSINT Guide," 1999. Online: http://www.williambowles.info/spysrus/eo.html.

i) that the crimes were actually committed;
ii) that the crimes fulfil all the legal elements – the contextual and specific elements – of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, Other Serious Violations of International Humanitarian Law, or Crimes Against Humanity;
iii) that there was a nexus between the alleged crimes and Mr. Taylor.

43. At this moment in time, the Defence expects this case to be primarily concerned with the nexus between the alleged crimes and Mr Taylor. The critical question in the case is therefore not so much whether the crimes in Sierra Leone were indeed committed, but whether Mr. Taylor is criminally responsible for them.

44. To establish a nexus between Mr. Taylor, who was residing in Liberia throughout the whole Indictment period, and the crimes allegedly committed in Sierra Leone, the Prosecution rely upon the five modes of participation detailed below, the elements in relation of each of which they need to establish beyond reasonable doubt.

A. Common Plan

45. A notable feature of the Amended Indictment was the deliberate decision to drop the allegation, present in the original indictment, that Mr. Taylor was part of a Joint Criminal Enterprise ("JCE"). The doctrine, scope and case law of JCE was well known to the Prosecutor as it has been employed in other cases before the SCSL. It has been judicially considered in a great many cases before the ICTY and ICTR. The decision to drop it from the Amended indictment in the case of Mr. Taylor cannot be taken to have been accidental. Nor can the Prosecution escape its consequences.

46. What is impermissible is for the Prosecution to decide to no longer specifically plead JCE and yet to rely upon its elements via the backdoor. Whilst it is accepted that some case law seems to conflate the doctrine of "common plan and purpose" with JCE, there are important

differences. As far as they differ, the indictment must prevail.[39] Charging of the forms of liability, in informing those accused in sufficient detail the nature of the charge, so as the defence can be prepared, pursuant to the rights to a fair trial, are material facts that must be pleaded in the indictment.[40]

47. The Prosecution have, it seems, used the term "common plan or purpose" but sought to define it, in the Pre-Trial Brief, by legal elements held to be specific to the jurisprudence of JCE, particularly JCE – Type III.[41] The Special Court's jurisprudence suggests that the Pre-Trial Brief's references to elements of joint and criminal enterprise do not cure prejudice to the Mr. Taylor lack of pleading in the Indictment.[42]

48. A review of current international criminal jurisprudence on this issue discloses that where joint and criminal enterprise liability is alleged in substance, the Prosecutor must distinguish between the three types of such liability in the indictment itself. The Indictment must state whether the joint and criminal enterprise charged is Basic - Type I and II, or Extended - Type III. The requirements for the latter, Type III (an extended form of JCE), are even more stringent. Even where (unlike the present case) joint and criminal enterprise is specifically pleaded in the indictment:

> "Trial Chambers have refused to rely on an extended form of joint criminal enterprise in the absence of an amendment to the Indictment expressly pleading it."[43]

49. Thus, the pleading requirements of Type III joint criminal enterprise are heightened. The Prosecutor must specify (1) "the purpose of the enterprise", (2) "the identity of the co-

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[39] The indictment is the primary charging instrument pursuant to Article 17 (4) of the Special Court's Statute, and the jurisprudence of international tribunals. *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004, para. 29 *citing* ICTR Statute Articles 17(4), 19(2), 20(4); Rule 47 of the ICTR Rules of Procedure and Evidence; *Semanza,* Judgement (TC), para. 42; *Kupreskic,* Judgement (AC), paras. 88; *Hadzohasanovic et al,* Case No. IT-01-47-PT, Decision on the Form of the Indictment (TC), 7 December 2001, para. 8.

[40] *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 34.

[41] Prosecution Pre-Trial Brief, para. 148.

[42], *Prosecutor v. Krnojelac,* IT-97-25-A, Appeals Chamber Judgment, 17 September 2003, paras. 91-94; *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 39.

[43] *Prosecutor v. Simic,* IT-95-9-T, Judgment, 17 October 2003, para. 146.

participants", and (3) "the nature of the accused's participation in the enterprise".[44] Lastly, as a form of accomplice liability, each count in which joint and criminal enterprise is charged must "refer to the paragraphs describing the relevant conduct of the accused and of the principal perpetrator."[45] The Indictment, needless to state, deficient of any reference to joint and criminal enterprise, does not distinguish or identify the type of joint and criminal enterprise that is charged, and does not meet the heightened pleading requirements for Type III joint and criminal enterprise liability. Further, there is no enumeration of the identity of the alleged co-participants in the joint criminal enterprise. Any elucidation of the joint enterprise and Mr. Taylor's participation is also deficient.

50. It is not, in any event, accepted that the third category of joint criminal enterprise, or extended form of joint criminal enterprise, as identified by the Appeals Chamber in *Tadic,*[46] was a basis of criminal liability that had crystallised into a norm of customary international law from the commencement of the indictment period in 1996. At this time, there was no uniform state practice of criminal liability for crimes arising out of a common plan or purpose that had not been agreed upon as part of any such common plan. Thus, it is submitted that, in such circumstances, no criminal liability should arise even if it was foreseeable that additional crimes might be perpetrated by a party to the joint criminal enterprise and that, notwithstanding this, the accused willingly participated in the joint criminal enterprise. In short, it is submitted that there should be no liability for an accused pursuant to the joint criminal enterprise doctrine unless the accused himself had the *intention* to commit the specific crime alleged.

51. Be that as it may, the Defence maintain that, the doctrine of "common plan or purpose" as identified in established international case law should be applied to this case rather than any attempt by the Prosecution to further blur the lines between JCE and what has been understood since Nuremberg as the scope and ambit of "common plan or purpose".

52. Also, in Paragraph 142, the Prosecutor misrepresents the *Tadic* appeals chamber Appeals Decision. While true that the Appeals Chamber requires that there must be a "common plan,

[44] *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 34.
[45] *Prosecutor v. Ntagerura,* Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para. 38.
[46] *Prosecutor v. Tadic,* IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, paras. 185-192

design or purpose which *amounts to* or *involves* the commission of a crime listed in the Statute[,]" such a requirement was merely one element of the *actus reus* of this form of liability, the others being "a plurality of persons", and "participation of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute."[47] The mischaracterisation is clear when paragraph 227 is read in conjunction with paragraph 220 of the *Tadic* Appeals decision. For Type 1 JCE, there co-perpetrators must have a common criminal intent. Even for Type 2 JCE, there must be an "(i) the intention to take part in a joint and criminal enterprise and to further – individually or jointly – the criminal purpose of the enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose."[48]

53. The Prosecutor's additional contention, that "A common plan to control a country by any means necessary, including criminal means, in order to exploit the natural resources of that country may be considered to *amount* to the commission of crimes within the jurisdiction of the court[,]"[49] is also mistaken in law. First, the common plan is one element. Secondly, the intent of the common plan must be criminal, and not merely the implementation. Having access to the oil in the middle east is not a criminal purpose in itself, and thus controlling resources in another country by non-criminal means does not constitute the requisite criminal intent, unless the plan was to control such resources unlawfully. Thus, if the common plan alleged by the Prosecutor is not criminal in its inception, and it is not alleged that the plan was amended to become a criminal one, the foundation element for JCE is not met.

54. The Prosecutor's alternative suggestion, also in Paragraph 143, also does not hold water. It avoids the issue – the common plan must have a criminal purpose, and that has not been pled in the Pre-Trial Brief, and not merely be a lawful common plan whose commission involves criminal methods.

55. The Prosecutor, in Paragraphs 145 to 148 extends its prior error in law. The "underlying purpose for entering the common plan...", unlike the proposition in Paragraph 145, is

[47] *Prosecutor v. Tadic,* ICTY, Appeals Chamber Judgement, para. 227.
[48] *Prosecutor v. Tadic,* ICTY, Appeals Chamber Judgement, para. 220.
[49] Prosecution Pre-Trial Brief, para. 143.

irrelevant only so far as the motive is concerned. Indeed, a full reading of the paragraph cited demonstrates that:

> "...the Common Plan necessarily has to amount to, or involve, an understanding or an agreement between two or more persons that they will commit a crime within the Statute"

as shown above, the common plan must have a criminal intent.

56. In Paragraph 143, the Prosecutor once again, perhaps inadvertently, diverges from the narrow definition of the jurisprudence. The case cited by the Prosecutor does not refer to Type III common plan or purpose involving events that were a "reasonably foreseeable consequence of the common plan, that is, possible consequence...". The *Brdjanin Appeals Judgement* does not use the modifier "reasonable". There is academic agreement that the "natural and foreseeable consequences" reflects the current standard.

B. Planning

57. The Defence accepts the definition of planning set out in the Rule 98 Decision, namely that one or several persons "contemplate designing the commission of a crime at both the preparatory and execution phases". The Defence notes that the Prosecution quotes this but subsequently adopts the definition without the last phrase "at both the preparatory and execution phases". The Defence submits that these omitted elements are crucial to the definition of planning and invites the Trial Chamber to use the definition as defined in the Rule 98 Decision, not by the Prosecution.

58. Mr. Taylor denies that he planned any of the criminal events in Sierra Leone, and, more specifically, denies all of the allegations set out in paragraphs 37 to 41.

C. Instigating

59. The Defence notes that the Prosecution has included the legal definition of instigation but failed to provide the factual premise on which the allegation of instigation is based.

D. Ordering

60. The Defence accepts the Prosecution's legal definition of ordering, namely that an Accused can be found guilty of ordering a crime where it is proved beyond reasonable doubt that he was in a position of authority and he used that authority "to impel another, who is subject to that authority, to commit an offence".[50]

61. In addition, whilst it is not required that there is a formal superior-subordinate relationship between the accused and the perpetrator, the accused must have given the alleged order in an authoritative capacity vis-à-vis the person who carried out his order.[51] If a formal superior-subordinate relationship between the Accused and the perpetrators has not been established, the Prosecution must demonstrate that the circumstances of the case suggest that the Accused's words of incitement were perceived as orders by the perpetrators.[52] The order must have had a direct and substantial effect on the commission of the offence charged in the indictment.[53]

62. If an authoritative relationship has been demonstrated, there still needs to be evidence that the person who ordered an act or omission had the requisite *mens rea* for the offence to be committed, which means he acted, as a minimum "with the awareness of the substantial likelihood that a crime will be committed in the execution of that order".[54] A mere risk does not suffice to infer criminal liability pursuant to Article 6(1); otherwise, any military commander who issues orders would be criminally liable.[55]

63. Mr. Taylor denies ever having given any orders to any member of the AFRC, RUF or any Liberian fighting in Sierra Leone in the indictment period. He denies having had any

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[50] Prosecution Pre-Trial Brief, para. 158, footnote 219.

51 *Prosecutor v Semanza*, ICTR-72-20-T, Judgment, 15 May 2003, paras. 361 and 382; *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, Judgment, 17 June 2004, para.282.

[52] *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, Judgment, 17 June 2004, para. 283.

[53] *Kamuhanda v Prosecutor*, No. ICTR-99-54A-A, Appeals Chamber Judgment, 19 September 2005, para. 75.

[54] *Prosecutor v Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 42 (emphasis added).

[55] *Ibid*, para. 41.

involvement in the operations that the Prosecution allege against him, which resulted in crimes and suffering in Sierra Leone during the indictment period.[56]

64. He further denies having "ordered" the release of the UN peacekeepers in 2000. He nonetheless, happily concedes that he played a crucial role in their release. Giving advice or even demands are not tantamount to orders. Mr. Taylor also denies having had a position of authority vis-à-vis the persons he allegedly ordered to conduct certain operations.[57]

E. Command Responsibility

65. There seems to be no disagreement between the parties that the Prosecution is required to prove three distinct elements in order to establish liability pursuant to Article 6(3) of the SCSL Statute, being:[58]

i) the existence of a superior-subordinate relationship;
ii) the superior knew or had reason to know that the criminal act had been, or was about to be committed; and
iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

66. The Defence is further not in dispute that a superior-subordinate relationship may be derived from the accused's *de facto* or *de jure* position of superiority.[59] Also, the Defence concedes that the principal question in determining whether Mr. Taylor was in a command position vis-a-vis the RUF, AFRC/RUF and "Liberian fighters" was whether Mr. Taylor had the ability to "effectively control" them.

67. In *Hadzihasanovic and Kubura*, the Trial Chamber summarised the elements to consider in establishing whether there is effective control, as established by jurisprudence, as follows:[60]

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[56] Prosecution Pre-Trial Brief, paras. 37-49.
[57] See below, command responsibility.
[58] *Celebici,* Trial Judgment, at para. 346; *Prosecutor v. Blaskic*, IT-95-14-A, Judgment, 29 July 2004, para. 484; *Prosecutor v Alekovski*, IT-95-14/1-A, Appeals Chamber Judgment, 24 March 2000, para. 72.
[59] Prosecution Pre-Trial Brief, para. 160.
[60] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Judgment, 15 March 2006, para. 83 (footnotes omitted).

> "the official position of an accused, even if "actual authority, however, will not be determined by looking at formal positions only;" the power to give orders and have them executed; the conduct of combat operations involving the forces in question; the authority to apply disciplinary measures; the authority to promote or remove soldiers, and the participation of the Accused in negotiations regarding the troops in question."

68. Further, in the ICTR case of *Semanza* the Trial Chamber defined "effective control" as follows:[61]

> "Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a simple showing of an accused individual's general influence".

69. Mr. Taylor denies the existence of all three legal ingredients in respect of the RUF, AFRC/RUF and "Liberian fighters".

i) Superior-subordinate relationship

a. Liberian fighters

70. The Defence accepts that there were various groups of Liberian fighters fighting in Sierra Leone, but contends that the Prosecution has failed to clearly define which of these groups allegedly fell under Mr. Taylor's command at any particular time. The term "Liberian fighters", when used in the context of Liberian nationals engaged in the conflict in Sierra Leone, is amorphous and encompasses a large number of individuals allied to different groups often with competing interests. Although their number is unknown, Liberian fighters seem to have fought for all sides and regularly switched sides. President Kabbah affirmed that the Sierra Leonean Army had integrated a Unit called the Special Task Force (STF) which consisted of Liberian fighters belonging to the United Liberation Movement for Democracy in Liberia (ULIMO).[62]

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[61] *Prosecutor v Semanza*, ICTR-72-20-T, Judgment, 15 May 2003, para 402 (emphasis added).
[62] A Statement by his Excellency the President Alhaji Dr. Ahmad Tejan Kabbah made before the Truth and Reconciliation Commission on Tuesday 5th August, 2003 ("President Kabbah's Statement"), paras 52-63.

71. The only information provided in this regard is set out in the paragraphs of the Prosecution Pre-Trial Brief cited below where the Prosecution state that the following Liberian fighters in Sierra Leone allegedly fell under Mr. Taylor's authority and control.

72. Paragraph 9 of the Prosecution Pre-Trial Brief refers to Mr. Taylor's Liberian subordinates who include: Benjamin Yeaten, Musa Sesay, Grace Minor, Joe Tuah, Roland Duoh, Christopher Varmoh, Momoh Gibba, Duopo Makerzon, Sampson Weah, and Zig Zag Marzah.

73. In paragraph 16, the Prosecution allege that the "the Accused exercised authority and control over Liberian fighters who participated with the RUF, Junta and AFRC/RUF throughout the armed conflict in Sierra Leone"

74. In paragraph 17, the Prosecution states that "[a]ll these organised armed groups, including the NPFL, had established chains of command, established headquarters and geographic areas over which they exercised control". (emphasis added)

75. Paragraph 24 states: "Most of the commanders of the composite force which initiated the conflict in Sierra Leone were members of the NPFL. The Accused was the superior commander over this composite force."

76. From the above it is unclear whether the Prosecution contend that all Liberian fighters in Sierra Leone including those individuals cited and NPFL members who "participated with the RUF, Junta and AFRC/RUF" were allegedly under Mr. Taylor's control. As confirmed by President Kabbah in his testimony before the Truth and Reconciliation Commission,[63] the Special Task Force ("STF") joined the AFRC/RUF forces after the AFRC coup. It is assumed that the Prosecution will not maintain that the STF, said to be sworn enemies of Mr Taylor, came under the authority and control of Mr. Taylor due to their alliance with the AFRC/Junta.

77. Further, in paragraph 21 of their Pre-Trial Brief, the Prosecution submits:

[63] President Kabbah's Statement, para. 61-62.

> "After the Accused became President in 1997, he also exercised control and authority over organised armed groups and/or government forces and units in Liberia. The Accused exercised de facto authority over the organised armed groups, and de jure and de facto authority over the Liberian forces, to include the Armed Forces of Liberia (AFL), the Liberian National Police (LNP), specialized units within those forces such as the Special Operations Division (SOD), and other special units such as the Special Security Service (SSS), and the Anti-Terrorism Unit (ATU). The Accused used all of the abovementioned organised armed groups and forces as tools to implement and achieve the common plan."

78. It is unclear whether the Prosecution allege that Mr. Taylor sent these "organised armed groups and forces" to Sierra Leone or whether he allegedly used them in Liberia or in any other way. It is submitted that if the allegation is that Mr. Taylor sent these "organised armed groups and forces" to Sierra Leone, the Prosecution should have stated this more clearly. In any event, Mr. Taylor denies having sent any of these "organised armed groups and forces" to Sierra Leone or used them in any other way "to implement and achieve the common plan".

79. Moreover, Mr. Taylor denies that he had any *de facto* authority over unidentified organised armed groups, and the Defence cannot properly prepare without knowing which groups the Accused was supposed to have controlled.

80. In the absence of any further specification, the Defence understands the groups of Liberian fighters allegedly under Mr. Taylor's authority and control to be: the persons specifically mentioned in paragraph 16 of the Prosecution Pre-Trial Brief, the NPFL, the AFL, the LNP, the SOD, the SSS and the ATU. His alleged authority and control over the NPFL covers the period between 30 November 1996 and 2 August 1997 when he became President of Liberia. Thereafter, his alleged authority and control was over the other units in the Liberian forces. The Defence does not accept that Mr. Taylor has been properly charged with having authority and control over any other unidentified group of Liberian fighters.

b. AFRC/RUF

81. The Defence further denies the allegations in paragraphs 26 and 27 of the Prosecution Pre-Trial Brief that Mr Taylor "exercised individual control and authority over the AFRC/RUF".[64] The Prosecution has not provided details of any relationship between Mr. Taylor and the AFRC and the allegation of an alleged superior-subordinate relationship is entirely unsubstantiated.

82. The Defence further interprets the Prosecution allegation that Mr. Taylor exercised authority and control over the "Junta – in particular the RUF component" as reading that Mr. Taylor merely exercised control over the RUF component of the Junta, not the AFRC.

c. RUF

83. The Prosecution has alleged that, during the period that Foday Sankoh was incarcerated in Nigeria, "Sankoh conveyed an order to his subordinates that they were to take orders from the Accused".[65] This is denied and Mr. Taylor rejects any suggestion that he has ever been in a position to give orders to the RUF fighters.

84. In further support of their allegation that Mr. Taylor exercised authority and control over the RUF, the Prosecution allege that the senior leaders of the RUF regularly deferred to Mr Taylor on critical decisions. Paragraphs 28 and 46 state:

> " Senior leaders of the RUF, Junta – in particular the RUF component, and AFRC/RUF consulted with the Accused before they took major decisions and travelled to Liberia often to speak with the Accused. When tensions or fighting increased in Sierra Leone, these leaders contacted the Accused to get his direction, advice and counsel."
>
> "When the accused ordered senior level leaders of these groups to travel to Liberia to meet with him they did so. When the accused ordered them to provide personnel to fight with his forces in Liberia, those senior leaders always obeyed those orders. When the AFRC/RUF took UN peacekeepers hostage in 2000, the accused obeyed that order, but indicated that had it not been for the accused's order, he would not have released them."

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[64] Prosecution Pre-Trial Brief, para. 26.
[65] Prosecution Pre-Trial Brief, para. 26.

85. Mr. Taylor denies issuing orders to any members of the RUF as alleged. There is a distinction between requesting and ordering. Exerting tremendous pressure on another party who then concedes their position is not tantamount to an order. Similarly, giving direction, advice and counsel is not tantamount to issuing orders. Mr Taylor accepts that, at the personal request of Former Secretary-General of the United Nations, H.E. Mr Kofi Annan, he exerted pressure on the RUF in the course of high level negotiations to release the UN peacekeepers. The negotiation process that led to their release was conducted under UN supervision. As a consequence of Mr. Taylor's persistence, the negotiations concluded successfully. The Prosecution is attempting to "spin" or distort the role played by Mr Taylor in securing, through diplomatic means, the release of the peacekeepers by citing this as evidence that he exercised *de facto* control over the RUF.

86. In addition, the Defence submits that the Prosecution have deliberately set out to mischaracterise Mr. Taylor's ties with the RUF. The Defence concedes that diplomatic contacts between Mr. Taylor and the RUF existed. However, these interactions largely arose out of Mr. Taylor's efforts to move forward the peace negotiations and did not give rise to a superior-subordinate relationship. The legal standard for establishing such a relationship is high and to satisfy the required criteria the Prosecution needs to demonstrate that there was a chain of command. The Defence maintain that the RUF had its own chain of command and its own leaders did not extend to Mr Taylor. Even if the Prosecution were able to demonstrate that Mr. Taylor happened to had influence over some individual RUF members, it is submitted that this does not give him the status of a superior over RUF personnel in general.

87. In a leading command responsibility Judgment of the ICTY, *Celebici*, the Prosecution contended that because the accused Delalic was in a position to "exercise considerable authority and control",[66] he could be held liable under Article 7(3) ICTY Statute (equivalent of Article 6(3) ICTR Statute), even though he had no real subordinates. The Prosecution asserted that:

[66] *Prosecutor v. Delalic et al,* Trial Judgment, IT-96-21-T, 16 November 1998, para. 609.

> "even if Zejnil Delalic is not characterised as a "superior" of the camp commander and considered to have been in a position to control him and the other perpetrators of offences, he would still have superior responsibility for the crimes committed in the prison-camp by virtue of the authority he exercised in relation to the prison-camp and the Konjic region. In its view, it is clear that he was one of the leading figures of authority in the region at that time, and that his power and influence extended to matters pertaining to the Celebici prison-camp..."

88. The Trial Chamber unanimously rejected such an argument, saying:[67]

> "The view of the Prosecution that a person may, in the absence of a subordinate unit through which the authority is exercised, incur responsibility for the exercise of superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a sine qua non for superior responsibility. The Trial Chamber is unable to agree with the submission of the Prosecution that a chain of command is not a necessary requirement in the exercise of superior authority. The expression "superior" in article 87 of Additional Protocol I is intended to cover "only ... the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter ... is under his control". Actual control of the subordinate is a necessary requirement of the superior-subordinate relationship. This is emphasised in the Commentary to Additional Protocol I."

89. The Trial Chamber accordingly rejected the Prosecution's argument that the Accused can exercise superior authority over non- subordinates that he can substantially influence in a given situation.

90. Moreover, in the *Semanza* case, the Trial Chamber rejected the Prosecution arguments seeking to impute criminal liability pursuant to Article 6(3) of the ICTR Statute as a result of the accused's 20 years as a bourgemestre, and the support and goodwill he enjoyed from the community. The Trial Chamber held: [68]

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[67] *Ibid*, para. 612 (emphasis added).
[68] *Prosecutor v Semanza*, ICTR-72-20-T, Judgment, 15 May 2003, para 415.

> "The Chamber emphasizes that the Prosecutor's theory, which is similar to the approach taken and rejected in *Musema*, fails to take account of the correct legal standard. A superior-subordinate relationship is established by showing a formal or informal hierarchical relationship involving an accused's effective control over the direct perpetrators. A simple showing of the accused's general influence in the community is insufficient to establish a superior-subordinate relationship."

91. The reasoning in *Semanza* was adopted in the *Cyangugu* Judgment, which was upheld on appeal.[69] Similarly, in acquitting the accused *Halilovic* of command responsibility, the ICTY Trial Chamber relied on reasoning from the Appeals Chamber in *Celebici*, and held that not even substantial influence would result in criminal liability, stating: [70]

> "A degree of control which falls short of the threshold of effective control is insufficient for liability to attach under Article 7(3). ' Substantial influence' over subordinates which does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising command responsibility and, therefore, to impose criminal liability."

92. The Defence therefore submit that, in order for the Prosecution to establish beyond a reasonable doubt that there was a superior-subordinate relationship between Mr. Taylor and any of the fighters in the Sierra Leonean war who were allegedly engaged in crimes, the Prosecution must establish that there was a chain of command between them, in that that Mr. Taylor had authority and control over them. To establish that Mr. Taylor had substantial influence over their decisions does not suffice to qualify him as a "superior" vis-à-vis the fighters on the ground in Sierra Leone.

ii) "knew or had reason to know"

93. As a preliminary note, the Defence submits that, if the Prosecution fails to establish that there is a superior-subordinate relationship, the elements of knowledge and failure to prevent or punish have become irrelevant considerations. However, the Defence makes the following submissions regarding the standard required.

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[69] *Prosecutor v Ntagerura et al*, ICTR-99-46-T, Judgment, 25 February 2004, para. 628.
[70] *Prosecutor v Halilovic*, IT-01-48-T, Judgment, 16 November 2005, para. 59.

94. The Prosecution states that "[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'. It is sufficient if the superior has notice of a "real and reasonably foreseeable risk" that crimes will occur."[71]

95. The Defence submits that the Prosecution's characterisation of the "had reason to know" requirement is incomplete. The Defence wishes to add the following important element, as established in *Celebici*, the leading case on command responsibility:

> "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates." "Neglect of a duty to acquire such knowledge, however, does not feature in the provision [Article 7(3)] as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish."[72]

96. Also in *Hadzihasanovic and Kubura*, the Trial Chamber confirmed that "had reason to know" is not equivalent to "should have known". Therefore, "a superior cannot be held criminally responsible for neglecting to acquire knowledge of the acts of subordinates, but only for failing to take the necessary and reasonable measures to prevent or to punish."[73] In Blaskic, the Appeals Chamber held that a superior may be held responsible for deliberately refraining from finding out, but not for negligently failing to find out.[74]

97. Mr. Taylor accepts he received information regarding the situation in Sierra Leone in his official capacity as the President of a neighbouring country and a member of the ECOWAS Committee of Five. In the course of his official duties, Mr Taylor obviously received information about the conflict in Sierra Leone, and was aware and sympathetic to the suffering of the people of that neighbouring Republic. However, as far as specific acts were concerned,

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[71] Prosecution Pre-Trial Brief, para. 166.
[72] *Prosecutor v. Delalic et al,* Trial Judgment, IT-96-21-A, 20 February 2001, para. 241; also: *Prosecutor v Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 62.
[73] *Prosecutor v. Hadzihasanovic and Kubura*, IT-01-47-T, Judgment, 15 March 2006, para. 96 (footnotes omitted).
[74] *Prosecutor v Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para. 406.

the Prosecution is put to proof that they were committed by subordinates of the Accused and that he "had reason to know" they had committed such crimes. Those allegations are denied.

iii) failure to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof

98. The Prosecution states: "A civilian or a military superior is liable if it is proved that he had the power to prevent or punish [which includes the power to turn over for investigations]."[75] Clearly, a civilian or a military superior cannot be liable unless the Prosecution establishes all the ingredients of liability as a superior, namely: (1) that there is a subordinate-superior relationship; (2) he knew or had reason to know that the superior knew or had reason to know that the criminal act had been, or was about to be committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

99. Mr. Taylor denies that he had the material ability to prevent or punish the commission of the principal crimes. Given the lack of jurisdiction over conduct in a foreign territory not to mention the geographic distance between him and the location where the crimes allegedly occurred, it would not have been possible for him to implement any measure in neighbouring country Sierra Leone.

100. As conceded by the Prosecution, at the very least, from about 1993 or 1994 until about 1996, ULIMO, "was in control of the border areas in Lofa County, cutting off a main supply and access route to Sierra Leone".[76] During this period, when the border between Liberia and Sierra Leone was effectively closed, it would be absurd to consider that Mr. Taylor had any material possibility to prevent any crime or punish any perpetrators in Sierra Leone. Even on the Prosecution's case, it should be accepted that during this period at least the Accused did not have "effective control" over those committing crimes in Sierra Leone.[77]

[75] Prosecution Pre-Trial Brief, para.
[76] Prosecution Pre-Trial Brief, para. 25.
[77] Prosecution Pre-Trial Brief

F. Aiding and Abetting

101. The Defence accepts the legal definition of aiding and abetting given by the Prosecution in paragraphs 151-154 of their Brief. However, where the Prosecution quote *Furundzija*, saying that aiding and abetting "*may* consist of moral support or encouragement of the principals in their commission of the crime", it is important to emphasise the word "may". Whether the circumstances individually or cumulatively amount to aiding and abetting requires a case-by-case consideration. Whether moral support or encouragement is sufficient to amount to aiding and abetting depends on the relationship between the aider and abetter and the principal: "The supporter must be of a certain status for this to be sufficient for criminal responsibility".[78]

102. The Prosecution further omit the very important requirement of the *actus reus* of aiding and abetting, namely "that the support of the aider and abettor has a substantial effect upon the perpetration of the crime".[79]

103. Mr. Taylor is alleged to have aided and abetted the crimes of the RUF, Junta, AFRC/RUF by providing "continuing assistance, including arms, ammunition and other material, manpower, military training, facilities and safe havens in Liberia, strategic and tactical advice, direction and encouragement, and other assistance".[80] Allegedly, Mr. Taylor is said to have received diamonds in return for this assistance.[81]

104. Mr. Taylor denies these allegations. The Defence further submit that these allegations, whether taken individually or cumulatively do not give rise to culpability on the basis of aiding and abetting.

i) Arms and Ammunition

[78] *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, 10 December 1998, para. 209.
[79] *Prosecutor v Blaskic*, IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, para, 48.
[80] Prosecution Pre-Trial Brief, para. 50.
[81] Prosecution Pre-Trial Brief, para. 51.

105. Mr. Taylor refutes any allegation that he was personally involved in any weapons trade to Sierra Leone at any time during the Indictment period. The Prosecution is put to strict proof and must accordingly establish, not only that weapons were delivered to Sierra Leone from Liberia, but also that Mr. Taylor was personally involved in any such illegal weapons trade.

ii) Manpower

106. Mr. Taylor denies providing manpower to the RUF, Junta and AFRC/RUF at any time during the Indictment period. The Prosecution is put to strict proof on this issue.

iii) Military Training

107. The Defence puts the Prosecution to strict proof on this issue. The Defence submits that the Prosecution must establish, not only that training sessions were held in Liberia but also that Mr. Taylor was involved in the operation thereof.

iv) Facilities and Safe Havens in Liberia

108. The Defence put the Prosecution to strict proof on this issue. The Defence concedes that Mr. Taylor provided a guest house in Monrovia to the RUF leadership during the peace process in the context of the Lome Peace Accord. He did so pursuant to his role as a Representative of the ECOWAS Committee of Five, a committee which was mandated to try and negotiate a peace settlement between the warring factions in Sierra Leone. In this capacity, Mr. Taylor held diplomatic talks with the RUF, which largely took place in Liberia. During the course of these communications Mr. Taylor, was in regular contact with the Former Secretary-General of the United Nations, H.E. Mr. Kofi Annan, President Kabbah, the other members of the ECOWAS Committee of Five. Mr. Taylor's efforts to bring back peace to Sierra Leone and the several meetings he had with RUF representatives are well documented in UN reports.

iv) Strategic and Tactical Advice, Direction and Encouragement

109. The Defence puts the Prosecution to strict proof to establish all allegations in this regard. 5516

v) Other Assistance

110. The Defence put the Prosecution to strict proof on this issue.

VI. Conclusion

111. Mr Taylor pleaded not guilty to counts 1 – 11 in the Amended Indictment at his first appearance before the SCSL in Freetown on 3 April 2006. He is not guilty of any of the crimes alleged against him. Accordingly he puts the Prosecution to strict proof of its case against him.[82]

Respectfully Submitted,

Karim A. A. Khan
Lead Counsel for Mr. Charles Taylor
Dated this 26th Day of April 2007

[82] At the time of filing this Defence Pre-Trial Brief, the Defence has not had the opportunity of taking final instructions from the client in relation to many issues. The reasons for this have been adequately ventilated in previous filings. (see for example adequate time motion and motion for reconsideration). In addition, many important Prosecution expert reports have not yet been disclosed to the Defence. The Defence therefore reserves the right to add to or amend this Pre-Trial Brief in due course, with the leave of the Trial Chamber.

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Annex B Mark Huband, *The Liberian Civil War,* Routledge, 30 June 1998 *

Annex C *Prosecutor v. Čermak and Markač,* IT-03-73, Decision on the Defence Motion on the Form of the Indictment, 8 March 2005

Annex D *Prosecutor v. Simba,* ICTR-01-76-I, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004

* note: this resource is more than 30 pages long, so in compliance with Article 7(E) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone as amended 10 June 2005, the annex only includes the relevant sections of text.

public health; he devoted more than 1 percent of the national budget to the upkeep of his presidential yacht. Tubman created a personal cult based on an elaborate network of kinship and patronage, personal loyalty, the manipulation and co-optation of tribal chiefs—and force. He built an extensive secret police network and laid the groundwork for much of what was to come under Doe: a personal autocracy based on weak institutions and contempt for law.

But Tubman established himself as a reliable ally of the United States in the early stages of the Cold War, and this won him both financial and military support. It was during Tubman's rule that the United States built the Voice of America relay station for broadcasts throughout Africa and the Omega navigation tower for shipping up and down the Atlantic Coast. The American embassy in Monrovia became the main transfer point for intelligence gathered in Africa. U.S. military planes were granted landing and refueling rights on twenty-four hours' notice at Roberts Field, outside Monrovia, which had been built by Americans as a staging ground during World War II. Liberia cast a key vote in the United Nations in support of the creation of Israel.

Tubman's successor, William Tolbert, did try to liberalize the political machinery, but his reforms merely heightened expectations that could not be satisfied. One memorable confrontation in Monrovia, on April 14, 1979, almost exactly a year before Doe's coup, highlighted the wide gap between the ruling elite and the indigenous masses. At a time of intensifying hardship for most Liberians and increasingly ostentatious displays of wealth by the elite, Tolbert announced an increase in the price of rice, the Liberian staple. When it became apparent that Tolbert and members of his family stood to benefit personally from the price increases, residents of a seething Monrovia slum known as West Point rose up in a series of street demonstrations. Tolbert ordered the police to open fire on the unarmed demonstrators. More than forty were killed. The "rice riots," as they came to be remembered, created a groundswell of ill will from which Tolbert never recovered.

Unfortunately, the agent of change was the army. Originally called the Frontier Force, Liberia's army was created in 1907 as a means of securing the country's borders against French and British colonial encroachment. President William Howard Taft sent the first U.S. training officers to help out in 1912. The army assumed two essential

responsibilities: tax collection—one might say "taxation without representation"—and suppression of dissent. The army fought twenty-three brutal wars against indigenous uprisings, and the United States intervened directly in nine of them. By 1951 the United States had established a permanent mission in Liberia to train its army. Many top officers were sent to America for training. Samuel Doe was trained by the Green Berets.

The enlisted ranks were mainly illiterate peasants, school dropouts and street toughs. In the hinterland areas under their control, they were kings—unpaid but able to plunder what they needed, from cattle and rice to women and girls. It was a West African version of Haiti's *Tonton Macoutes*.

The Armed Forces of Liberia (AFL), as it came to be called, was a malignant organism in the body politic, inherently opportunistic, unlikely to be a source of progressive change. In retrospect it's clear that the institution of the army was a microcosm for what ailed Liberia. A gang culture flourished. Violence was rampant. Ties of blood and ethnicity were paramount. The construction of ethnic patronage systems by rival soldiers would become one of the most important causes of Liberia's subsequent collapse.

On April 12, 1980, Samuel Doe, then an unknown semiliterate master sergeant, and a band of sixteen collaborators—the youngest was sixteen years old—stormed the Executive Mansion in Monrovia, captured President Tolbert in his pajamas and disemboweled him. Two weeks later, in an unforgettable public spectacle that haunts Liberia to this day, thirteen members of Tolbert's cabinet were tied to telephone poles on the beach and mowed down by a drunken firing squad. There followed weeks of bloodletting in which hundreds were killed.

Nevertheless, Doe's coup was widely applauded at first. There was dancing in the streets of Monrovia. Casting himself as the liberator of the indigenous masses, Doe promised an end to the corrupt and oppressive domination of the Americo-Liberian elite and a more equitable distribution of the nation's wealth. He also pledged to return the country to civilian rule in five years. But he soon proved to be a lawless and brutal tyrant.

Master Sergeant Doe and his comrades styled themselves the "People's Redemption Council" (PRC), and they lost no time in consolidating their control. Within a matter of days after the coup, the PRC suspended the constitution

was banned. Military rule evolved into a byzantine pattern of plotting and intrigue, alleged conspiracies, and executions by firing squad. In his first five years in power Doe executed more than fifty rivals, real and imagined, after secret trials. Scores of civilians were detained without trial for violating the ban on political activity. Informal charges ranged from plotting coups to "discussing Sgt. Doe's level of education." Doe, for his part, adapted to the perquisites of power in a manner familiar to leaders across the continent, expanding from the scrawny sergeant in battle fatigues to a blowfish-fat, self-proclaimed doctor in a three-piece suit.

"When the coup took place in 1980, it was an exact reflection of the kind of army that the system had produced," said Commany Wesseh, a onetime student activist who spent a decade in exile during Doe's regime. "Arrest on mere suspicion, strip people naked, parade people naked through the streets, kill people on the beach after summary trials—the same acts that were carried out against my own father and others prior to 1980 were carried out against their creators. Doe was the embodiment of everything that had happened before. The difference with Doe was a difference in scale, not quality. If Tolbert did it twice, Doe did it a thousand times."

"Some rapes"

Patrick Seyon, president of the University of Liberia, likewise emphasized the continuity from one regime to the next. "Those who found themselves in power after 1980 went along with the world that had been set in place by the freed American slaves," Seyon told me. "No one saw that there was something systemic in the level of inequality that existed. They followed right in line."

Dr. Seyon is a gentle, soft-spoken scholar with a wry wit and wispy white goatee. In 1981, when he was forty-three and vice president of the university, he was jailed for two weeks on suspicion of plotting to overthrow Doe's year-old government. He told me he received fifty lashes twice a day for eight consecutive days. Flogging has long been the most common form of summary punishment in Liberia. This, too, was a legacy of the old Americo-Liberian regime, under which common criminals were subjected to what was known as "breakfast and dinner," twenty-five lashes in the morning and twenty-five lashes in

"There were two of them, two soldiers," Dr. Seyon recalled. "One of them used a fan belt from an army truck, doubled up. The other used a strip from a rubber tire. The rubber portion of the thing was removed, so that the fiber, the nylon, was exposed. First they put water on your back. Then they sprinkle sand on your back so that when the piece of rubber was used, you get traction. The sensation you got was as if your skin was being pulled off your back."

The campus of the University of Liberia is a modest collection of tan and red cement-block buildings directly across the street from the Executive Mansion, on the edge of downtown Monrovia. It has been a focal point of conflict for years. In the 1970s it was the scene of protest against the regime of President Tolbert. In the 1980s the campus was roiled by protest and repression under Doe. In 1982 Doe issued an infamous edict, Decree 2A, banning all academic activities that "directly or indirectly impinge, interfere with or cast aspersion upon the activities, programs or policies of the People's Redemption Council." Faculty members and student leaders were repeatedly detained and harassed under martial law.

On August 22, 1984, in an event that left an indelible impression on a generation of Liberians, uniformed troops of Doe's personal militia, the Executive Mansion Guard, opened fire on unarmed student demonstrators. They killed a still-unknown number of students. Doe's justice minister at the time, Jenkins Scott, acknowledged there had also been "some rapes" on the campus of both students and staff, but the episode was never investigated, and no one was ever prosecuted.

In October 1985 Doe brazenly stole an election that was to have ushered in civilian rule. There were piles of burning ballots. The Special Election Commission appointed to verify the vote was abruptly replaced with a new panel stacked with Doe partisans. Opposition parties had been banned, criticism outlawed, newspapers closed, opposition leaders detained and beaten.

Doe by then was well on his way toward bankrupting the country. In a decade in power Doe and his cronies are estimated to have stolen about $300 million—equal to half of the anemic gross domestic product for their final year at the till. Doe himself stashed $5.7 million in a London branch of the notoriously corrupt, now liquidated Bank of Credit and Commerce International (BCCI). He had turned Liberia's distinctive American panache—the U.S. dollar remains legal tender—into a lucrative money-laundering racket. At a time when Liberia's

> is possible to begin the last, but the most formidable task, the total elimination of potential opposition. As we agreed in our discussion, it may be anticipated that the most vigorous opposition to your staying on will come from Nimba County. You may be assured that the leading voice will be that of your 'friend' Thomas Quiwonkpa ... I am convinced that they are troublemakers who do not hesitate to organise themselves. You may recall that Nimba was the strongest base of the PPP. Nimbaians seem to love politics, thus, the removal of Thomas and supporters from the Army and positions of Government must be gradual and most carefully planned ... Regardless of the risk, I believe you will agree that Thomas and the other 'Nimba heroes' must be totally discredited, if not totally eliminated ... I have no doubt that once these critical steps are taken it is certain that the people of Liberia will overwhelmingly support a continuation of your leadership in 1985.

The letter reflects the complete absence of any kind of political philosophy in the regime, other than the philosophy of clinging to power. The readiness of the regime to do absolutely anything to please the US, knowing that Reagan's America would only see what it wanted to see, meant that Doe could portray his domestic enemies as the 'socialist' enemies of America, and thereby oppress and 'eliminate' them almost in the name of the United States. This repeatedly allowed the Reagan administration to flaunt Doe as an ally when the administration's critics in Congress attempted to distinguish criminality from American national interest.

By 1985, however, Liberians opposed to Doe were reacting with increasing disbelief to the continued American support for the monster they had watched take power. Rumours abounded that secretly America would like to see Doe overthrown, but that it was not acceptable for the US to be seen to be involved. This was not the case. It was the wishful thinking of a population which was losing hope. The hope of many Liberians that secretly America was on their side against their oppressor was not true. America wanted Doe to remain in power.

A key American policy-maker told me:

> We were getting fabulous support from him on international issues. He never wavered in his support for us against Libya and Iran. He was somebody we had to live with. We didn't feel that he was such a monster that we couldn't deal with him. All our interests were being impeccably protected by Doe. We weren't paying a penny for the US installations.

The Reagan administration's contentment with Doe had its most memorable moment when Doe honoured his promise of holding civilian elections. This he did on 15 October 1985.

'I have photographs of the cheating. The ballot boxes were filled before the voting,' says Doe's former vice-president Harry Moniba, who retained his post as a result of the malpractice. 'The Liberian Action Party, which declared itself the winner, was also cheating. [Doe's] National Democratic Party of Liberia cheated more carefully,' he said. This did not matter to America.

Crocker, testifying to the US Senate Foreign Relations Committee's Africa sub-committee on 10 December 1985, said: 'There is now the beginning, however imperfect, of a democratic experience that Liberia and its friends can use as a benchmark for future elections – one on which they want to build.' His comments came after two political parties had been banned and prevented from running in the election, after a year preceding the poll when opposition leaders had been imprisoned, after a massacre of students on Doe's orders at Monrovia university on 22 August 1984 following agitation against Doe by students and academics.

American acceptance of the election result contributed to the view among many Liberians that the country it looked to for guidance must have a hidden agenda which eventually would save them from Doe, but which in the meantime it was necessary to conceal until the time was right to rid them of him.

After the election Chester Crocker said, in a statement to a joint session of the US Congressional Subcommittees on Africa and Human Rights and International Organisations on 23 January 1986, that 'we learned that Doe was considering appointing to important positions in his new civilian government Liberians of proven talent who were not members of the party.' It didn't seem to matter to the US government that officials such as Rancey were throwing democratic titbits to the US, solely in order to prevent any public breakdown of relations while Doe secured his mandate to commit murder and mayhem.

Thomas Quiwonkpa did not understand that fundamentally the United States was happy with its ally in Monrovia, as long as Crocker could continue to find a balance between what he called in his 1986 testimony the 'plusses and minuses' of Doe's conduct. Crocker said that 'no outside observer could be certain who won those elections', yet the US accepted the result. A month later, on 12 November 1985, the very troublemakers Rancey had identified in his 1983 letter to Doe as 'troublemakers' in Monrovia, and for six hours Doe was overthrown.

there was the problem of keeping it under control. One of his former confidantes said that 'Doe used to complain to me sometimes that he was just not getting as rich as some of the other African heads of state. He used to say: look at Houphouet-Boigny [of the Ivory Coast]. He has all that money. Why am I not getting that rich?' His annual presidential salary of $35,000 was minuscule beside those of the habitual diverters of foreign aid he took to comparing himself with. He wanted more for himself, and also for his cronies, otherwise they would stop supporting him.

Corruption, of the kind in which Charles Taylor implicates himself and the rest of the Doe regime in his letter to Doe of 10 January 1984, began eventually to irk America. Liberia's corruption was an issue for the American tax-payer; human rights were not. [redacted] the US had given [redacted] the outbreak of war in December 1989, this had risen to $500 million. This was still less than the cost of relocating all the US installations sited in Liberia, but came to be seen as an increasingly expensive price-tag. Even though human rights' abuses in Liberia were not playing a significant role in the cat and mouse game of the cold war, pressure within the US opposition-led Congress eventually resulted in an attempt to stem the corruption which was proving such a waste of American money.

On 26 August 1987, Doe, the US State Department and the United States Agency for International Development signed an agreement allowing 17 American-appointed Operational Experts (Opex) to take over financial control of government accounts in the Liberian Ministry of Finance and at the National Bank of Liberia. Opex officials were also to be present in the revenue, customs and data processing offices of the Ministry of Finance, the Bureau of the Budget and other key government offices. The Opex team, which produced its final, unpublished report in May 1989, worked on the basis expressed in the report of being 'a last ditch effort on the part of the US to assist Liberia out of its financial crisis'. The report also said that Doe had 'requested outside assistance to help control fiscal disarray in Liberia, and gave the team operational authority to implement management and policy reforms'. Doe was to act as arbiter in any disputes which might arise during the operation of the Opex team.

Overmanning in the public sector as a result of favouritism by ministers keen to employ family members, as well as the total disarray of national accounts in the Ministry of Finance, were criticisms made by the Opex team. But such criticisms are not peculiar to Liberia, and prevail

in most critiques made by Western economists when describing the economies of Africa. More significant is the evidence in the report showing how decision-making was carried out, and how, having apparently invited the Opex team in, Doe and his cronies then developed elaborate methods of diverting funds from the ministries under inspection directly to the Executive Mansion.

The Opex report, which looks at the process of decision-making within the government rather than tracing where foreign aid money has gone, identifies the close relationship between members of Liberia's largely expatriate business community and the Doe government. This relationship meant that businessmen, mostly Lebanese, Indian and Israeli, were able to use personal contacts with Doe's 'kitchen cabinet' to strike business deals which circumvented any budgetary controls the Opex team may have been trying to instigate. The report said:

> Lebanese businessmen were among the most influential at the Mansion. A Lebanese-owned construction company obtained the first loan guarantee that specifically by-passed the Ministry of Finance and Opex. This deal established a precedent for other construction companies... An Israeli firm obtained payments for the construction of a new Defense Ministry directly from the Mansion, financed by diverted forestry revenues collected by the Forestry Development Authority ... The vendor community in Monrovia, dominated by the Lebanese and Indian businessmen, also contributed to the budgetary problem. The vendors who provide goods to the Government often overcharge by two to three times the normal price. The Government was in arrears to most of them, dating as far back as 1984, and the vendors rationalised the over-billing as compensation for lost interest and for the risk of not being paid at all. In this environment, vendors have a strong incentive to offer bribes to get early payment.

It identified eight different ways in which the economic reform team was by-passed and decision-making and finances remained in the hands of the Executive Mansion staff. This led the team to conclude that its failure was due to the fact that Doe's Liberia 'was managed with far greater priority given to short-term political survival and deal-making than to any long-term recovery or nation-building efforts ... The President's primary concern is for political and physical survival. His priorities are very different from and inconsistent with economic recovery ... President Doe has great allegiance to his tribespeople and inner circle. His support of local groups on ill-designed projects without larger social objectives.'

Annex C

2005 WL 1172761 (UN ICT (Trial)(Yug))

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International Criminal Tribunal for the Former Yugoslavia
In Trial Chamber II

Decision

PROSECUTOR
v.

IVAN CERMAK, MLADEN MARKAC

Case No. IT-03-73-PT

Decision: 8 March 2005

DECISION ON IVAN CERMAK'S AND MLADEN MARKAC'S MOTIONS ON FORM OF INDICTMENT

The Office of the Prosecutor: Mr. Kenneth Scott, Ms. Laurie Sartorio

Counsel for the Accused: Mr. Cedo Prodanovic and Ms. Jadranka Slokovic for Ivan Cermak, Mr. Miroslav Separovic and Mr. Goran Mikulicic for Mladen Markac

Before: Presiding Judge Carmel Agius, Judge Jean Claude Antonetti, Judge Kevin Parker

Registrar: Mr. Hans Holthuis

I. BACKGROUND

1. This decision of Trial Chamber II is in respect of Ivan Cermak's and Mladen Markac's preliminary motions pursuant to Rule 72(A) of the Rules of Procedure and Evidence ("Rules") alleging defects in the **form** of the **Indictment**.

2. The Indictment against Ivan **Cermak** and Mladen **Markac** was confirmed on 24 February 2004. Both Accused surrendered voluntarily and were transferred to the seat of the Tribunal on 11 March 2004. At their initial appearances held on the following day each of the Accused pleaded "not guilty" to all counts of the Indictment.

3. On 9 July 2004 the Defence for Mladen Markac ("Markac Defence") filed "Mladen Markac's Preliminary Motion on the Defects in the Form of the Indictment" ("Markac Defence Motion"). On 15 July 2004 the Defence for Ivan Cermak ("Cermak Defence") filed "Ivan Cermak's Motion on the Form of the Indictment" ("Cermak Defence Motion"). The Prosecution responded jointly opposing both Motions on 22 July 2004. [FN1]

1. "Prosecution's Response to the Preliminary Motions on Defects in the Form of the Indictment Filed by Mladen Markac on 9 July 2004 and Ivan Cermak on 15 July 2004" ("Prosecution's Response"). An accompanying motion to exceed page limitation on the

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Prosecution response was granted on 23 July 2004.

4. Each of the Accused is charged with four counts of crimes against humanity under Article 5 of the Statute of the International Tribunal ("Statute"), namely persecutions, deportation, forced displacement and other inhumane acts, and with three counts of violations of the laws or customs of war under Article 3, namely murder, plunder of property and wanton destruction of cities, towns or villages. The offences were allegedly committed in the Krajina Region of the Republic of Croatia between 4 August and 15 November 1995. Ivan Cermak is alleged to have been the Commander of the Knin Garrison from 5 August to 15 November 1995. Knin is the capital of the Krajina region. He is alleged to have had de jure and/or de facto authority over Croatian forces operating in the southern portion of the Krajina region at the material time. Mladen Markac is alleged to have been the Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia and in this capacity is alleged to have deployed, issued orders to, and otherwise exercised control over, inter alia, the Special Police forces in the region at the material time. With respect to the form of individual criminal responsibility, both Articles 7(1) and 7(3) are relied on.

II. GENERAL PLEADING PRINCIPLES

5. Article 18(4) of the Statute and Rule 47(C) of the Rules provide that an indictment shall contain a concise statement of the facts and the crimes with which the accused is charged. These provisions should be interpreted in conjunction with Article 21(2) and Article 21(4)(a) and (b) of the Statute, which provide for the right of an accused to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. [FN2] This right of the accused translates into an obligation on the part of the Prosecution to plead the material facts underpinning the charges against the accused. [FN3] An indictment is pleaded with sufficient particularity when it sets out the material facts of the Prosecution case with enough detail to inform the accused clearly of the charges against him, thus allowing him to prepare his defence. [FN4]

2. Prosecutor v. Zoran Kupreskic et al., Case No.: IT-95-16-A, Judgement, 23 October 2001 ("Kupreskic AppealsJudgement"), para 88.

3. Kupreskic Appeals Judgement, para 88; Prosecutor v. Tihomir Blaskic, Case No.: IT-95-14-A, Judgement, 29 July 2004 ("Blaskic Appeals Judgment"), para 209; Prosecutor v. Mile Mrksic, Case No.: IT-95-13/1-PT Decision on the Form of the Indictment 19 June 2003, ("Mrksic Decision"), para 7.

4. Kupreskic AppealsJudgement, para 88; Prosecutor v. Milorad Krnojelac, Case No.: IT-97-25-A, Judgement, 17 September 2003 ("Krnojelac Appeals Judgement"), para 131; Blaskic Appeals Judgment, para 209; Mrksic Decision, para 8; Prosecutor v. Mitar Rasevic, Case No.: IT-97-25/1-PT, Decision Regarding Defence Preliminary Motion on the Form of the Indictment, 28 April 2004 ("Rasevic Decision"), para 10.

6. The materiality of a particular fact depends on the nature of the Prosecution case. [FN5] A decisive factor in this respect is the nature of the alleged

criminal conduct charged against the accused, [FN6] and in particular, the proximity of the accused to the events alleged in the indictment. [FN7] The materiality of facts such as the identity of the victims, the place and date of the events and the description of the events themselves necessarily depend on the alleged proximity of the accused to those events. [FN8]

5. Kupreskic Appeals Judgement, para 89; Blaskic Appeals Judgment, para 210.

6. Kupreskic Appeals Judgement, para 89.

7. Kupreskic Appeals Judgement, paras 89-90.

8. Prosecutor v. Radoslav Brdjanin and Momir Talic, Case No.: IT-99-36-PT, "Decision on objection by Momir Talic to the form of the amended indictment" 20 February 2001, ("Brdjanin Decision"), para 18; Prosecutor v. Milorad Krnojelac, Case No.: IT-97-25, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000, ("Second Krnojelac Decision") para 18; Prosecutor v. Krajisnik, Case No.: IT -00-39-PT, Decision concerning Preliminary Motion on the Form of the Indictment, 1 August 2000, ("Krajisnik Decision"), para 9.

7. Where an indictment is based on individual criminal responsibility under Article 7(1) of the Statute, the Prosecution may be required to indicate in relation to each individual count the particular nature of the responsibility alleged, i.e. to indicate the particular form of participation. [FN9] Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the particular acts or course of conduct of the accused which form the basis for the allegations. [FN10] In these circumstances the Prosecution must also plead the acts for which it is alleged the accused is to be held responsible, subject to the Prosecution's ability to provide such particulars. [FN11] The precision required for these acts however is not the same as that required when the accused is alleged to have personally committed the acts. [FN12]

9. Blaskic Appeals Judgment, para 212; Prosecutor v. Delalic et al., Case No.: IT-96-21-A, Judgement, ("Celebici Appeals Judgement"), para 350; Krnojelac Appeals Judgement, para 138.

10. Blaskic Appeals Judgment, para 213.

11. Brdjanin Decision, para 20.

12. Brdjanin Decision, para 20.

8. Further, in cases where the accused is charged with the "commission" of a crime pursuant to Article 7(1) of the Statute, the indictment should make clear whether this means "physical commission" by the accused or participation in a joint criminal enterprise (JCE), or both. [FN13]

13. Krnojelac Appeals Judgement, para 138; Rasevic Decision, para 13.

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9. When pleading participation in a JCE, the Prosecution is required to specify the following four categories of material facts in the Indictment:

(a) the nature and the purpose of the JCE;

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

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

(d) the nature of the participation by the Accused in that enterprise. [FN14]

14. Second Krnojelac, Decision, para 16; See also Prosecutor v. Milan Milutinovic, Dragoljub Odjanic and Nikola Sainovic, Case No.: IT-99-37-PT, Decision on Defence Preliminary Motion Filed by the Defence for Nikola Sainovic, 27 March 2003 ("Milutinovic Decision"), p 4 with a similar approach as to pleading requirements for a JCE; Rasevic Decision, para 15.

10. Where an indictment is based on individual responsibility as the superior of the actual perpetrators under Article 7(3) of the Statute, the accused needs to know not only his alleged conduct forming the basis of his responsibility, but also what is alleged to have been the conduct of those persons for whom he is allegedly responsible, subject to the Prosecution's ability to provide those particulars. [FN15] In cases where individual responsibility as a superior, i.e. command responsibility, is alleged the following material facts should be pleaded: [FN16]

15. Second Krnojelac Decision, para 18; Prosecutor v. Milorad Krnojelac, Case No.: IT-97-25, PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("First Krnojelac Decision"), para 40; Blaskic Appeals Judgment, para 216.

16. Blaskic Appeals Judgment, para 218.

(a)(i) that the Accused is the superior [FN17] of (ii) subordinates sufficiently identified, [FN18] (iii) over whom he had effective control - in the sense of a material ability to prevent or punish criminal conduct [FN19] - and (iv) for whose acts he is alleged to be responsible; [FN20]

17. Mrksic Decision, para 10.

18. Mrksic Decision, para 10.

19. Mrksic Decision, para 10; With regard to this element as a pre-requisite see Celebici Appeals Judgement, para 256.

20. Brdjanin Decision, para 19; Krajisnik Decision, para 9; Mrksic Decision, para 10.

(b) the conduct of the Accused by which he may be found to (i) have known or had

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reason to know that the criminal conduct was about to be committed or was being committed, or had been committed, by his subordinates, [FN21] and (ii) any related conduct of those subordinates for whom he is alleged to be responsible. [FN22] The facts relevant to the acts of the subordinates for whose acts the Accused is alleged to be responsible as a superior, will usually be stated with less precision, [FN23] because the detail of those acts is often unknown, and because the acts themselves are often not critically in issue; nevertheless the Prosecution remains obliged to give the particulars which it is able to give, [FN24] and

21. Second Krnojelac Decision, para 18; Krajisnik Decision, para 9; Brdjanin Decision, para 19; Mrksic Decision, para 10.

22. First Krnojelac Decision, 24 February 1999, para 38; Mrksic Decision, para 10.

23. Second Krnojelac Decision, para 18; Brdjanin Decision, para 19; Mrksic Decision, para 10.

24. Second Krnojelac Decision, para 18; Brdjanin Decision, para 19; Krajisnik Decision, para 9;Mrksic Decision, para 10.

(c) the conduct of the Accused by which he may be found to have failed to take necessary and reasonable measures to prevent such acts or to punish the persons who committed them. [FN25]

25. Brdjanin Decision, para 19; Secodn Krnojelac, para 18; Krajisnik Decision, para 9; Prosecutor v. Hadzihasanovic et al., Case No.: IT-01-47-PT, Decision on Form of Indictment, 7 December 2001, ("Hadzihasanovic Decision"), para 11.

11. A reference in an indictment to the accused as a "commander" of a camp may be sufficient to ground the charges of command responsibility, where the alleged crimes were committed in that camp. [FN26] Further, a reference to the accused's specific military duties has been found to be sufficient to identify the basis of his alleged command responsibility. [FN27]

26. First Krnojelac Decision, para 19; Blaskic Appeals Judgment, para 217.

27. Blaskic Appeals Judgement, para 217, Prosecutor v. Radoslav Brdjanin and Momir Talic, Case No.: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("Second Brdjanin Decision"), para 19.

12. Where the state of mind with which the accused carried out his alleged acts is relevant the Prosecution must either (i) plead the relevant state of mind itself as a material fact, in which case the facts by which that material fact is to be established are ordinary matters of evidence, and need not to be pleaded; or (ii) plead the evidentiary facts from where the relevant state of mind is to be inferred. [FN28] The Prosecution may not simply presume that the legal pre-requisites are met. [FN29] In general each of these facts should be pleaded expressly, though, under certain circumstances, they can be sufficiently pleaded by necessary implication. [FN30]

28. Second Brdjanin Decision, para 33; Mrksic Decision, para 11; See also Blaskic Appeals Judgment, para 219, solely addressing the issue of pleading responsibility under Article 7(3).

29. Second Brdjanin Decision, 20 February 2001, para 48; Had ihasanovic Decision, para 10, both not specifically referring to the material facts concerning mens rea; Blaskic Appeals Judgment, para 219.

30. Brdjanin Decision, 20 February 2001, para 48; Hadzihasanovic Decision, para 10;Blaskic Appeals Judgment, para 219.

III. CHALLENGES TO THE **FORM** OF THE **INDICTMENT**

13. The **Cermak** Defence and **Markac** Defence submit that the **form** of the **Indictment** is defective in that material facts are not pleaded sufficiently to allow for an adequate preparation of the case. Their motions are largely formulated in identical terms. The Prosecution generally responds that all relevant material facts are contained in the Indictment.

1. Lack of specification of the "background" section

(a) Parties' submissions

14. Each of the Accused submits that the Indictment does not conform to Rule 47 (C) as it fails to properly specify the factual context in which the alleged crimes took place. [FN31] They submit that the Indictment gives a wrong interpretation of the factual context by placing the internationally recognized state of Croatia and the self-proclaimed formation of Rapubilka Srpska Krajina (RSK) on the same level, [FN32] and by omitting Croatia's efforts for peaceful settlements with the Serb population. [FN33] The Accused further argue that the "Operation Storm" is regarded as a modus operandi for the alleged joint criminal enterprise, whereas it constituted an internationally legalized means of re-integrating an illegally occupied territory. [FN34]

31. Cermak Defence Motion, para 6; Markac Defence Motion, para 6.

32. Cermak Defence Motion, para 12; Markac Defence Motion, para 12.

33. Cermak Defence Motion, para 10; Markac Defence Motion, para 10.

34. Cermak Defence Motion, para 13- 14; Markac Defence Motion, para 13-14.

15. The Prosecution responds that the background material is not essential for the charges against the Accused but is included solely for informational reasons. [FN35] As such, it does not have to meet the requirements of Rule 47(C). [FN36] It further submits that the reference in the Indictment to the RSK as "self-proclaimed" is based on the very same language used in General Assembly Resolution A/RES/49 /43 of 9 December 1994, and rather emphasises the lack of any official recognition. [FN37] In addition, the Indictment does not deal with the issue of the legality of the "Operation Storm" but rather with the crimes allegedly committed in the course

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of this military operation. [FN38]

35. Prosecution's Response, para 10.

36. Prosecution Response, para 10.

37. Prosecution Response, para 11.

38. Prosecution Response, para 13.

(b) Discussion

16. The "background" section of an indictment provides information to sketch the context in which the alleged crimes were committed. [FN39] Material facts of the alleged charges may in some cases depend upon facts forming part of the "background." [FN40] However, it is the material facts, rather than the general background facts, that have to be pleaded with the necessary particularity. [FN41] Therefore, a lack of particularity of background information does not normally amount to a defect in the form of the Indictment.

39. Prosecutor v. Dragoljub Kunarac, Case No.: IT-96-23&23/1, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, 21 October 1998, p. 1; First Krnojelac Decision, para 24; Prosecutor v. Radovan Stankovic, Case No.: IT-96-23/2, Decision on the Defence Preliminary Motion on the Form of the Indictment, 15 November 2002 ("Stankovic Decision"), para 11.

40. Stankovic Decision, para 11.

41. First Krnojelac Decision, para 24.

17. With regard to the objections alleging a wrongful presentation of facts, disagreements about the facts do not constitute a basis upon which it can be claimed that an indictment is defective. The veracity of the alleged facts is a matter to be determined on the basis of the evidence presented during the trial. [FN42]

42. Prosecutor v. DelalIc et al., Case No.: IT-96-21, Decision on Motion by the Accused Zejnil Delalic Based on Defects in the Form of the Indictment, 2 October 1996, para 11.

18. Moreover, the Chamber is not able to agree with the Defence's submission that "Operation Storm" is characterized in the Indictment as illegal and as a modus operandi for the commission of the alleged crimes. While the charges are based on crimes committed in the context of that operation, the issue whether the operation itself was legal is irrelevant.

19. Finally, the Chamber would observe that the references in the Indictment to Croatia and the self-proclaimed territory of RSK are of a purely descriptive nature. They do not constitute a legal recognition of parts of the territory of Croatia as a State or a challenge to the recognition of Croatia as a State.

20. On the basis of the foregoing, the Trial Chamber dismisses the objections

of the Defence relating to the background section of the Indictment.

2. Identities of the victims and their properties

(a) Parties' submissions

21. The Defence for both Ivan Cermak and Mladen Markac object to the lack of factual particulars with regard to a causal nexus between the identities of the victims and their properties. [FN43] They argue that the identification, in the Indictment, of the victims as "Krajina Serbs," "Serb population" and "Krajina Serb population" and of the properties as "their homes", "habitation" or "outbuildings" is not sufficient. [FN44] Both Defences contend that this insufficiency is not remedied by the listing of names of villages and hamlets, dates, victims by name, age, sex and manner of death in the Schedule annexed to the Indictment. The Defences note in particular that the dates are sometimes described as "about" or "between," the victims are often unidentified and their age or relevant circumstances of death are not established. [FN45] Moreover, the Cermak Defence points out that 118 of the 150 victims allegedly murdered between 4 August and 15 November 1995, according to paragraphs 30 and 33 of the Indictment, have not been sufficiently identified, [FN46] since the schedule contains information with respect to only 32 of the victims. [FN47]

43. Cermak Defence Motion, para 32; Markac Defence Motion, para 31.

44. Cermak Defence Motion, para 32; Markac Defence Motion, para 31.

45. Cermak Defence Motion, para 32; Markac Defence Motion, para 32.

46. Cermak Defence Motion, para 34.

47. Cermak Defence Motion, para 34.

22. The Prosecution responds that the level of necessary specificity required for the prosecution of high-level perpetrators is met. [FN48] It argues that the present case involves massive-scale crimes which, in accordance with the case-law, do not require a high degree of specificity in the identification of victims and of the dates when the crimes were allegedly committed. [FN49]

48. Prosecution Response, para 34.

49. Prosecution Response, para 35.

(b) Discussion

23. The Trial Chamber refers to the general pleading principles outlined in Section II. [FN50] The Chamber notes that, in the Indictment, the Prosecution has identified the towns and villages where property was allegedly plundered in paragraphs 26 and 35, the municipalities where property was allegedly destroyed in paragraph 27 and 38, and the region of the Krajina from which Serbians were allegedly deported or forcibly displaced in paragraphs 28 and 41. There need not be a specific

causal nexus pleaded or proved between a particular property and a particular victim. With respect to the allegations of murder, paragraphs 30 and 33 list the number of people allegedly murdered and the municipalities where the crimes are alleged to have taken place. In support of these two paragraphs is the annexed Schedule identifying some of the victims by name, sex, age and/or cause of death. All offences are alleged to have been committed in a short time span. In view of the large scale on which the crimes are alleged to have occurred, and the role and conduct alleged against each of the Accused, the Trial Chamber is persuaded that the victims and their properties have been sufficiently pleaded in the circumstances of this case.

50. See supra, paras 5-12.

24. On the basis of the foregoing, the Trial Chamber does not uphold this objection. It observes, however, that it would no doubt facilitate the speed and efficiency of the trial, if the Prosecution provided to the Defence any further particulars of the identity of the alleged murdered victims, which becomes known.

3. Identification of "Croatian forces"

(a) Parties' submissions

25. The Cermak Defence submits that the Indictment does not sufficiently identify the military and police units involved, describing them merely in paragraph 22 as "[--] those units of HV, Croatian Air Force and units of the RH MUP that participated in Operation Storm and/or its aftermath and also the civilian and Special Police [--]." [FN51] The Markac Defence argues accordingly. [FN52] Furthermore it submits that the wording in paragraph 16 of the Indictment, which reads "[--] Mladen Markac deployed and issued orders to, the Special Police forces and otherwise exercised control over them [--]" is contrary to the command and responsibility role of the Accused Markac as described throughout the Indictment. [FN53]

51. Cermak Defence Motion, objection E (p 13, paras 31, 30), objection F (para 33).

52. Markac Defence Motion, para 29 and 33.

53. Markac Defence Motion, para 29.

26. The Prosecution responds that the material facts are sufficiently stated, as the Croatian military units (HV) and the Special Police forces of the RH MUP, whose members allegedly carried out the crimes, have been characterised in detail in the Statement of Facts and the counts of the Indictment. [FN54] It refers to previous jurisprudence, according to which the exact perpetrators do not have to be identified in cases, such as the present one, where the Accused is not in close proximity to the acts. [FN55] The Prosecution argues that it is then sufficient for the perpetrators to be identified by category or group in the Indictment. [FN56]

54. Prosecution Response, para 35.

55. Prosecution Response, para 35.

56. Prosecution Response, para 35.

Discussion

27. There are cases in which investigation has not been able to uncover the identity of the actual perpetrators of a crime, but what is known may provide a sufficient factual basis to connect them to an accused in a relevant way. Whether the identity of the actual perpetrators is a material fact that must be pleaded in an indictment in such a case depends, in particular, on the proximity of an accused to the alleged crimes [FN57] and also on the facts which might connect them to an accused in a relevant way. Their identity may not be material so as to require specific identification, in particular, when the accused is remote in proximity from the crimes allegedly committed. [FN58]

57. Second Brdjanin Decision, para 59.

58. Second Brdjanin Decision, 26 June 2001, para 59. In that case, the Chamber found that these facts did not have to be pleaded, because the Accused, as the President of the ARK Crisis Staff and the commander of the 1st Krajina Corps respectively, were not in great proximity to the "Bosnian Serb forces" that allegedly carried out the crimes.

28. By paragraph 10 of the Indictment it is alleged that both of the Accused are individually criminally responsible, pursuant to Article 7(1) of the Statute of the Tribunal, by planning, instigating, ordering, committing, and otherwise aiding and abetting the crimes. In so doing they are alleged to have acted individually and in concert with others. The actual physical perpetrators of the crimes are alleged to be "Croatian forces," a term defined in paragraph 22 of the Indictment as meaning and including those units of the HV, the HRZ, and RH MUP and the civilian and Special Police that participated in "Operation Storm" and/or its aftermath in the southern Krajina region. That is a very general characterization of the alleged actual physical perpetrators. However, given that what is alleged is one single military operation over specified weeks in an identified geographical area, an operation in which villages, towns, farms, crops, etc are alleged to have been devastated or destroyed, and the inhabitants in large numbers displaced or killed, the Chamber is persuaded that this is a sufficient specification of the actual physical perpetrators for the purposes of this Indictment. The Indictment is charging Accused who are alleged to be responsible because of their roles, essentially as instigators, planners and commanders at a high level. Neither Accused is alleged to have been so proximate to the actual physical commission of the crimes charged, as to require specific identification of the actual perpetrators.

29. It does not follow, however, that the present indictment is satisfactory for all purposes. It is not the Prosecution case that either of the Accused had superior or immediate command of all the Croatian forces involved. For some bases of individual criminal responsibility command is not necessary. However, superior, i.e. command responsibility, pursuant to Article 7(3) is alleged against both Accused. This requires that the respective subordinates of each of the Accused, whose conduct is alleged to found superior or command criminal liability in each Accused, need to

be sufficiently identified. [FN59] In this respect it is pleaded in paragraph 15 that Ivan Cermak, as Commander of the Knin Garrison, exercised de jure and de facto control over some of the Croatian forces, in particular units of the RH MUP and some elements of the HV including the Military Police and the civil administration through which he exercised territorial control over significant areas in which the crimes were committed. There is no greater specification of the forces under his effective control, so as to enable them to be distinguished from the remainder of the Croatian forces engaged in "Operation Storm." The effect of this lack of specification is aggravated because the pleading does not make clear the alleged relevance of the "civil administration" and "territorial control" to the alleged superior liability of Ivan Cermak.

59. See supra, para 10.

30. This difficulty does not affect Mladen Markac as it is the allegation in paragraph 16 that he exercised control as commander over the RH MUP, which as pleaded in paragraph 9, is the Special Police of the Ministry of the Interior. That is a sufficient identification in the circumstances of this case.

31. With respect to paragraphs 17 and 18 of the Indictment, the Chamber should make it clear that it reads these paragraphs as alleging only a failure by each Accused to prevent crimes of and to punish their respective subordinates, and not all Croatian forces as could be understood by the first sentence of paragraph 18.

32. The Chamber is not able to accept the submission that the allegation in paragraph 16 of the Indictment that Mladen Markac "deployed, and issued orders to, the Special Police forces, and otherwise exercised control over them" is contrary to the command and responsibility role described in the Indictment. The allegation in paragraph 16, and in paragraph 9, is that he was the Commander of the Special Police (the VH MUP). To deploy, issue orders and otherwise exercise control over forces are each usual manifestation in this pleading.

33. It is necessary therefore that the Indictment be amended to adequately identify the forces alleged to be under the effective control of Ivan Cermak and to clarify the matters identified in paragraph 29 above.

4. The perpetrators and their relationship with the Accused

(a) Parties' submission

34. The Defence for each of the Accused further submits that the Prosecution has failed to plead the material facts establishing a relationship between the Accused and the perpetrators among the "Croatian forces." [FN60] The Cermak Defence further objects that no material facts are provided in the Indictment in support of the allegation that Ivan Cermak had de jure or de facto control over the Croatian forces. [FN61] In this respect, it submits that the Indictment does not describe sufficiently the subordinate units over which Ivan Cermak exercised control and is ambiguous as to which areas were under his territorial control, whether it was the town of Knin, the whole Sector South or the Krajina region. [FN62] It is also sub-

mitted by the Cermak Defence that the material facts supporting the allegation that Ivan Cermak was responsible over the civil authorities have not been sufficiently pleaded. [FN63] Finally, it is submitted that the Prosecution failed to distinguish between the authority of Ante Gotovina and that of Ivan Cermak over the Croatian forces in the southern Krajina at the time. [FN64]

60. Cermak Defence Motion, para 35; Markac Defence Motion, para 34.

61. Cermak Defence Motion, para 38.

62. Cermak Defence Motion, para 38.

63. Cermak Defence Motion, para 38.

64. Cermak Defence Motion, para 39, referring to count 11 of the Indictment against Ante Gotovina.

35. The Prosecution responds that both Accused acted at high level positions which "gave them power and superior authority over their subordinates" and that there is no need for further specification. [FN65] The Prosecution further argues that the Indictment sets out clearly which units Ivan Cermak was responsible for as a commander of the RH MUP Special Police, [FN66] and that given the nature of the allegations, there is no requirement to distinguish between what the Accused and others, including Ante Gotovina, are alleged to have done. [FN67]

65. Prosecution Response, paras 19- 20.

66. Prosecution Response, para 18.

67. Prosecution Response, paras 19- 20.

(b) Discussion

36. A number of the matters raised by the parties have already been considered in the preceding part of this decision. Subject to the need to amend the Indictment to deal with the matters already identified, the nature of the relationship between each of the Accused and their subordinates under their respective commands and the basis relied on for the allegation that Ivan Cermak had de jure and de facto control over his subordinates is sufficiently identified in the circumstances of this case by the references to their respective positions of commander. The argument of the Cermak Defence that the Indictment failed to distinguish the authority of Ivan Cermak from that of Ante Gotovina, who is not charged in this Indictment, appears to raise a false issue. Paragraphs 55 and 56 detail the alleged role of Ante Gotovina as "overall operational commander" of the Croatian that were deployed as part of "Operation Storm" in the southern portion of the Krajina region. Ivan Cermak is alleged to have been the commander of some of those forces. The clear effect of what is alleged in the Indictment is that Ante Gotovina was the superior of Ivan Cermak.

37. With regard to the other elements of individual criminal responsibility pursuant to Article 7(3) of the Statute the Indictment expressly pleads that each

Accused had the required state of mind to engage criminal liability as a superior for the acts of subordinates. However, as indicated earlier in this decisions [FN68] the conduct by which each Accused had the means of knowledge that criminal conduct was about to be committed, was being, or had been committed by subordinates of that Accused should also be pleaded. In this respect the present form of the Indictment appears to fail to identify fully the Prosecution case. The only express pleading appears to be in paragraph 32, which identifies the means of knowledge of each Accused by the phrase "including as a result of being so informed by representatives of the international community." The Chamber does not understand this to be the extent of the means of knowledge relied on, but merely an additional means. That leaves unpleaded the primary means of knowledge the Prosecution wishes to rely on. These appear to be what was known to each Accused as a commander of the subordinates and by virtue of the respective conduct of each Accused as alleged in paragraphs 10 to 14. If the Chamber's understanding of the case which the Prosecution wishes to present is correct, then paragraph 32 needs to be amended to include these further means of knowledge. If not, the Prosecution will be confined to its pleading of information from representatives of the international community.

68. See supra, para 10.

38. Further, paragraph 18 of the Indictment is presently unclear as to what is intended. The first sentence appears to allege that each Accused had power to prevent or punish offences committed by all the Croatian forces engaged in Operation Storm. That appears, however, not to be what is intended. The content of paragraphs 17 and 18 suggests that the power to prevent or punish of each of the Accused was confined to those Croatian forces which were their respective subordinates. If that is what is intended, the Indictment requires amendment to make that clear. Further, the last words of the second sentence of paragraph 18, "the perpetrators thereof" should also be amended accordingly, perhaps by substituting a phrase such as "their subordinates who were the perpetrators thereof." Alternatively, however, if it is intended to allege that each of the Accused had power to prevent or punish offences by all Croatian forces participating in Operation Storm, then the factual basis for that allegation needs to be pleaded.

39. It is therefore necessary to amend the Indictment to satisfy the deficiencies identified in paragraphs 37 and 38 of this decision, and, to this extent, the Defence submissions are upheld.

5. Cumulative charges

(a) Parties' submissions

40. The Defences for both Ivan Cermak and Mladen Markac submit that the specific forms of individual criminal responsibility are not sufficiently defined. [FN69] It is submitted that the Indictment does not make it clear whether the Accused participated in the commission of the crimes or merely aided and abetted. [FN70] Further it is submitted the Indictment does not sufficiently distinguish between aiding and abetting and participation in a JCE, in particular with regard to the reference

to common design. [FN71]

69. Cermak Defence Motion, para 26- 29; Markac Defence Motion, para 24-27.

70. Cermak Defence Motion, para 26; Markac Defence Motion, para 24.

71. Cermak Defence Motion, para 26; Markac Defence Motion, para 24.

41. The Prosecution responds that the word "committed" in the Indictment includes participation in a JCE. [FN72] It maintains that charging the Accused with participating in, inter alia, the planning, instigating, ordering, committing or otherwise aiding and abetting the persons committing the particular crimes is consistent with Article 7(1). [FN73]

72. Prosecution Response, para 30.

73. Prosecution Response, para 30.

(b) Discussion

42. The Chamber notes that in paragraph 10 of the Indictment the conjunction "or" is pleaded in respect of the various forms of liability pursuant to Article 7(1), while the intention of the Prosecution seems to be that they are pleading the conjunction "and." Both Accused are charged cumulatively with all forms of liability as defined in Article 7(1), including aiding and abetting, as well as with liability pursuant to Article 7(3) for the crimes alleged in counts 1, 3, 4, 5 and 6 of the Indictment.

43. While it is vital for an Indictment to specify under which Article the Accused's responsibility is invoked, [FN74] cumulative charges do not violate the rights of the Accused. [FN75] As held in the Blaskic Appeal Judgement, where there is evidence sufficient to support such a pleading, the Prosecution is not required to decide in the indictment on one specific form of criminal liability of the Accused. It is allowed to plead a number or all of them. [FN76] The Accused will be on notice and can prepare the Defence case accordingly. It will be a matter to be determined by the Trial Chamber in such a case, whether the evidence can sustain a conviction on all or any of the bases alleged.

74. Krnojelac Appeals Judgement, para 138.

75. Rasevic Decision, para 29.

76. Blaskic Appeals Judgment, para 226.

44. By paragraph 13 it is alleged that the crimes in Counts 2 and 7 were the natural and foreseeable consequences of the execution of the JCE, and each Accused was so aware. While from this it appears that the intention is to rely on JCE for counts 2 and 7, there is no reliance on Article 7(1) in the formulation of Counts 2 (paragraph 34) and 7 (paragraph 46). Very strictly, para 11 could also be read as not alleging JCE liability for counts 2 and 7 because the word "committed," on which

paragraph 11 turns, does not appear in the formulation of either of those counts. However, adopting a more purposive interpretation of the Indictment, the use of "commit" in the chapeau to each of counts 2 and 7 can be regarded as an adequate interpretation of "committed" to allege JCE liability. It is necessary, therefore, for the Indictment to be amended to make it clear whether JCE is relied on in respect of counts 2 and 7 (perhaps by including Article 7(1) in the statement of each of these counts in the Indictment). If JCE is not relied on, paragraph 13 needs attention.

45. The pleading of cumulative charges in counts 1, 3, 4, 5 and 6 of the Indictment is in accordance with the jurisprudence of the Tribunal.

6. Existence of a joint criminal enterprise (JCE)

(a) Parties' submissions

46. The Defence for each of the Accused submit that JCE is insufficiently pleaded in the Indictment. [FN77] In particular, it is maintained that the role of each of the Accused in conceiving the common design is not established, [FN78] that the purpose of the JCE is not sufficiently defined, [FN79] that not all participants in the JCE are identified, [FN80] and that the Indictment fails to determine the role of each participant in the commission of each crime. [FN81] The Cermak Defence further submits that the Indictment does not provide supporting material regarding the existence of a JCE, [FN82] that Ivan Cermak cannot have participated in a JCE for the launching of "Operation Storm" as he was mobilised at a later date, and that as a commander of the Knin Garrison, Ivan Cermak cannot be responsible for crimes committed outside that region. [FN83]

77. Cermak Defence Motion, para 18; Markac Defence Motion, para 18.

78. Cermak Defence Motion, para 21; Markac Defence Motion, para 19.

79. Cermak Defence Motion, para 23; Markac Defence Motion, para 21.

80. Cermak Defence Motion, para 25, 30; Markac Defence Motion, paras 23, 28.

81. Cermak Defence Motion, para 30; Markac Defence Motion, para 28.

82. Cermak Defence Motion, para 19.

83. Cermak Defence Motion, para 20.

47. The Prosecution responds that the Indictment complies with the requirements on pleading a JCE as established by the Tribunal's jurisprudence. [FN84] Specifically it maintains that the purpose of the JCE is determined in paragraph 11 ("the forcible and permanent removal of the Serb population from the Krajina region"), [FN85] that the leading co-participants are identified by name, that the categories of perpetrators are defined in paragraph 22 as members of the Croatian forces, in particular units of HV, Croatian Air Force or the "HRZ," [FN86] and that identification by category of participants is sufficient. [FN87] Further, it is submitted that the Indictment establishes the roles of the Accused and their co-participants, mak-

ing reference to the positions of authority of each of the Accused, as well as the common purpose of the JCE and the means by which Croatian forces under the command of the Accused carried out that common purpose, i.e. persecution, plunder, destruction, and forced displacement of the Serbian population. [FN88]

84. Prosecution Response, para 26.

85. Prosecution Response, para 27.

86. Prosecution Response, para 27.

87. Prosecution Response, para 28.

88. Prosecution Response, para 32.

(b) Discussion

48. As held earlier, when pleading a JCE the Prosecution is required to plead the nature and purpose of the JCE, the timeframe of its existence, the identity of the participants and the nature of each Accused's participation.

(i) Nature and purpose of the JCE

49. For the existence of a JCE, there must be a joining of two or more individuals in a common plan, design or purpose which amounts to or involves the commission of one or more crimes which are within the jurisdiction of the Tribunal. There is no necessity for this plan, design or purpose to have been previously arranged or expressly formulated. It may materialise extemporaneously. Its existence may be inferred. Further, the Accused must participate in the common purpose, by participation in the commission of the crime, or one of the crimes, contemplated, or by assisting in, or contributing to, the execution of the common plan, design or purpose. [FN89]

89. See Tadic Appeals Judgement, para 227; Krnojelac Appeals Judgement, para 31, Vasiljevic Appeals Judgement, para 100.

50. Paragraph 11 of the Indictment defines the purpose of the JCE as "the forcible and permanent removal of the Serb population from the Krajina region, including by the plunder, damage or outright destruction of the property of the Serb population, so as to discourage or prevent members of that population from returning to their homes and resuming habitation." Paragraph 12 states that the crimes alleged in counts 1 and 3 to 6 were within the common purpose of the JCE. Further, paragraphs 13 and 29 specifically set out that the alleged acts of murder and other inhumane acts, underlying the charge of persecutions (count 1), were the natural and foreseeable consequences of the JCE.

51. The Trial Chamber is satisfied that the nature and purpose of the JCE have been sufficiently pleaded.

(ii) Timeframe of the JCE

52. The Indictment defines the timeframe of the JCE as "(d(uring and after Operation Storm, and at all times relevant to this Indictment." [FN90] The Indictment specifies that "Operation Storm" began on 4 August 1995, [FN91] that the Croatian government announced the completion of the operation on 7 August 1995 and that further follow-up actions continued until about 15 November 1995. [FN92] The same timeframe, between 4 August 1995 and 15 November 1995, is set out with respect to each count of the Indictment where JCE is alleged. [FN93] In view of the above, the Chamber finds that the timeframe of the JCE is sufficiently pleaded.

90. Indictment, para 11.

91. Indictment, paras 11, 56.

92. Indictment, para 56.

93. Indictment, paras 25, 27, 28, 30, 31, 33, 35, 38, 41 and 45.

53. The Cermak's Defence submits that Ivan Cermak could not have participated in a JCE for the planning and ordering of "Operation Storm" as he was mobilised in the evening of 6 August 1995. [FN94] As held above, participation in a JCE after its establishment is possible. The purpose of the JCE alleged in the Indictment was "the forcible and permanent removal of the Serb population from the Kraijna region" and its timeframe was from 4 August to 15 November 1995. The alleged means through which this common purpose was carried out, namely the acts charged in the Indictment, are alleged to have taken place both before and after Ivan Cermak's mobilisation. Therefore, this argument of the Cermak Defence is rejected.

94. Cermak Defence Motion, para 20.

(iii) Identity of participants

54. Sufficient pleading of JCE requires identification of the alleged members of the JCE. However it has been held that identification of the members by category is sufficient, if the precise identity is not known [FN95] and that identification can only be obtained to the extent possible [FN96] as there cannot be an obligation on the Prosecution to perform the impossible. [FN97] However, even where a description of the members of a JCE by referring to them by reference to a group or category is considered sufficient, the Prosecution must make it clear in the indictment that it is unable to identify the participants in more detail. [FN98]

95. Third Krnojelac Decision, para 18; Rasevic Decision, para 47.

96. The Prosecutor v. Pavle Strugar., Case No.: IT-01-42-PT, Decision on the Defence Preliminary Motion Concerning the Form of the Indictment, 28 June 2002, para 18; See also Milutinovic Decision, p. 4 to the effect that the names of all members of the JCE need not to be pleaded.

97. Second Krnojelac Decision, para 57.

98. Second Krnojelac Decision, para 34, 57; Third Krnojelac Decision, para 18.

55. The Prosecution submits that paragraph 22 of the Indictment defines the categories of perpetrators as members of the Croatian forces. [FN99] If that was intended, it is not made clear by the pleading. Paragraph 11 of the Indictment specifically names the two Accused, Ante Gotovina and Franjo Tudman as members of the JCE. Other members are not identified; they are solely referred to as "others." This pleading does not provide sufficient information as to the identity of the other participants, or categories of participants. It is true that there is no express pleading of the relationship of President Tudman to Croatian forces but this is implicit in his office of President. There is, however, one further issue. There appears to be a failure of the Indictment to reflect what the Chambers understands to be a material aspect of the Prosecution case, that is, that the common purpose of the JCE was to be achieved, inter alia, by Croatian forces under the respective commands of the members of the JCE. If this is the case, which the Prosecution seeks to make out, which is a matter entirely for the Prosecution to determine, it should be expressly pleaded so that it is clear to the Defence.

99. Prosecution Response, para 27.

56. The Chamber further observes that in paragraph 43 the allegation of concert alleges "others including President Tudman," whereas for all other counts the equivalent phraseology is to "other members of the JCE." If no distinction is intended, the language would be better standardized to avoid confusion.

57. The Defence objection to the Indictment therefore is partly upheld in this respect. The Prosecution is ordered to provide a more detailed identification of the alleged participants in the JCE by name or, if this is not possible, by some adequate categorization or grouping.

(iv) Nature of the participation of each of the Accused

58. An accused may participate in a JCE in a number of ways. Paragraph 11 of the Indictment pleads the participation of each of the Accused in a JCE. The paragraph does not indicate the specific conduct by which each Accused is alleged to have participated in or furthered the JCE. Paragraph 14 of the Indictment further pleads that Croatian forces carried out the acts alleged to form the basis of the charges "(p(ursuant to the orders of each of the accused," that by their acts and omissions the Accused "encouraged" others to commit crimes, and that the Accused failed to fulfil their duty to restore and ensure public order. It is not made clear whether these allegations are in support of the Accused's personal liability or in support of the allegation about their pursuance of the JCE, or both. While paragraph 10 identifies conduct of each of the Accused, this appears to be directed to liability pursuant to Article 7(1) and there is no allegation in paragraph 11 that the conduct of each of the Accused alleged in paragraph 10 is also a conduct by which it is alleged that each of the Accused participated in the JCE.

59. There are further allegations with respect to the acts of each of the Accused in paragraphs 15 and 16. In particular, Ivan Cermak is alleged to have exercised territorial control over significant areas in which the crimes were allegedly committed, [FN100] and Mladen Markac to have deployed and issued orders to the Spe-

cial Police forces and otherwise exercised control over them. [FN101] However, it is not made clear whether these allegations are intended to be in support of the Accuseds' participation in the JCE, or pursuant to Article 7(3), or pursuant to Article 7(1), or more than one of these. Further, as mentioned earlier, the alleged significance of territorial control for these respective purposes is not identified.

100. Indictment, para 15.

101. Indictment, para 16.

60. In view of the above, the nature of the Accuseds' participation in the JCE is not sufficiently pleaded in the Indictment. This objection of the Defence is therefore upheld. The Prosecution is ordered to clarify the nature of the alleged participation of the each of the Accused in the JCE and in the other respects mentioned.

7. Required state of mind

(a) Parties' submissions

61. The Markac Defence submits that the state of mind of the Accused with respect to all counts is not defined sufficiently. [FN102] In particular, it argues that the sole reference in paragraph 12 of the Indictment to the Accused having "the state of mind necessary for the commission of each of these crimes" is not sufficient. [FN103]

102. Markac Defence Motion, para 35.

103. Markac Defence Motion, para 35.

62. The Prosecution responds that in relation to the crimes under Article 7(1) and 7(3), there is no defect in the pleading of mens rea, because the jurisprudence of the Tribunal allows for the state of mind to be inferred from facts pleaded. [FN104] With regard to Article 7(1) in particular, the Prosecution submits that the Indictment specifies that the Accused are responsible "for planning, instigating, ordering, committing, or otherwise aiding and abetting in the above, or in the execution of crimes, or by foreseeing the likelihood that such crimes would be committed," [FN105] and that the outline of the "crimes of killing, inhumane treatment, destruction and plunder" constitutes a sufficient basis from which the Accused's state of mind can be inferred. [FN106] With respect to Article 7(3), the Prosecution refers to paragraph 17 of the Indictment, where it is stated that each Accused "knew or had reasons to know that his subordinates were about to commit such acts, or had done so, and the superior failed to take the necessary reasonable measures to prevent such acts or to punish the subordinates." [FN107] Finally, with regard to the JCE, the Prosecution refers to the Rasevic case and submits that paragraphs 11 to 13 of the Indictment sufficiently specify that the Accused either shared the intent to perpetrate the crimes in the context of the JCE or were aware that the crimes could be perpetrated as a natural and foreseeable consequence of the JCE. [FN108]

104. Prosecution Response, para 42.

105. Prosecution Response, para 43.

106. Prosecution Response, para 43.

107. Prosecution Response, para 43.

108. Prosecution Response, para 41.

(b) Discussion

63. As held earlier, where the state of mind is relevant the Prosecution must plead either the relevant state of mind as a material fact or the evidentiary facts from which the state of mind is to be inferred. In the present case, each of the Accused is charged with all forms of liability under Article 7(1), with criminal liability arising from participation in a JCE and with criminal responsibility of superiors under Article 7(3). Further, the charge of persecutions (count 1 of the Indictment) requires a specific discriminatory intent in addition to the state of mind required for the commission of the underlying crime.

64. The mens rea required for participation in a JCE is different for the different categories of JCE. If the crimes charged in the Indictment fall within the common purpose of the joint criminal enterprise, the Accused's intent to perpetrate a particular crime (being the shared intent of the co-perpetrators) is required. [FN109] Where the crime or crimes charged fall beyond that common purpose, both the Accused's intent to participate in and further the common purpose is required, and also that it was foreseeable that such a crime might be perpetrated by one or other members of the group and that the Accused accepted that risk. [FN110]

109. See Tadic Appeals Judgement, para 228; Krnojelac Appeals Judgement para 32.

110. See Tadic Appeals Judgement, para 228; Krnojelac Appeals Judgement para 32.

65. Therefore if the Prosecution case is that a crime charged fell within the common object, it will be necessary for the Prosecution to prove that the accused had the state of mind required for that crime. [FN111] If the Prosecution case is that one or more crimes charged are beyond that common purpose, the Prosecution must prove the Accused's intent to participate in and further the common purpose, and further, that each crime charged was the natural and foreseeable consequence of that plan and that the Accused accepted that risk. [FN112] These are the respective mental states of the Accused which must either be expressly pleaded, or alternatively, the Prosecution must plead the facts from which these mental states can be inferred.

111. See Second Brdjanin Decision, para 41.

112. See Tadic Appeals Judgement, para 228; Krnojelac Appeals Judgement para 32.

66. Paragraph 12 of the Indictment pleads explicitly that "each of the Accused had the state of mind necessary for the commission of each of the (alleged) crimes."

This sentence is found among the three paragraphs of the Indictment alleging the Accused's participation in a JCE and it may well deal only with JCE liability. In any event, however, this attempt at a shorthand pleading of the various states of mind which must be established for each of the offences charged and each forms of liability relied on, may well stem from words used in the Second Brdjanin Decision. [FN113] In the Chamber's view, however, this misunderstands the intention of these words in the context of that decision. What was said in the decision is not intended as a model form of pleading. Rather, it is a statement of the task which the Prosecution must fulfil to adequately plead its case. [FN114] In other words, it is necessary for the Prosecution to sufficiently plead the respective states of mind which are relevant to each charge and each form of liability. The only alternative to this is to plead sufficient facts from which the states of mind could be inferred. While some of the states of mind may probably be inferred from the presently pleaded facts that is not the position for all states of mind. In the Chamber's view there has not been an adequate express pleading of the necessary states of mind, although paragraphs such as 13 and 14 partially attempt to do so, and there is an insufficient pleading of facts to make good the alternative. The Prosecution must therefore amend the pleading to deal adequately with the necessary states of mind.

113. See Second Brdjanin Decision, para 41.

114. In that particular case, for example, following the Trial Chamber's order the Prosecution incorporated in the indictment a statement that "each (of the accused) shared the intent and state of mind required for the commission of each of these crimes." (Prosecutor v. Brdjanin and Talic, Case No.: IT-99-36- PT, Third Amended Indictment, para 27) The Trial Chamber found that the Prosecution had not complied with its order to plead that the accused had the state of mind required for each of the crimes charged which are alleged to fall within the common purpose. It held that the very general allegation of the indictment is not sufficient and that "the Prosecution must plead in terms the relevant state of mind required for each crime alleged to fall within the object of the joint criminal enterprise." (Prosecutor v. Brdjanin and Talic, Case No.: IT-99-36-PT, Decision on Form of Third Amended Indictment, 21 September 2001, paras 19 and 20).

67. And finally, with respect to the state of mind required to engage individual responsibility of superiors under Article 7(3) of the Statute the Chamber refers to its earlier decision with regard to the pleading of the elements of command responsibility. [FN115]

115. See supra, para 37.

68. It is necessary therefore that the Indictment be amended to plead adequately, whether expressly or implicitly, the states of mind as indicated in the preceding paragraphs.

8. Individual role of the Accused in each incident

(a) Parties' submissions

69. The Defence for both Cermak and Markac further submit that the Indictment fails to specify the exact role of each of the Accused with regard to the specific counts charged, which does not allow for proper preparation of the case. [FN116] The Prosecution responds that the Indictment as a whole sufficiently spells out the positions of each of the Accused as well as the area and the forces they had under their command and that it puts each of the Accused on notice their liability flows from their participation in high-level positions of authority. [FN117]

116. Cermak Defence Motion, paras 36-37; Markac Defence Motion, paras 36-37.

117. Prosecution Response, para 20.

(b) Discussion

70. The Indictment explicitly pleads the relevant form of liability, whether under both Article 7(1) and Article 7(3), or only under Article 7(3) of the Statute with respect to each count charged. The Trial Chamber has already found that the Indictment pleads sufficiently the position of authority of each of the Accused, [FN118] subject to the need to identity the subordinates over whom Ivan Cermak is alleged to have exercised effective control. [FN119] It has further found that the nature of the participation of each of the Accused in a JCE is not sufficiently pleaded in the Indictment. [FN120] The Defence objection as to the role of the Accused in each incident therefore is subsumed. The role of each of the Accused ought to be sufficiently identified once the Prosecution pleads sufficiently the subordinates of each of the Accused and the nature of each of the Accused's participation in the JCE, as ordered earlier in this Decision. The Defence objection is therefore rejected.

118. See supra, para 36.

119. See supra, para 33.

120. See supra, para 60.

9. Other matters

71. The Chamber observes that a reference to forces "subordinated to him" is used in paragraph 40 of the Indictment, whereas such reference is not used in the other equivalent paragraphs. If no distinction is intended, the language would be better standardized to avoid confusion.

72. The Chamber notes that there are no particulars of the Inhumane Acts the subject of count 7 (paragraph 46). Given the factual statement in paragraph 45 it appears that beating and assault are intended. Particulars should be inserted.

IV. DISPOSITION

For the foregoing reasons and pursuant to Rule 72 of the Rules, the Trial Chamber

(1) GRANTS partly the Motions as held in paragraphs 33, 39, 57, 60, and 68 of this Decision.

(2) ORDERS the Prosecution to amend the Indictment as follows:

(a) To adequately identify the forces alleged to be under the effective control of Ivan Cermak; [FN121]

121. See supra, para 33.

(b) To identify the conduct by which each of the Accused is alleged to have had the means of knowledge that criminal conduct was about to, was being, or had been committed by subordinates of that Accused; [FN122]

122. See supra, para 37.

(c) To clarify the meaning of paragraphs 17 and 18 of the Indictment; [FN123]

123. See supra, para 38.

(d) To clarify the meaning of paragraph 13 of the Indictment; [FN124]

124. See supra, para 44.

(e) To provide a more detailed identification of the alleged participants in the JCE by name or, if this is not possible, by some adequate categorization or grouping; [FN125]

125. See supra, para 57.

(f) To clarify the nature of the alleged participation of each of the Accused in the JCE; [FN126]

126. See supra, para 60.

(g) To plead adequately, whether expressly or implicitly, the states of mind relied on; [FN127]

127. See supra, para 68.

(h) To clarify the language used in paragraphs 40 and 46 of the Indictment; [FN128]

128. See supra, paras 71 and 72.

(3) ORDERS the Prosecution to file the amended indictment within twenty-one days of the filing of this Decision. Pursuant to Rule 50 of the Rules the Defence for each of the Accused is to file complaints, if any, resulting from the amendments made in accordance with the above directions within twenty-one days of the filing of the amended indictment.

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

Dated this eight day of March 2005 At The Hague, The Netherlands

Carmel Agius, Presiding

Seal of the Tribunal

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Annex D

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2004 WL 1660311 (UN ICT (Trial)(Rwa))

International Criminal Tribunal for Rwanda
Trial Chamber I

Before: Judge Jai Ram Reddy, Judge Sergei Alekseevich Egorov, Judge Emile Short

Registrar: Adama Dieng

Date: 14 July 2004

THE PROSECUTOR
v.

ALOYS **SIMBA**

DECISION ON THE DEFENCE'S PRELIMINARY MOTION CHALLENGING THE **SECOND AMENDED INDICTMENT**

ICTR-01-76-I

Office of the Prosecutor: William T. Egbe, Sulaiman Khan, Ignacio Tredici, Amina Ibrahim

Counsel for the Defence: Sadikou Ayo Alao, Beth Lyons

Original: English

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the Tribunal");

SITTING as Trial Chamber I, composed of Judge Jai Ram Reddy, presiding, Sergei Alekseevich Egorov, and Judge Emile Short;

BEING SEIZED OF the "Requête de la Defense en Exception Préjudicielles et en Incompétence pour Vices de Forme Substantiels Contre l'Acte d'Accusation Modifié en Date du 10 Mai 2004 (Articles 72 et 73 du RPP)", filed on 9 June 2004, the annex thereto filed on 15 June 2004, and the corrigendum to the motion, filed on 16 June 2004;

CONSIDERING the Prosecution's response filed on 16 June 2004;

HEREBY DECIDES the motion.

INTRODUCTION

1. The **Indictment** against Aloys **Simba** was confirmed on 8 January 2002. A first **amended Indictment** was filed on 27 January 2004, adding an allegation that the Accused participated in a joint criminal enterprise. The Defence filed a preliminary motion challenging defects in the first amended Indictment on 16 April 2004. In its

decision filed on 6 May 2004, the Chamber ordered the Prosecutor to plead the mens rea of the Accused or his alleged partners in the joint criminal enterprise. The Chamber also ordered the Prosecutor to plead that the alleged murders in Count 4 were part of the widespread and systematic attack and that the gendarme was part of the civilian population. The Prosecution filed a second amended Indictment on 10 May 2004, which forms the basis of the present challenge. The trial is scheduled to begin on 16 August 2004.

SUBMISSIONS

2. In its motion filed on 9 June 2004, the Defence argues that, notwithstanding the Prosecutor's amendments, the second amended Indictment still fails to adequately plead the mens rea element for joint criminal enterprise and also fails to adequately link the murders alleged in Count 4 (Murder as a Crime Against Humanity) to the widespread and systematic attack. On 15 June 2004, the Defence submitted the annex mentioned in its motion. This annex contained a copy of earlier pleadings submitted by the Defence on the issue, most of it irrelevant to the two narrow issues framed in the Defence's motion. On 16 June 2004, the Defence submitted a corrigendum to its motion, largely rectifying grammatical errors in the original motion.

3. In its response, the Prosecutor asserts that the amendments made to the indictment filed on 10 May 2004 fully comply with the Chamber's decision of 6 May 2004.

DELIBERATIONS

4. At the outset, the Chamber emphasizes its profound dissatisfaction with the Defence's practice of submitting its motions in a piecemeal fashion, particularly where its supplementary pleadings primarily contain irrelevant material or corrections of an editorial nature, as in the present motion. This practice wastes scarce judicial time and resources by placing an unnecessary burden on the Chamber to review these multiple submissions and on the Registry which is tasked with filing, copying, circulating, and translating these largely superfluous documents. It further reflects a lack of diligence on the part of Lead Counsel in preparing his initial submissions. The Lead Counsel for the Defence must exercise greater care in preparing his initial pleadings. Should this practice continue, the Chamber will consider imposing an appropriate sanction, particularly if the Defence is billing these unnecessary submissions.

Joint Criminal Enterprise

5. The Appeals Chamber has explained that joint criminal enterprise is a form of "commission" within the meaning of Article 6(1) of the Statute. The mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set forth in the indictment. If the Prosecutor intends to rely on the theory of joint criminal enterprise, the indictment should plead this in an unambiguous manner and specify upon which of the three recognized forms of joint criminal enterprise the Prosecutor will rely: basic, systematic, or extended.

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6. The Chamber notes that the indictment only refers to joint criminal enterprise without specifying the particular form. In the Chamber's view, the indictment's failure to point to a particular form of joint criminal enterprise reflects the Prosecution's intention to rely on all three forms. Consequently, the indictment must plead the distinct mens rea for each form of joint criminal enterprise. In assessing an indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.

7. In response to the Chamber's decision of 6 May 2004, the Prosecutor **amended** the **indictment** to include the following allegation at paragraph 58: "Aloys **Simba** intended to commit the acts above, this intent being shared by all other individuals involved in the crimes perpetrated."

8. The requisite intent for the basic form of joint criminal enterprise is the intent to perpetrate a certain crime. Paragraph 58 asserts that the Accused intended to commit the acts enumerated in the indictment. Though this is somewhat conclusory, it suffices in the context of the indictment as a whole given that an intention to participate in a crime can be reflected by an individual's words and actions or inferred from surrounding circumstances. Therefore, notice of the Accused's as well as the other participants' intention to commit the crime's enumerated in the indictment, which form the purpose of the joint criminal enterprise, is reflected not only by paragraph 58, but also by the allegations of his repeated actions in furtherance of committing the enumerated crimes and allegations detailing the circumstances in which they were committed.

9. The requisite intent for the systemic form of joint criminal enterprise is personal knowledge of the system of ill-treatment, as well as the intent to further this system of ill-treatment. The Appeals Chamber has noted that personal knowledge of the system of ill-treatment can be proven by express testimony or a matter of reasonable inference from the accused's position of authority. The indictment does not contain a specific conclusory allegation asserting personal knowledge and the intent to further a system of ill-treatment. Nonetheless, the Chamber is satisfied that the requisite intent is adequately pleaded in the indictment's numerous allegations that the accused was in a position of authority and planned, participated in, or was present during the alleged crimes, which if proven would reflect knowledge of ill-treatment and an intent to further it.

10. The requisite intent for the extended form of joint criminal enterprise is the intent to participate in the common criminal purpose and awareness that the commission of such a crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise. In the Chamber's view, given that mens rea can be proven by an individual's words and actions or inferred from surrounding circumstances, the indictment adequately pleads the accused's intent to participate in the extended form of joint criminal enterprise from the numerous allegations of his authority, his statements to assailants, acts of planning, participation in, and presence during numerous attacks.

11. Consequently, the Chamber does not find merit in the Defence's challenge to the indictment's pleading of mens rea for joint criminal enterprise.

Murder as a Crime Against Humanity

12. A crime against humanity must have been committed as part of a widespread or systematic attack against any civilian population on discriminatory grounds. Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence, objectively form part of the discriminatory attack.

13. Responding to the Chamber's decision concerning Count 4 (Murder as a crime Against Humanity), the Prosecutor amended the indictment to add an allegation at paragraph 66 incorporating the previous 65 paragraphs of the indictment into the charge of murder. This incorporated into the murder count the general allegations of a widespread or systematic attacks directed against a civilian population and the specific allegations of particular massacres and preparatory acts contained in paragraphs 1 through 65 of the Indictment.

14. In the Chamber's view, having read each paragraph in the context of the other paragraphs in the indictment, the allegations contained Count 4, charging murder, are adequately connected to the widespread and systematic attack.

15. Paragraphs 67 and 68 of the second amended indictment refer to the killing of a Tutsi gendarme at the barracks of the Gendarmerie in Gikongoro Town. Mindful that the murder as a crime against humanity must be committed against the civilian population, the Chamber ordered the Prosecutor to plead that the gendarme was part of a civilian population. In response to the Chamber's order, the Prosecution added the following paragraph: "The Killing (sic) of the Tutsi gendarme was part of the campaign against Tutsi civilians." In the Chamber's view, this is a conclusory allegation that does not plead the material facts indicating how the murder of the gendarme formed part of the civilian population. Nonetheless, the Chamber notes that other paragraphs in the indictment concerning the massacres forming the widespread and systematic attack refer to the Accused's orders to identify the number of Tutsis in the gendarmerie (paragraph 37) as well as instructions to soldiers to shoot attackers who displayed cowardice during attacks (paragraph 31). As such, the Chamber will reserve its finding on whether to disregard or dismiss the allegation due to vagueness or lack of jurisdiction after hearing the evidence adduced at trial and further legal arguments of the parties.

16. Paragraphs 69 and 70 of the second amended indictment refer to the alleged murder by the Accused of Gasana, a deputy prosecutor, as well as Monique Munyana, a primary school teacher, and her child on or about 21 April 1994 near Kaduha Trading Centre. Paragraphs 27 through 34 of the second amended Indictment, which are incorporated in the Count 4, refer to multiple attacks against Tutsi civilians culminating in the massacre of thousands of civilians at Kaduha parish on or around 21 April 1994. Given the temporal and geographic proximity of the three murders to the broader attack at Kaduha parish, the alleged participation of the Accused in both events,

the allegation that thousands of mostly Tutsi civilians were killed in the area, the apparent civilian status of the three murder victims, the Chamber is satisfied that the Indictment adequately pleads that these three individual murders objectively form part of the discriminatory attack.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence motion.

Arusha, 14 July 2004

Jai Ram Reddy, Presiding Judge

Sergei Alekseevich, Judge

Egorov Emile Short, Judge

Seal of the Tribunal

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