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SPECIAL COURT FOR SIERRA LEONE

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

Registrar: Robin Vincent
Date filed: 28 May 2004

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA

CASE NO. SCSL-2004-14-PT

MOININA FOFANA
DEFENCE PRE-TRIAL BRIEF

Office of the Prosecutor:
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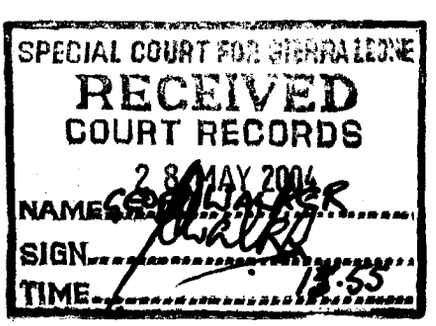

Defence Counsel for Sam Hinga Norman:
James Jenkins-Johnston

Defence Counsel for Allieu Kondewa:
Charles Margai

Introduction

1. The Defence for Mr. Moinina Fofana (the "Defence") hereby files its Pre-Trial Brief, pursuant to the Trial Chamber "Decision on Request for Extension of Time to File Pre-Trial Brief", dated 26 May 2004 (the "Decision").

2. In the Decision, the Defence was ordered to file its Pre-Trial Brief no later than 27 May 2004. Unfortunately, the Defence did not receive the Decision until 27 May 2004, and despite its best efforts, was unable to file the Pre-Trial Brief on that same day. The Pre-Trial Brief is therefore filed one day late, for which delay the Defence apologises profusely.

3. According to Rule 73 *bis* (F) of the Rules of Procedure and Evidence (the "Rules"):

> "[...] the Trial Chamber or a Judge designated from among its members may order the defence to file a statement of admitted facts and law and a pre-trial brief addressing the factual and legal issues, not later than seven days prior to the date set for trial."

4. According to the Decision:

> "[...] the Defence Pre-Trial Brief is principally intended to provide a response to the case presented in the Prosecution's Pre-Trial Brief and to address factual and legal issues, setting forth a framework for the commencement of trial;"[1]

5. The Defence will therefore concentrate on responding to the factual and legal issues raised in the "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73 bis) of 13 February 2004", filed on 2

[1] Decision, p. 2.

March 2004, (the "Prosecution Pre-Trial Brief") and in the "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", filed on 22 April 2004 (the "Prosecution Supplemental Pre-Trial Brief").

6. Before discussing the Prosecution Pre-Trial Briefs, however, the Defence would raise an important preliminary issue.

Preliminary issue

7. On 14 November 2003, the Defence filed the "Preliminary Defence Motion on the Lack of Personal Jurisdiction" (the "Preliminary Motion") challenging the jurisdiction of the Special Court for Sierra Leone.

8. In this Preliminary Motion the Defence stated, among other things, that pursuant to Article 1(1) of its Statute, the Special Court only has jurisdiction over those persons who bear the greatest responsibility for those serious violations of international humanitarian law that are within the subject-matter jurisdiction of the Special Court. In the respectful submission of the Defence, Mr. Fofana does not belong in that category of persons and the Special Court cannot therefore exercise its jurisdiction over him.

9. In its "Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana", rendered 3 March 2004, (the "Decision on Preliminary Motion") the Trial Chamber first noted:

> "Based on the foregoing findings, the Chamber therefore concludes that the issue of personal jurisdiction is a jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively

> articulate prosecutorial discretion, as the Prosecution has submitted.[*emphasis added*]"[2]

In addition, the Trial Chamber noted the following:

> "It should be emphasised that in the ultimate analysis, whether or not in actuality the Accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law and Sierra Leonean law is an evidentiary matter to be determined at the trial stage."[3]

10. In view of the Decision on Preliminary Motion, the Defence reiterates that Mr. Fofana is not one of the persons bearing the greatest responsibility for these alleged violations, and that the burden lies upon the Prosecution to prove otherwise "at the trial stage".

11. Failure to prove that an Accused falls within the personal jurisdiction of the Special Court should, in the view of the Defence, lead to an acquittal.

Outline of Defence argument

12. The Defence submits that Mr. Fofana does not bear any individual criminal responsible for any of the alleged crimes, as he never planned, instigated, ordered or committed these crimes, nor did he otherwise aid or abet the commission of the crimes.

13. In addition, Mr. Fofana did not share a common criminal plan, purpose or design with either of the other Accused, nor with anyone else. He did therefore not

[2] Decision on Preliminary Motion, para. 27.
[3] Decision on Preliminary Motion, para. 44.

participate in any joint criminal purpose, if ever such a joint criminal purpose existed.

14. In the alternative, any common plan between the Accused, or between the Accused and members of the CDF, was not criminal. In particular, it was not "to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone", neither did it include "gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone".[4]

15. Mr. Fofana, finally, does not bear any command responsibility for any of the allegations in the Indictment, as no superior-subordinate relationship existed between Mr. Fofana and the alleged perpetrators.

Legal issues raised in Prosecution Pre-Trial Brief

16. The Defence will not here respond to every legal issue raised in the Prosecution Pre-Trial Brief, but will focus on the most important points. Lack of response to a particular issue should not, however, be taken to indicate agreement.

Crimes against humanity

17. The Defence accepts the following submissions of the Prosecution, made in Section "E" of the Prosecution Pre-Trial Brief, with regard to crimes against humanity:

> "**a. Crimes Against Humanity**
>
> Article 2 states that the Special Court shall have the power to prosecute

[4] Prosecution Supplemental Pre-Trial Brief, para. 6.

persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; (h) persecution on political, racial, ethnic or religious grounds; and (i) other inhumane acts.

In accordance with international jurisprudence, these categories are not exhaustive. 'Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3'.

The elements common to all crimes defined as Crimes Against Humanity under Article 2 of the Statute are the following: (a) the *actus reus* must be committed as part of a widespread or systematic attack; (b) the *actus reus* must be committed against the civilian population; (c) the *actus reus* must be inhumane in nature and character, causing great suffering or serious injury to the body or to mental or physical health.

The *actus reus* cannot be a random inhumane act, but rather is an act committed as part of an attack. The attack may be either widespread or systematic and need not be both.

'Widespread', as an element of crimes against humanity, may be defined as a 'massive, frequent, large scale action, carried out collectively with considerable seriousness' and directed against multiple victims.

'Systematic', consists of organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy."

'Attack', may be defined as an unlawful act of the kind enumerated in Articles 3(a) to (i) of the Statute. An attack, 'can be described as a course

of conduct involving the commission of acts of violence'; or, alternatively, can be 'non-violent in nature.'

The *actus reus* for any of the enumerated acts in Article 2 of the Statute must be directed against the civilian population defined as predominately people who were 'not taking any active part in the hostilities."[5]

18. To this legal analysis of crimes against humanity, the Defence would like to add that of course intent is also a necessary element of the crime. To convict an Accused of crimes against humanity, it must be proved that the crimes were related to the attack on a civilian population, as correctly stated by the Prosecution, that the Accused had the *intent* to commit the underlying offence and that he *knew* that his crimes were so related. The Accused must have had knowledge of the broader context in which that offence occurred.[6]

Child recruitment

19. In Section "E" of the Prosecution Pre-Trial Brief the Prosecution also gives its own analysis of the "offence" described in Article 4(C) of the Statute of the Special Court as follows:

> "***Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Article 4(c))***
>
> The elements of this offence are as follows: (a) the Accused conscripted or enlisted one or more person into an armed force or group or used one or more persons to participate actively in hostilities; (b) such person or persons were under the age of 15 years; (c) the Accused knew or should have known that such person or persons were under the age of 15 years; (c) the conduct took place in the context of and was associated with an

[5] Prosecution Pre-Trial Brief, paras. 89-96.
[6] See: John R.W.D. Jones & Steven Powles, International Criminal Practice, third edition, paras. 4.2.225-232.

armed conflict not of an international character; (d) the Accused was aware of the factual circumstances that established the existence of an armed conflict.

The terms 'conscript' and 'enlist' presented in the alternative clearly shows they are two different activities. 'Conscript' implies some form of forced participation. It contemplates the formal call-up of children, the process of training them as soldiers or subjecting them to military discipline - or all three of these activities. The common element in the targeted practices, however, which vary from official acts of conscription, to press-ganging, to abduction, is simply making under-age persons members of an armed force against their will.

By contrast, 'enlist' would suggest a child's voluntary enrolment, an interpretation that is borne out by Article 51 of the Fourth Geneva Convention (which forbids any pressure or propaganda aimed at securing 'voluntary enlistment'). The criminal act would presumably be similar to that contemplated in the crime of conscription, with one difference: that any volition on the part of a child would not be permitted to function as a justification or defence.

Conscription and enlistment are supplemented by a third offence: using children to 'participate actively in hostilities'. This offence is more general that the other two. Unlike the previous crimes, using children to participate in hostilities suggests the absence of any formal induction into a military unit. It would be unnecessary to prove that a child was put into uniform, subjected to military discipline, made to bear arms or subjected to any of the traditional means of marking an individual as a soldier rather than a civilian. The criminal act would therefore be employing a child in hostilities regardless of what tasks the child had to perform.

The consent of the child is not a defence under this offence. It submits that all under-age children must be deemed incapable of forming a proper consent. This is the case in most systems of municipal law which refuse children the capacity to give valid consent to legal transactions without

their guardians' approval.

The offence does not refer to an 'armed conflict' - which was the phrase used in the Geneva Conventions and Protocol I – but instead refers to 'hostilities' used in art 4(3) of Geneva Protocol II. The use of "hostilities" clearly denotes the actual state of fighting.

The Child's participation in the conflict must be active. This entails actually arming a child and sending him or her into battle, or sending the child to transport munitions, gather information or guard bases."[7]

20. Determination of the elements of this new international crime will clearly need consideration and discussion by the parties, if it is found to be relevant. However, the Prosecution analysis of the Article 4 (C) is premature, as it is still unclear whether "child recruitment" was a crime under (customary) international humanitarian law at all at the time of the offences alleged in the Indictment. The "Preliminary Motion based on Lack of Jurisdiction (Child Recruitment)", filed on 26 June 2003, in which the Defence intervened, is still awaiting a decision by the Appeals Chamber. As long as this is the case, it is impossible to identify, let alone define, the various elements of the "offence".

Joint criminal enterprise

21. The theory of joint criminal enterprise is the last legal issue on which the Defence wishes to comment. The Defence notes that the Prosecution usefully attempted to summarise the current state of the law on this issue in the Prosecution Pre-Trial Brief.[8]

22. However, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (the "ICTY") dealt at some length with this form of liability in

[7] Prosecution Pre-Trial Brief, paras. 126-132.
[8] Prosecution Pre-Trial Brief, paras. 152-155.

its Judgement in the *Vasiljevic* case, handed down on 25 February 2004,[9] shortly before the filing of the Prosecution Pre-Trial Brief. This Judgement is not referred to in the Prosecution Pre-Trial Brief. The relevant passages of that Judgement read as follows:

> "Three categories of joint criminal enterprise have been identified by the International Tribunal's jurisprudence.
>
> The first category is a 'basic' form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. An example is a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants may carry out a different role, each of them has the intent to kill.
>
> The second category is a 'systemic' form of joint criminal enterprise. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. An example is extermination or concentration camps, in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise.
>
> The third category is an 'extended' form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example is a common purpose or plan on the part of a group to forcibly remove at gun-point members of one ethnicity from their town, village or region (to effect 'ethnic cleansing') with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common purpose, it was

[9] ICTY, Appeals Chamber, Prosecutor v. Mitar Vasiljevic, IT-98-32-A, Judgement, 25 February 2004.

nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians."[10]

And:

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

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

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

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one which was part of the common design arises 'only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk'* – that is, being aware that such crime was a possible consequence of the execution of that enterprise, and with that awareness, the accused decided to participate in that enterprise."[11]

[10] *Ibidem*, paras. 96-99.
[11] *Ibidem*, paras. 101.

The Defence submits that especially the definitions of the *mens rea* required for this form of criminal participation in the Vasiljevic Judgement are particularly clear and detailed, and should be taken as the latest statement of the law on this point.

23. The Defence fully agrees with the proposition in the Prosecution Pre-Trial Brief that the degree of participation required of the participant in a joint criminal enterprise must be "significant".[12]

Factual issues

24. Before discussing the factual issues raised in the Prosecution Supplemental Pre-Trial Brief, the Defence notes that, on 1 April 2004, the Prosecution filed the "Prosecution's Motion for Judicial Notice and Admission of Evidence" (the "Motion for Judicial Notice"). The Defence is aware of the Trial Chamber "Decision on Co-operation between the Parties", rendered on 26 May 2004, urging the parties to intensify their efforts to establish points of agreement, and takes the opportunity to respond to that Motion for Judicial Notice.

25. The Defence admits the following propositions:

> B. The city of Freetown, the Western Area, and the following districts are located in the country of Sierra Leone: Kenema, Bo, Bonthe, Moyamba.
>
> E. Sierra Leone acceded to the Geneva Conventions of 12 August 1949 and Additional Protocol II to the Geneva Conventions on 21 October 1986.

[12] Prosecution Pre-Trial Brief, para. 155 sub c.

P. The organized armed group that became known as the RUF was founded in about 1988 or 1989 in Libya. The RUF began organized armed operations in Sierra Leone in or about March 1991.

Q. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'état on 25 May 1997. Shortly after the AFRC seized power, the RUF joined with the AFRC.

W. The Junta was forced from power on or about 14 February 1998. President Kabbah's government returned in March 1998.

26. The Defence would emphasise that only the propositions listed above are admitted. Propositions A, C, D, F, G, H, I, J, K, L, M, N, O, R, S, T, U, V, X and Y, are therefore *not* admitted.

27. With regard to the Prosecution Supplemental Pre-Trial Brief, the Defence does not admit any of the factual allegations therein. In particular, the Defence does not admit the following propositions, repeatedly listed in the Prosecution Supplemental Pre-Trial Brief. Mr. Fofana does *not* admit that:
    - he was the National Director of War of the CDF;
    - he held a position of authority within the CDF;
    - he was a member of the War Council;
    - he was physically present in war planning meetings and at the issuing of directives and commands to the CDF;
    - he was the Battlefield Commander of the 17th Battalion;
    - he was responsible for sending ammunition to the CDF in the field;
    - during the relevant times in the indictment, he was in regular communication with Samuel Hinga Norman;
    - during the relevant times in the indictment he provided logistical support to the CDF in the field;

- he received regular status reports of war operations and frequently visited the CDF bases;
- he received reports of CDF atrocities with no action taken.

28. The allegations listed above, which Mr. Fofana does not admit, appear to form the core of all the various charges against Mr. Fofana.[13]

Special defences

29. As a final point, the Defence would stress that it reserves its right to enter a special defence on Mr. Fofana's behalf.

30. Due to the continuing uncertainty about the extent of the case against Mr. Fofana and the heavy redaction of all but nineteen of the Prosecution witness statements, the Defence has not been able to notify the Prosecution yet of its intent to file a defence of alibi or any other special defence, pursuant to Rule 67(A)(ii) of the Rules. The Defence will notify the Prosecution, if appropriate, as soon as it is able to do so.

31. It should be noted, however, that failure of the defence to provide the notice mentioned in Rule 67(A)(ii) does not limit the right of an accused to rely on a special defence (Rule 67(B) of the Rules).

COUNSEL FOR THE ACCUSED

pp Michiel Uiterwaal

Michiel Pestman

[13] *See* paras. 16, 19, 25, 28, 33, 36, 41, 44, 49, 52, 57, 60, 65, 68, 72, 75, 79, 82, 86, 88, 93, 96, 101, 104, 108, 111, 115, 117, 122, 125, 135 an 138 of the Prosecution Supplemental Pre-Trial Brief.

LIST OF ANNEXES

1. ICTY, Appeals Chamber, Prosecutor v. Mitar Vasiljevic, IT-98-32-A, Judgement, 25 February 2004, paras. 87-102.

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-98-32-A
		Date:	25 February 2004
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Date: **25 February 2004**

PROSECUTOR

v.

MITAR VASILJEVIĆ

JUDGEMENT

The Office of the Prosecutor:

Ms. Helen Brady
Ms. Michelle Jarvis
Mr. Steffen Wirth

Counsel for the Accused:

Mr. Vladimir Domazet
Mr. Geert-Jan Knoops

V. THE APPELLANT'S PARTICIPATION IN A JOINT CRIMINAL ENTERPRISE AND HIS RELATED INDIVIDUAL CRIMINAL RESPONSIBILITY

87. The Appellant's fourth (murder), fifth (inhumane acts), sixth (persecution) and seventh (joint criminal enterprise) grounds of appeal are interlinked and share, as a central issue, the Appellant's *mens rea* in relation to the Drina River incident. Therefore, the Appeals Chamber has decided to address these four grounds of appeal in the same Chapter of this Judgement. Before presenting the various arguments submitted under these grounds of appeal, the Appeals Chamber will recall the relevant findings of the Trial Chamber.

88. The Trial Chamber found that the Appellant incurred individual criminal responsibility for the crime of murder (as a crime against humanity) under Count 4 of the Indictment, and for the crime of murder (as a violation of the laws or customs of war) under Count 5 of the Indictment in respect of Meho Džafić, Ekrem Džafić, Hasan Kustura, Hasan Mutapčić and Amir Kurtalić,[151] as well as for the crime of inhumane acts (as a crime against humanity) under Count 6 of the Indictment in respect of witnesses VG-14 and VG-32 and persecution by way of murder and inhumane acts under Count 3 of the Indictment.[152] The Trial Chamber applied the established test for determining whether cumulative convictions are permissible and found that persecution pursuant to Article 5(h) of the Statute requires the materially distinct element of a discriminatory act and a discriminatory intent compared to the crimes of murder and inhumane acts. Therefore a conviction was entered for persecution pursuant to Article 5(h) of the Statute, but not for murder and inhumane acts pursuant to Article 5 of the Statute. As a result, the Appellant was convicted for persecution as a crime against humanity under Article 5 of the Statute (Count 3) and for murder under Article 3 of the Statute (Count 5).[153]

89. The Trial Chamber found that: i) There was an understanding amounting to an agreement between Milan Lukić, the Appellant and two unidentified men to kill the seven Muslim men, including the two survivors;[154] ii) the Appellant participated in this joint criminal enterprise to murder by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other offenders shortly before the shooting occurred;[155] iii) the attempted murder of witnesses VG-14 and VG-32 constituted a serious attack on their human dignity, and caused witnesses VG-14 and VG-32

[151] Judgement, para. 211.
[152] *Ibid*, para. 240.
[153] *Ibid*, paras 266-268.
[154] *Ibid*, para. 208.

immeasurable mental suffering;[156] iv) the Appellant, by his acts, intended to seriously attack the human dignity of witnesses VG-14 and VG-32;[157] and v) the murders and the inhumane acts were discriminatory and that the Appellant shared the discriminatory intent for persecution. The Trial Chamber further considered that, if the agreed crime is committed by one or other of the participants in the joint criminal enterprise, all of them are guilty of the crime regardless of the part played by each in its commission. The Trial Chamber found it unnecessary to deal with the alternative basis of criminal responsibility upon which the Prosecution relied – that of aiding and abetting.[158]

90. The Appellant argues, under the seventh ground of appeal, that the Trial Chamber erred in law and in fact when it applied the concept of joint criminal enterprise in this case. The three alleged errors of law relate to the elements required to prove the existence of a joint criminal enterprise. The Appellant submits that the Trial Chamber failed to explicitly indicate the criteria it applied,[159] that it erred in finding that an agreement existed[160] and that the Trial Chamber erred in holding that the participants in a joint criminal enterprise are equally guilty.[161] The errors of fact relate to the *mens rea* of the Appellant and constitute the principal submission common to the Appellant's fourth, fifth, sixth and seventh grounds of appeal, where he argues that the Trial Chamber erred in determining that he shared the intent to kill the seven Muslim men[162] and to cause witnesses VG-14 and VG-32 "serious mental or physical suffering."[163] The Appellant also argues in his Additional Appeal Brief that the Trial Chamber erred in finding that he shared the intent of the principal offender. In this respect, the Appellant challenges the Trial Chamber's finding that the Appellant provided assistance to the other perpetrators[164] and submits that there is no proof of his actual participation in the shooting.[165]

91. Under the sixth ground of appeal the Appellant submits that the Trial Chamber erred in finding him guilty of persecution as a crime against humanity for the murder of five Muslim men and the inhumane acts inflicted on two other Muslim men in relation to the Drina River incident under Count 3 of the Indictment. The main argument presented by the Appellant is that he did not act with the requisite

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[155] *Ibid*, para. 209.
[156] *Ibid*, para. 239.
[157] *Ibid*.
[158] *Ibid*, para. 210.
[159] Defence Additional Appeal Brief, para. 29.
[160] *Ibid*, paras 30-38. *See* also Defence Appeal Brief, para. 238, where it was submitted that: "the Prosecution in this case didn't establish the proof of this existence of an arrangement or understanding amounting to an agreement."
[161] Defence Appeal Brief, para. 241 (under the seventh ground of appeal) and paras 202-212 (under the fourth ground of appeal).
[162] *Ibid*, paras 183 to 216 and Defence Additional Appeal Brief, paras 39-42 and 59.
[163] *Ibid*, paras 222-224.
[164] Defence Additional Appeal Brief, paras 32-38.
[165] *Ibid*, paras 52-53. The Appellant also reiterates arguments already addressed in relation to the absence of proof that he carried a weapon and to the Trial Chamber's reliance on his failure to prevent Milan Lukić from committing the crime (*see Ibid*, paras 43-51, *see* also Section A and D of Chapter IV above).

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

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

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

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

1. Joint criminal enterprise

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- With regard to the extended form of joint criminal enterprise, what is required is the *intention* to participate in and further the common criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a

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

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

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

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

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

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

B. Alleged errors of law

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

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

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