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Case No. 001/18-07-2008/ECCC/OCIJ

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ANNEX A

AUTHORITY 60

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SCSL-04-14-T
(21048-21487)

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SPECIAL COURT FOR SIERRA LEONE

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TRIAL CHAMBER I

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

Registrar: Herman von Hebel

Date: 2 August 2007

PROSECUTOR Against **MOININA FOFANA**
ALLIEU KONDEWA
(Case No.SCSL-04-14-T)

Public Document

JUDGEMENT

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SPECIAL COURT FOR SIERRA LEONE
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 COURT MANAGEMENT

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TIME 15-10

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 nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians.²⁵⁸

211. In the present case, however, the pleading in the Indictment is limited to an alternative pleading of the first and third categories of joint criminal enterprise.

212. Regardless of the category at issue or the charge under consideration, the *actus reus* of the participant in a joint criminal enterprise is common to each of the three above-mentioned categories and comprises three requirements.²⁵⁹

213. First, a plurality of persons is required. They need not be organised in a military, political or administrative structure.²⁶⁰ However, it needs to be shown that this plurality of persons acted in concert with each other.²⁶¹

214. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required.²⁶² There is no need for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.²⁶³

²⁵⁸ Vasiljevic Appeal Judgement, paras 97-99 [footnotes omitted]; Tadic Appeal Judgement, paras 196, 202, 204.

²⁵⁹ Vasiljevic Appeal Judgement, para. 100.

²⁶⁰ Stakic Appeal Judgement, para. 54; Tadic Appeal Judgement, para. 227.

²⁶¹ Prosecutor v. Krajisnik, IT-00-39-T, Judgement (TC), 27 September 2006 [Krajisnik Trial Judgement], para. 884.

²⁶² Stakic Appeal Judgement, para. 54; Tadic Appeal Judgement, para. 227.

²⁶³ Ibid.

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215. Third, the participation of the Accused in the common purpose is required.²⁶⁴ "This participation need not involve the 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."²⁶⁵ It must be shown that the plurality of persons acted in concert with each other in the implementation of a common purpose.²⁶⁶ As to the required extent of the participation, the Prosecution need not demonstrate that the Accused's participation is necessary or substantial, but the Accused must at least have made a significant contribution to the crimes for which he is held responsible.²⁶⁷

216. The principal perpetrator need not be a member of the joint criminal enterprise, but may be used as a tool by one of the members of the joint criminal enterprise. The Chamber adopts the view of the ICTY Appeals Chamber in *Brdjanin et al.*, that "where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the joint criminal enterprise, and that this member - when using the principal perpetrator - acted in accordance with the common plan".²⁶⁸

217. The *mens rea* requirements for liability under the first and third categories of joint criminal enterprise, which are pleaded in the Indictment, are different.

218. In the first category of joint criminal enterprise the Accused must intend to commit the crime and intend to participate in a common plan whose object was the commission of the crime.²⁶⁹ The intent to commit the crime must be shared by all participants in the joint criminal enterprise.²⁷⁰

219. The *mens rea* for the third category of joint criminal enterprise is two-fold: in the first place, the Accused must have had the intention to take part in and contribute to the common purpose. In the second place, responsibility under the third category of joint criminal enterprise for a crime

²⁶⁴ *Stakic* Appeal Judgement, para. 64.

²⁶⁵ *Tadic* Appeal Judgement, para. 227.

²⁶⁶ *Krajisnik* Trial Judgement, para. 884.

²⁶⁷ *Prosecutor v. Brdjanin*, IT-99-36-A Judgement (AC), para. 430 [*Brdjanin* Appeal Judgement], citing *Kvočka et al.* Appeal Judgement, para. 97.

²⁶⁸ *Brdjanin et al.* Appeal Judgement, para. 430. See also para. 413.

²⁶⁹ *Tadic* Appeal Judgment, para. 228, *Brdjanin et al.* Appeal Judgement, para. 365. See also *Vasiljevic* Appeal Judgement, paras 97, 101; *Kvočka et al.* Appeal Judgement, para. 82 (requiring "intent to further the common purpose").

²⁷⁰ *Tadic* Appeal Judgement, para. 228.

that was committed beyond the common purpose of the joint criminal enterprise, but which was "a natural and foreseeable consequence thereof", arises only if the Prosecution proves that the Accused had sufficient knowledge that the additional crime was a natural and foreseeable consequence to him in particular.²⁷¹ The Accused must also know that the crime which was not part of the common purpose, but which was nevertheless a natural and foreseeable consequence of it, might be perpetrated by a member of the group (or by a person used by the Accused or another member of the group).²⁷² The Accused must willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.²⁷³ The Chamber can only find that the Accused has the requisite intent "if this is the only reasonable inference on the evidence".²⁷⁴

4.1.3. Planning

220. The Prosecution charges the Accused pursuant to Article 6(1) of the Statute with planning the crimes referred to in the Indictment.²⁷⁵

221. The Chamber adopts the view of the various Chambers of the *Ad Hoc* Tribunals which have consistently stated that "planning" a crime implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.²⁷⁶ The Chamber agrees with the ICTY Appeals Chamber in the *Kordic and Cerkez* case that the *actus reus* of planning a crime requires that one or more persons design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.²⁷⁷ "It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct."²⁷⁸ The Chamber is of the opinion that the *mens rea* requirement for planning an act or omission is satisfied if the Prosecution proves that the Accused acted with an intent that a crime provided for

²⁷¹ *Kvočka et al.* Appeal Judgement para. 86.

²⁷² *Brdjanin* Appeal Judgement, para. 411.

²⁷³ *Kvočka et al.* Appeal Judgement, para. 83; *Vasiljevic* Appeal Judgement, para. 99; *Tadic* Appeal Judgement, paras 204, 227-228; *Stakic* Appeal Judgement, para. 65.

²⁷⁴ *Brdjanin* Appeal Judgment, para. 429.

²⁷⁵ Indictment, para. 20.

²⁷⁶ *Limaj et al.* Trial Judgement, para. 513; *Brdjanin* Trial Judgement, para. 268; *Krstic* Trial Judgement, para. 601; *Blaskic* Trial Judgement, para. 279.

²⁷⁷ *Kordic and Cerkez* Appeal Judgement, para. 26, citing *Kordic and Cerkez* Trial Judgement, para. 386; see also *Limaj et al.* Trial Judgement, para. 513.

²⁷⁸ *Kordic and Cerkez* Appeal Judgement, para. 26.

Hon. Justice Benjamin Mutanga Itoe appends his "Separate and Partially Dissenting Opinion Only on Count 8" to the written Judgement;

Hon. Justice Pierre Boutet appends his "Separate Concurring Opinion" to the written Judgement;

Hon. Justice Bankole Thompson appends his "Separate Concurring and Partially Dissenting Opinion" to the written Judgement; Hon. Justice Bankole Thompson acquitting both Accused on all Counts of the Indictment.

Done in Freetown, Sierra Leone, this 2nd day of August 2007.

Hon. Justice Bankole Thompson

Hon. Justice Benjamin Mutanga Itoe

Presiding Judge
Trial Chamber I

Hon. Justice Pierre Boutet

