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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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acts or culpable omission:, whether individually or jointly with others.<sup>249</sup> The Chamber takes the view that the *mens rea* requirement for committing a crime is satisfied if the Prosecution proves that the Accused acted with intent to commit the crime, or with the reasonable knowledge that the crime would likely occur as a consequence of his conduct.

#### 4.1.2. Committing through Participation in a Joint Criminal Enterprise

206. The Indictment charges the Accused with participating in a common purpose, plan or design. The Chamber notes that the phrases "common purpose doctrine" on the one hand, and "joint criminal enterprise" on the other have been used interchangeably in the international jurisprudence and they refer to one and the same thing. The latter term, which this Chamber adopts, refers to the same form of liability as that known as the common purpose doctrine or liability.<sup>250</sup>

207. For the Court to exercise its jurisdiction on the basis of this form of liability, it must conclude that, even though Article 6(1) does not make a specific reference to joint criminal enterprise, it is indeed included in Article 6(1) as a means of "committing".<sup>251</sup>

208. The Chamber adopts the position that, although "committing" in Article 6(1) of the Statute "covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law,"<sup>252</sup> the verb "commit" is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime.<sup>253</sup> The view that "committing" also describes participation in a joint criminal enterprise is reinforced "to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be

<sup>249</sup> *Limaj et al.* Trial Judgement, para. 509; *Kvočka et al.* Trial Judgement, para. 251; *Kordic and Cerkez* Trial Judgement, para. 376; *Kunarac et al.* Trial Judgement, para. 390; *Prosecutor v. Stakic*, IT-97-24-T, Judgement (TC), 31 July 2003, para. 439 [*Stakic* Trial Judgement]; *Musema* Trial Judgement, paras 122-123; *Semanza* Trial Judgement, para. 383.

<sup>250</sup> *Ojdanic* Appeal Decision on Joint Criminal Enterprise, para. 36.

<sup>251</sup> *Ibid.*, para. 23.

<sup>252</sup> *Tadic* Appeal Judgement, para. 188; *Limaj et al.* Trial Judgement, para. 509.

<sup>253</sup> *Prosecutor v. Milutinovic, Sainovic and Ojdanic*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by *Ojdanic* to Jurisdiction - Joint Criminal Enterprise (AC), 21 May 2003, para. 26 [Separate Opinion of Judge Hunt to *Ojdanic* Appeal Decision on Joint Criminal Enterprise], citing *Tadic* Appeal Judgement, para. 188.

regarded as a mere aider and abettor to the crime which is contemplated".<sup>254</sup> The Chamber also recalls that this mode of liability has been routinely applied in the jurisprudence of the *Ad Hoc* Tribunals.<sup>255</sup> The Chamber is therefore satisfied that individual criminal responsibility for participation in a joint criminal enterprise to commit a crime over which the Court has jurisdiction is included within Article 6(1) of the Statute.<sup>256</sup>

209. In *Tadic*, the ICTY Appeals Chamber found that, by 1992, joint criminal enterprise was a mode of liability which was "firmly established in customary international law".<sup>257</sup> The Chamber concurs with this position and finds as a result that joint criminal enterprise existed under customary international law at the time of the acts charged in the Indictment.

210. The jurisprudence of the *Ad Hoc* Tribunals has identified the following three categories of joint criminal enterprise:

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

<sup>254</sup> *Ojdanic* Appeal Decision on Joint Criminal Enterprise, para. 20. See also *ibid.*, para. 31: "joint criminal enterprise is to be regarded, not as a form of accomplice liability, but as a form of 'commission' and that liability stems not [...] from mere membership of an organization, but from participating in the commission of a crime as part of a criminal enterprise".

<sup>255</sup> *Prosecutor v. Stakic*, IT-97-24-A, Judgement (AC), 22 March 2006, para. 62 [*Stakic* Appeals Judgement] referring to *Kvočka et al.* Appeal Judgement, para. 79; *Prosecutor v. Vasiljevic*, IT-98-32-A, Judgement (AC), 25 February 2004, para. 95 [*Vasiljevic* Appeal Judgement]; *Prosecutor v. Krstic*, IT-98-33-A, Judgement (AC), 19 April 2004, paras 79-134 [*Krstic* Appeal Judgement]; *Prosecutor v. Furundzija*, IT-95-14/1-A, Judgement (AC), 21 July 2000 [*Furundzija* Appeal Judgement], para. 119; *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement (AC), 17 September 2003, paras 29-32 [*Krnojelac* Appeal Judgement]; *Celebici* Appeal Judgement, para. 366; *Tadic* Appeal Judgement, para. 220; *Prosecutor v. Brđjanin and Talic*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend (TC), 26 June 2001, para. 24; *Prosecutor v. Babic*, IT-03-72-A, Judgement on Sentencing Appeal (AC), 18 July 2005, paras 27, 38, 40 [*Babic* Judgement on Sentencing Appeal]. See also *Prosecutor v. Gacumbitsi*, ICTR-01-64-A, Judgement (AC), 7 July 2006, paras 158-179 [*Gacumbitsi* Appeal Judgement]; *Prosecutor v. Ntakirutimana and Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, paras 463-468 [*Ntakirutimana* Appeal Judgement].

<sup>256</sup> Rule 98 Decision, para. 130.

<sup>257</sup> *Tadic* Appeal Judgement, paras 220, 226. See also *Ojdanic* Appeal Decision on Joint Criminal Enterprise, para. 29: "[the ICTY Appeals Chamber] is satisfied that the state practice and *opinio juris* reviewed in that decision was sufficient to permit the conclusion that such a norm existed under customary international law in 1992 when *Tadic* committed the crimes for which he had been charged and for which he was eventually convicted."