03 SCSL-2004-16-PT (6-6) 6

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson
Judge Benjamin Itoe
Judge Pierre Boutet

Case No: SCSL-2004-16-PT

Registrar: Mr. Robin Vincent

Date filed: 3 February 2004

THE PROSECUTOR

Against

ALEX TAMBA BRIMA also known as TAMBA ALEX BRIMA also known as GULLIT

BRIMA BAZZY KAMARA also known as IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

AND

SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S. B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION MOTIONS FOR JOINDER

Office of the Prosecutor:
Mr. Luc Côté
Mr. Robert Petit
Ms. Boi-Tia Stevens

Defence Counsels:
Mr. Terrence Terry
Mr. Ken Fleming, Q.C.
Mr. Geert-Jan Alexander Knoops

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

ALEX TAMBA BRIMA also known as TAMBA ALEX BRIMA also known as GULLIT

BRIMA BAZZY KAMARA also known as IBRAHIM BAZZY KAMARA also known as ALHAJI IBRAHIM KAMARA

AND

SANTIGIE BORBOR KANU, also known as 55 also known as FIVE-FIVE also known as SANTIGIE KHANU also known as SANTIGIE KANU also known as S. B. KHANU also known as S.B. KANU also known as SANTIGIE BOBSON KANU also known as BORBOR SANTIGIE KANU

CASE NO. SCSL – 2004 – 16 – PT

PROSECUTION'S APPLICATION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL AGAINST THE DECISION ON THE PROSECUTION MOTIONS FOR JOINDER

I. INTRODUCTION

1. Pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Special Court (the Rules), the Prosecution submits this application for leave to file an interlocutory appeal in respect of the decision on the Prosecution's motion for joinder, dated 27 January 2004.

2. In the decision, the Trial Chamber denied the Prosecution's Motion for a single joint trial of six accused persons, namely Sesay, Kallon, Gbao who are alleged to

be former members of the RUF and Accused Brima, Kanu and Kamara, who are alleged to be former members of the AFRC. Instead, the Chamber found that two joint trials, one composed of the 3 RUF members and the other composed of the 3 AFRC members would be in the best interest of justice. The Chamber found the requirements of Rule 48(B) were met for purposes of a joint trial of all six accused persons. However the Chamber exercised its discretion in denying the request for a single trial of all six accused persons on the basis that it was against the interest of justice to do so, stating that there would be a conflict of interest in trying together members of the RUF and the AFRC who might have conflicting defences.

II. ERRORS COMMITTED BY THE TRIAL CHAMBER

3. If granted leave to appeal, the Prosecution will argue the following:

4. The Chamber's ruling that "the possibility of mutual recrimination" was a bar to granting the joinder sought by the Prosecutor constituted an error in the exercise of the Chamber's discretion. In *Prosecutor v. Brdanin & Talic*, the ICTY recognized that a joint trial necessarily envisages the case where each accused may seek to blame the other and so did not consider mutual recrimination a sufficient factor to bar a joinder.[1]

5. The Chamber's ruling that the "spectre of a potential conflict in defence strategy" was a bar to granting the joinder sought by the Prosecutor constituted an error in the exercise of the Chamber's discretion. In *Prosecutor v. Barayagwiza,* the ICTR ruled that the mere intimation of a conflict of interest is insufficient to bar joinder and required the Defence to make a specific showing of factors which would establish a conflict.[2]

---

[1] *See Prosecutor v. Brdanin & Talic,* IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000, paras 29-30.
[2] *See Prosecutor v. Barayagwiza,* ICTR097-19-I, Decision on the Request of the Defence for Severance and Separate Trial, 26 September 2000, paras. 5-11.

6. There was nothing on the record to support either the existence of conflicting defence strategies or the possibility of mutual recriminations and none of the six accused persons raised these factors at any time during the proceedings.

7. If the facts and the law justify joining the Accused to each other, and the Chamber so concluded in paragraph 37 of its decision, then the mere membership of an Accused in one group or another does not in and of itself give rise to possible conflict and does not justify the Decision.

8. Having correctly found that the alleged crimes were committed by the RUF and the AFRC as part of a common plan, the Chamber erred in finding that there would be a conflict of interest between the two groups in having to defend the allegations.

9. The principle of individual criminal responsibility is not preserved by separating the Accused persons in two groups as this does not in and of itself preclude conflicting defences.

10. In reaching the conclusion that a joint trial of the six accused persons will be prejudicial to the accused persons because of the possibility of conflicting defence strategies and the possibility of mutual recriminations, the Trial Chamber therefore abused its discretion by giving undue weight to these factors.

III. ARGUMENTS FOR INTERLOCUTORY APPEAL

11. Rule 73(B) of the Rules provides for interlocutory appeals of Rule 73 motions in order to avoid irreparable prejudice to a party.

12. The Prosecution submits that the decision of the Chamber, if allowed to stand, would cause irremediable prejudice to the Prosecution.

IV. IRREPARABLE PREJUDICE TO THE PROSECUTION

13. The Prosecution submits that the Trial Chamber's decision not to permit a joint trial of the six accused persons would cause such serious prejudice to the Prosecution as could not be cured by the final disposal of the trial, including post-judgement appeal.

14. The Chamber's decision has serious ramifications for Prosecution witnesses and consequently on the Prosecution's ability to prove its case beyond reasonable doubt.

15. As stated in the Prosecution's motions for joinder, because the Prosecution intends to lead essentially the same evidence against each accused person, all Prosecution witnesses, with the possible exception of strictly biographical witnesses could be called to testify against each Accused.[3] Indeed, the Chamber's decision on the Prosecution's joinder motions recognizes that many of the Prosecution witnesses are common to all accused persons.[4] In practical terms, the decision of the Chamber to have two joint trials means that most of the Prosecution witnesses will testify twice - in the trial against RUF members and then again in the trial against AFRC members - to the exact same events. The Prosecution has genuine concerns that many of its witnesses, who have already expressed some fear about testifying, will not be willing to testify in a subsequent trial.

16. Further, Prosecution witnesses, particularly highly-placed individuals with first hand knowledge of the actions of the accused, would not be in a position to testify

---

[3] *See* Prosecution Motion for Joinder, paras. 26-7, filed 9 October 2003, in the following cases: *Prosecutor Against Brima,* SCSL-2003-06-PT; *Prosecutor Against Sesay,* SCSL-2003-05-PT; *Prosecutor Against Kallon,* SCSL-2003-07-PT; *Prosecutor Against Gbao,* SCSL-2003-09-PT *Prosecutor Against Kamara,* SCSL-2003-10-PT; *Prosecutor Against Kanu,* SCSL-2003-13-PT.

[4] *See* Decision and Order on Prosecution Motions for Joinder, 27 January 2004, para. 44(e), in the following cases: *Prosecutor Against Brima,* SCSL-2003-06-PT; *Prosecutor Against Sesay,* SCSL-2003-05-PT; *Prosecutor Against Kallon,* SCSL-2003-07-PT; *Prosecutor Against Gbao,* SCSL-2003-09-PT *Prosecutor Against Kamara,* SCSL-2003-10-PT; *Prosecutor Against Kanu,* SCSL-2003-13-PT.

twice against the accused persons, because of credible security concerns. In various decisions on protective measures for witnesses, this Court has acknowledged the security risk to Prosecution witnesses.[5] Once the security of witnesses has been compromised, their further testimony is lost forever.

17. The Chamber's decision, by forcing the appearance of the same Prosecution witnesses in two trials means a prolonged stay of the witnesses in the witness protection program, which will present overwhelming financial costs and severe logistical implications for the Witness and Victims Support Unit.

18. The appearance of the same witnesses in two trials will also considerably increase the risk to their security and undermine the efficiency of witness protection measures. As stated earlier, this Court has indeed expressed concern for the security of witnesses.

19. Having two separate trials on essentially the same evidence and by the same panel of judges will jeopardize the principle of a fair trial. As there is only one Trial Chamber, it is the same panel of judges who will assess the credibility of witnesses and the weight of their testimonies in both trials. The second trial will be contaminated or affected by conclusions drawn by the judges from the first trial with respect to witness credibility and the weight accorded to evidence. The appearance that the judges would have already assessed the credibility of the evidence when conducting the second hearing would undermine the credibility of the judicial process as a whole and would be contrary to the interest of justice. In *Prosecutor Against Delalic,* the ICTY considered it to be distinctly adverse to the interests of justice where the judges would have to hear the same witnesses giving the same testimony on at least two or more occasions and on each occasion would

[5] *See Prosecutor Against Gbao*, SCSL-2003-09-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure, 10 October 2003; *Prosecutor Against Kanu*, SCSL-2003-13-PT, Decision on the Prosecution Motion for Immediate Protective Measures for Witnesses and Victims, 24 November 2003, particularly paras 25-6, 42-3;

12

have to try to consider the evidence with minds unaffected by their prior conclusions regarding the evidence reached on earlier occasions.[6]

20. Even if a second Trial Chamber is constituted in due time and a separate bench of judges sit on the second trial, these judges will hear essentially the same trial as the first, but may then render contradictory or inconsistent decisions regarding the credibility and weight of the same evidence adduced by the same witnesses in the first trial.

21. Two separate trials will also compromise the principle of equality of arms by placing the Prosecution at a substantial disadvantage vis-à-vis the Defence in the second trial. The Chamber's decision forces the Prosecution to call its witnesses to testify twice on the same events, thereby subjecting them to cross-examination twice on the same evidence. On the other hand, the decision does not compel Defence witnesses to testify more than once, thus not subjecting them to cross-examination more than once on the same evidence. The decision therefore has the disparate effect of providing the Defence in the second trial with two opportunities to hear Prosecution witnesses in direct examination and prepare for cross-examination whilst the Prosecution will only have one opportunity with Defence witnesses. In *Prosecutor v. Tadic,* the Appeals Chamber of the ICTY recognized that the principle of equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.[7]

V. REQUEST FOR EXPEDITIOUS DECISION

22. The Prosecutor respectfully request that the Chamber rule expeditiously on the present Request, particularly in light of the irreparable prejudice which will inure to the Prosecution should the trials proceed in accordance with the Chamber's decision.

---

[6] *See Prosecutor v. Delalic,* IT-96-21, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996, para. 7

[7] *See Prosecutor v. Tadic,* IT-94-01, Judgement, 15 July 1999, para. 48.

23. In the interest of justice and a speedy trial the Prosecution is not requesting a stay of proceedings at this stage, but reserves its right to seek a stay of proceedings if a decision is not rendered within a reasonable time before the commencement of trial, given the impact of the current decision on the form of the trials.

VI. CONCLUSION

24. For the foregoing reasons, the Prosecution respectfully requests leave to file an interlocutory appeal against the Decision of the Trial Chamber.

Done in Freetown, 3 February 2004.

For the Prosecution,

Luc Côté
Chief of Prosecution

Robert Petit
Senior Trial Counsel

14

PROSECUTION BOOK OF AUTHORITIES

15

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Brdanin & Talic,* IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000.

2. *Prosecutor v. Barayagwiza,* ICTR-97-19-I, Decision on the Request of the Defence for Severance and Separate Trial, 26 September 2000.

3. *Prosecutor v. Delalic,* IT-96-21, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996.

4. *Prosecutor v. Tadic,* IT-94-01-A, Judgement, 15 July 1999, paras. 29-56.

PROSECUTION AUTHORITIES

1. *Prosecutor v. Brdanin & Talic,* IT-99-36, Decision on Motions by Momir Talic for a Separate Trial and for Leave to File a Reply, 9 March 2000.

17

International Criminal Tribunal for the Former Yugoslavia
IN TRIAL CHAMBER II

Decision

Trial Chamber

Decision

PROSECUTOR
v.

Radoslav BRDANIN & Momir TALIC

Decision of: 9 March 2000

DECISION ON MOTIONS BY MOMIR TALIC FOR A SEPARATE TRIAL AND FOR LEAVE TO FILE A REPLY

DECISION ON MOTIONS BY MOMIR TALIC FOR A SEPARATE TRIAL AND FOR LEAVE TO FILE A REPLY

The Office of the Prosecutor: Ms.Joanna Korner, Mr.Michael Keegan, Ms.Ann Sutherland

Counsel for Accused: Mr.John Ackerman for Radoslav Brdanin, Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

Before: Judge David Hunt, Presiding, Judge Florence Ndepele Mwachande Mumba, Judge Fausto Pocar

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

I Introduction

1. The accused -- Radoslav Brdanin ('Brdanin') and Momir Talic ('Talic') -- are jointly charged in the amended indictment with a number of crimes alleged to have been committed in the area of Bosnia and Herzegovina now known as Republika Srpska. Those crimes may be grouped as follows:

(i) genocide [FN1] and complicity in genocide; [FN2]

(ii) persecutions, [FN3] extermination, [FN4] deportation [FN5] and forcible transfer [FN6] (amcunting to inhumane acts), as crimes against humanity;

(iii) torture, as both a crime against humanity [FN7] and a grave breach of the Geneva Conventions; [FN8]

(iv) wilful killing [FN9] and unlawful and wanton extensive destruction and

appropriation of property not justified by military necessity, [FN10] as grave breaches of the Geneva Conventions; and

(v) wanton destruction of cities, towns or villages or devastation not justified by military necessity [FN11] and destruction or wilful damage done to institutions dedicated to religion, [FN12] as violations of the laws or customs of war.

Each count alleges that each of the accused is responsible both individually pursuant to Article 7(1) of the Tribunal's Statute and as a superior pursuant to Article 7(3). The indictment defines individual responsibility as including the commission of a crime by the accused both personally and by way of aiding and abetting the commission of a crime by others. [FN13]

II The application

2. Talic has filed a motion seeking a separate trial in relation to the amended indictment ('Motion'). [FN14] The application is made by way of a preliminary motion pursuant to Rule 72 of the Tribunal's Rules of Procedure and Evidence, and within the period permitted by Rule 50(C). He relies upon Rule 82(B), which provides:

The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 48 permits persons accused of the same or different crimes committed in the course of the same transaction to be **jointly** charged and tried.

3. It is argued on behalf of Talic that a **joint trial** is not justified because neither the witnesses nor the documents will be the same in relation to the prosecution case against each of the accused, [FN15] that separate trials are required in order to avoid any conflict of interest likely to cause serious prejudice, and that only separate trials would ensure a proper administration of justice. [FN16] Before referring to the detail of that argument, and in order more fully to understand the nature of the conflict of interest and of the likely prejudice asserted, it is necessary first to identify, as succinctly as possible, the case now pleaded by the prosecution against the two accused jointly.

III The pleaded case

4. The amended indictment alleges that:

(i) In 1992, the Assembly of the Serbian People in Bosnia and Herzegovina adopted a declaration on the Proclamation of the Serbian Republic of Bosnia and Herzegovina, an entity which eventually became known as Republika Srpska. [FN17]

(ii) The significant Bosnian Muslim and Bosnian Croat populations in the areas claimed for the new Serbian territory were seen as a major problem in the creation

of such a territory in those areas, and the removal of nearly all of those populations (or 'ethnic cleansing') was part of the overall plan to create the new Serbian territory. [FN18]

(iii) To achieve this goal, the Bosnian Serb authorities initiated and implemented a course of conduct which included:

(a) the creation of impossible conditions (involving pressure and terror tactics, including summary executions) which would have the effect of encouraging the non-Serbs to leave the area;

(b) the deportation and banishment of those non-Serbs who were reluctant to leave; and

(c) the liquidation of those non-Serbs who remained and who did not fit into the concept of the Serbian state. [FN19]

(iv) Between April and December 1992, forces under the control of the Bosnian Serb authorities seized possession of those areas deemed to be a risk to the accomplishment of the overall plan to create a Serbian state within Bosnia and Herzegovina. By the end of 1992, the events which took place in these take- overs had resulted in the death of hundreds, and the forced departure of thousands, from the Bosnian Muslim and Bosnian Croat populations from those areas. [FN20] Those events constitute the crimes with which the two accused are charged jointly to have both individual responsibility and responsibility as a superior.

(v) The forces immediately responsible for those events (which are referred to in the indictment collectively as the 'Serb forces') comprised the army, the paramilitary, and territorial defence and police units. [FN21] The Bosnian Serb authorities under whose control the Serb forces acted are not identified in the indictment beyond including the two accused. [FN22] These authorities had authority and control over:

(a) attacks on non-Serb villages and areas in the Autonomous Region of Krajina ('ARK');

(b) destruction of villages and institutions dedicated to religion;

(c) the seizure and detention of the Bosnian Muslims and Bosnian Croats;

(d) the establishment and operation of detention camps;

(e) the killing and maltreatment of Bosnian Muslims and Bosnian Croats; and

(f) the deportation or forcible transfer of the Bosnian Muslims and Bosnian Croats from the area of the ARK.

The Bosnian Serb authorities also had power to direct a body identified only as 'the regional CSB' -- which appears to be the Regional Centre for Public Security -- and the Public Prosecutor to investigate, arrest and prosecute any persons believed to have committed crimes within the ARK. [FN23]

(vi) Brdanin was the President of the ARK Crisis Staff, one of the bodies responsible for the co-ordination and execution of most of the operational phase of the plan. [FN24] As such, he had executive authority in the ARK and was responsible for managing the work of the Crisis Staff and the implementation and co-ordination

of Crisis Staff decisions. [FN25]

(vii) Talic was the Commander of the 5 Corps/1 Krajina Corps, which was deployed in the ARK into, or near, areas predominantly inhabited by Bosnian Muslims and Bosnian Croats. [FN26] He had authority to direct and control the actions of all forces assigned to the 5 Corps/1 Krajina Corps or within his area of control, and all plans for military engagement and attack plans had to be approved by him in advance. Troops under his command took part in the events which constitute the crimes with which the two accused are charged with responsibility. [FN27] His approval or consent was required for any significant activity or action by forces under the command or control of the 5 Corps/1 Krajina Corps, all units under his command were required to report their activities to him, and he had power to punish members of those units for any crimes they may have committed. [FN28] In addition (in municipalities such as Prijedor and Sanski Most within the ARK), he had power to direct and control the actions of the territorial defence units, the police and paramilitary forces, [FN29] which were immediately responsible for the events which occurred there. [FN30]

(viii) Talic was also a member of the ARK Crisis Staff, [FN31] and he and Brdanin, as such members, participated individually or in concert in the operations relating to the conduct of the hostilities and the destruction of the Bosnian Muslim and Bosnian Croat communities in the ARK area. The ARK Crisis Staff worked as a collective body to co-ordinate and implement the overall plan to seize control of and 'ethnically cleanse' the area of the ARK. After the dissolution of the ARK Crisis Staff, Brdanin and Talic continued with the implementation of this overall plan. [FN32]

IV The submissions

5. In support of his argument that a **joint trial** is not justified, Talic has submitted that, whereas Brdanin is presented as a civilian and politician with broad powers in both these roles who did not exercise any command or ''subordinate' functions in respect of Talic, Talic is presented only as a military man and, as such, subject to the military hierarchy. The only link alleged between them, it is said, is their membership of the Crisis Staff. It is submitted that neither the indictment nor the supporting material demonstrates any participation by Talic in the Crisis Staff, and even less any joint action by him with Brdanin. The supporting material for the indictment, it is said, demonstrates that the action of the civilian and military bodies was not co-ordinated (as alleged in the indictment) because, 'for many reasons', communication between the two bodies was almost non-existent. [FN33]

6. In its response to the Motion ('Response'), the prosecution concedes that Brdanin and Talic each played a different role in the execution of the overall plan to create the new Serbian territory, but points out that proof of the particular events for which each of them is jointly charged with criminal responsibility is the same so far as the case against each of them is concerned, that each of them is charged with the same crimes and that all of the crimes were committed in the course of the same transaction. It also says that the supporting material does show a link in authority between the Crisis Staff and the military, quoting from a Crisis Staff minute (but not of the ARK Crisis Staff) which provides:

The relationship of the military authorities to the civilian authorities should be

21

such that the military will execute the orders of the civilian authorities while the civilian authorities will not interfere with the way these orders are carried out.

The prosecution says that the supporting material includes proof of meetings between the two accused on at least ten occasions. [FN34]

7. After an unexplained delay, Talic sought leave to file a Reply to the prosecution's Response. [FN35] Although some of the matters which he wished to raise in Reply were not, strictly, matters in reply and should have been raised in the Motion, the Trial Chamber has granted leave for the Reply to be filed. It proposes, however, to refer only to those matters in the Reply which relate to the issues raised in the prosecution's Response referred to in this Decision. The Reply does not call for any further response from the prosecution.

8. Talic points out that all Serbian persons charged with crimes before this Tribunal are accused of having participated in the creation of the greater Serbia but not all of them are accused of the same offences. [FN36] He further points out that, of the supporting material upon which the prosecution relies to show a link in authority between the Crisis Staff and the military, the Crisis Staff whose minute has been quoted was not within his zone of command, and the document establishing the meeting between Brdanin and himself has been provided only in a redacted form and accordingly, it is said, cannot serve as any kind of proof. [FN37]

9. In support of his argument that separate trials are required in order to avoid any conflict of interest which may cause sericus prejudice and that only separate trials will ensure a proper administration of justice, Talic has submitted that there is a risk that a joint trial would deprive him of rights which would be his if he were tried separately.

10. It is said that, as the deadlines for filing motions, responding to motions and seeking leave to appeal differ for each of the accused, [FN38] and as a consequence Brdanin always files his documents before Talic does, the Trial Chamber makes its determinations relating to both accused without Talic having ''the opportunity to exercise his right to respond'. [FN39] That is the only right to which express reference is made in the present Motion, although it does refer to 'rights' in the plural, and the right said to have been denied by the different deadlines is introduced by the phrase 'inter alia' and it is concluded by the qualifying description 'in particular.'

11. However, in support of an earlier motion by Talic, which sought separate trials in relation to the original indictment, it was said that the defences of each accused would be 'totally different', and that each of the accused 'has a fundamentally differing approach in the conduct of his defence'. [FN40] Attention was drawn to statements made on behalf of Brdanin in a motion to dismiss the original indictment which, it was suggested, demonstrated that Brdanin placed the sole responsibility for certain events upon Talic, and the submission was made on behalf of Talic that in a joint trial with Brdanin he could be incriminated by 'a person having a personal interest in the matter', contrary to the interests of justice within the meaning of Rule 82(B). [FN41]

12. The Trial Chamber has therefore considered the submissions made by Talic in his present Motion as asserting as well that a joint trial would deprive him of both a right to be tried without incriminating evidence being given against him by his co-accused and also (it may be) a right Talic has, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed -- not in order to escape criminal responsibility but in order to mitigate punishment, pursuant to Article 7(4) of the Tribunal's Statute.

13. In its Response, the prosecution submits there is no merit in the assertion by Talic that a joint trial will deprive him of rights which would be his if he were tried separately. In relation to his claim that, because of the differing deadlines for filing documents, he is denied his right to respond, the prosecution points out that on one occasion Talic filed an application for leave to appeal without waiting for a French translation of the decision disputed, and on another occasion he filed a response to a prosecution motion without waiting for a French translation of the motion. In any event, the prosecution says, Talic has no automatic right to respond to a motion by Brdanin, and where he wishes to respond to something in a response by Brdanin to a prosecution motion he may always seek leave to do so. [FN42]

14. In reply, Talic has given as an example of the prejudice he says that he has suffered in this way an order made in relation to the prosecution's motion for protective measures which had been made before he had filed his response to the motion and which is said to be binding on both Brdanin and himself. [FN43]

15. The prosecution says that the interests of justice would not be served by separating the trials because of the possibility that each of Brdanin and Talic would at a **joint trial** blame each other. [FN44] The importance of a **joint trial**, the prosecution says, is not merely the saving of time and money, it also affects the public interest that there should be no inconsistencies in verdicts, and the desirability that the same verdict should be returned and the same treatment afforded to those found to have been concerned in the same offence. [FN45]

16. Talic replies that this last submission illustrates his fear that the possible guilt of one of the accused may automatically be ascribed to the other, and that the responsibility of each accused must be evaluated individually upon the basis of his own acts and not in the light of the acts of the other accused. [FN46]

17. The prosecution also says that, if separate trials are ordered, the trial of one of the two accused will be delayed, jeopardising that accused's right to a fair and expeditious trial. [FN47] Talic replies that the fairness of his trial takes precedence over its expedition. [FN48]

V Discussion and findings

18. The first challenge, although not expressly so identified, is to the propriety of the two accused being jointly charged in accordance with Rule 48. That Rule provides:

23

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Each of the two accused are charged with exactly the same crimes. The prosecution asserts, moreover, that the crimes were committed in the course of the same transaction.

19. The word 'transaction' is also used in Rule 49, which permits two or more crimes to be joined in the one indictment if the series of acts committed together form the same transaction, and the crimes are committed by the same accused. A transaction is defined by Rule 2 as a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan.

20. A joinder of counts under Rule 49 has been approved in the Appeals Chamber upon the basis that they 'relate in substance to the same campaign of destruction, the same people, the same period of time, the same area [...]. It is not necessary for all the facts to be identical'. [FN49] In another case concerning the equivalent of Rule 49 in the Rules of Procedure and Evidence of the Rwanda Tribunal, that statement was identified in the Appeals Chamber as an example of the jurisprudence of this Tribunal which justifies a joinder of counts, and the further statement was made that '[w]here possible public interest and the concern for judicial economy would require joint offences to be tried together'. [FN50] The Trial Chamber adopts all these statements as relevant also to the issue raised under this Tribunal's Rule 48. In a third case, one which concerned Rule 48, a Trial Chamber said:

To justify joinder [under Rule 48] what has to be proved is that (a) there was a common scheme or plan, and (b) that the accused committed crimes during the course of it. It does not matter what part the particular accused played provided that he participated in a common plan. It is not necessary to prove a conspiracy between the accused in the sense of direct coordination or agreement. The transaction referred to in Rule 48 does not reflect the law of conspiracy found in some national jurisdictions. [...] The fact that evidence will be brought relating to one accused (and not to another) is a common feature of joint trials. On the basis of the submissions and the allegations in the indictment the Trial Chamber is of the view that this in itself will not cause serious prejudice to [the applicant for a separate trial]. [...] [The Trial Chamber considers that it is in the interests of justice, of which judicial economy in the administration of justice under the Statute of the Tribunal is an element, that these accused, charged as they are with offences arising from the same course of conduct, should be tried together. [FN51]

In a fourth case, one which concerned this Tribunal's Rules 48 and 82, a Trial Chamber was not satisfied that the fact that one accused was a member of the military forces whereas his co-accused were members of the civilian authorities gave rise to a conflict of interests within the meaning of Rule 82(B). [FN52]

21. The case pleaded against these two accused clearly asserts the existence of the one campaign (for the execution of which both accused are charged with criminal responsibility), carried out by the same people, against the same people, during the one period of time and in the same area. The Trial Chamber is satisfied that,

24

in accordance with Rule 48, it was proper to have charged the two accused **jointly**. The issue nevertheless remains as to whether, in the circumstances of this case, it is appropriate for them to be tried **jointly**. The **Trial** Chamber turns, therefore, to the matters raised by Talic supporting his allegation that separate trials are required in order to avoid any conflict of interest which may cause serious prejudice and that only separate trials will ensure a proper administration of justice.

22. The challenge by Talic to various allegations in the indictment concerning his participation in the Crisis Staff and his association with Brdanin, based upon what is said to be the absence of any evidence in the supporting material, is not one which is relevant to the present application. Subject to the accused being informed of the nature of the case he is to meet, and to the obligations of the prosecution to provide disclosure pursuant to Rules 66-68, it (the prosecution) is limited in the evidence which can be given at the trial by the allegations made in the indictment, not by those made in the supporting material. What must be looked at in this application are the allegations made in the indictment, and the Trial Chamber sees no need to resolve the dispute between the parties as to what the supporting material establishes.

23. The fact that the two accused played different roles in the hierarchy of command (or even in different hierarchies of command) does not matter, as the jurisprudence of the Tribunal makes clear.

24. The objection by Talic that neither the witnesses nor the documents will be the same in relation to the prosecution case against each of the accused is borne out only to a slight extent. The bulk of the evidence in the trial will be to establish the particular events -- or the actions of the army, the paramilitary, and the territorial defence and police units -- for which the two accused are charged with criminal responsibility. There is no suggestion made that these events will not be greatly in dispute. Although there may well be different witnesses and different documents required to establish the differing roles alleged to have been played by each of the accused, the evidence relevant solely to each of the accused has not, in the circumstances of the case as put forward in this application, been shown to be likely to cause serious prejudice to the other accused.

25. The Trial Chamber sees no realistic possibility of prejudice resulting from the differing deadlines for filing responses to motions. At the request of Talic, [FN53] the Order for Filing Motions was varied so that the time for filing a response to a motion commences to run from the receipt of the translation of the motion into the working language in which the receiving party has been filing its documents in these proceedings. [FN54] Hence, when the prosecution files a motion in the English language, the time for filing a response by Brdanin -- who has been filing his documents in English -- commences to run from the date the motion was filed (it is faxed to his counsel the same day), and the time for filing a response by Talic -- who has been filing his documents in French -- commences to run from when the French translation is faxed to him, which is usually two or three days after the English original was filed.

26. Although it may be assumed that, generally, Brdanin will file his response before Talic, that does not mean that Talic is denied the opportunity to respond to the prosecution's motion. Although so far it has not been necessary in the present

case to determine a motion by the prosecution which relates to both accused, [FN55] it is both normal and necessary procedure in relation to any motion to wait before a decision is reached until the opportunity has been given for all the respondents to the motion to file their responses. There is therefore no possibility that the Trial Chamber will issue a decision relating to both Brdanin and Talic without Talic having the opportunity to exercise his right to respond.

27. The example given by Talic of where this is alleged to have happened already is misconceived. The order in question was a scheduling order. [FN56] It did not determine the prosecution's motion; it merely ordered the prosecution to elaborate upon the need for certain of the measures sought before any determination was made. The only effect of that order upon either of the accused was to assist them to file a proper response to the motion. It did not bind either of the accused in any way.

28. Should the situation arise that Talic does not receive the French translation of a response by Brdanin before he files his own response, and he discovers upon receipt of the French translation that a submission made by Brdanin is prejudicial to him, it is always open to Talic to seek leave to file a further response. He would need to file the proposed further response with the application for leave. [FN57] If he is concerned that a decision may be given in the meantime, he need only contact the Senior Legal Officer of the Trial Chamber to inform him that such an application is to be filed. This would be a very rare situation, and is not caused by the differing deadlines; it is a situation which could arise whenever there are two accused. There is no possibility of the serious prejudice which Rule 82(B) envisages.

29. Nor does the Trial Chamber see any possibility of serious prejudice resulting from the prospect that Brdanin may give evidence which incriminates Talic or that Talic will be unable, without fear of contradiction, to blame Brdanin and others for the orders which the prosecution may establish that he followed. A **joint trial** does not require a **joint** defence, and necessarily envisages the case where each accused may seek to blame the other. The Trial Chamber will be very alive to the 'personal interest' which each accused has in such a case. Any prejudice which may flow to either accused from the loss of the 'right' asserted by Talic here to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82(C) is directed. The Trial Chamber recognises that there could possibly exist a case in which the circumstances of the conflict between the two accused are such as to render unfair a joint trial against one of them, but the circumstances would have to be extraordinary. It is not satisfied that the present is such a case.

30. The Trial Chamber considers that it would be contrary to the interests of justice were only half of the whole picture to be exposed in each trial if separate trials are ordered. Should, for example, Brdanin attempt to blame Talic (and we are by no means persuaded that was what was being attempted in Brdanin's motion to dismiss the original indictment), it is in the interests of justice that Talic should be able to give evidence refuting that attempt. Similarly, it is in the interests of justice that Brdanin should be able to give evidence refuting any attempt by Talic to place the blame on Brdanin. Again, the Trial Chamber will be very alive to the 'personal interest' which each of the accused has in the matter.

31. There is, moreover, a fundamental and essential public interest in ensuring

26

consistency in verdicts. Nothing could be more destructive of the pursuit of justice than to have inconsistent results in separate trials based upon the same facts. The only sure way of achieving such consistency is to have both accused tried before the same Trial Chamber and on the same evidence -- unless (as Rule 82(B) requires) there is a conflict of interests which might cause serious prejudice to an accused, or separate trials are otherwise necessary to protect the interests of justice. Neither matter has been established by Talic in this case.

32. Both the suggestion by Talic that he may automatically be found guilty if Brdanin is found guilty and his assertion that the responsibility of each of them must be evaluated individually overlook the fact that trials in this Tribunal are conducted by professional judges who are necessarily capable of determining the guilt of each accused individually and in accordance with their obligations under the Statute of the Tribunal to ensure that the rights of each accused are respected. It is surprising that such a suggestion should be made or that it was thought necessary to make such an assertion.

33. The Trial Chamber accepts the argument of Talic that the prospect that his may be the trial which is delayed if separate trials are ordered should not be taken into account against his application for a separate trial if he is prepared to accept that delay in order to achieve a fair trial. The Trial Chamber does not, however, accept that a joint trial will be unfair to him.

34. The application by Talic for a separate trial of each accused in the amended indictment must accordingly be dismissed.

VI The earlier motion for separate trials

35. The Earlier Motion by Talic, for separate trials of the original indictment, has not been disposed of. In the present Motion, Talic says that it is 'no longer applicable' [FN58] It is, however, unsatisfactory to leave a motion on the file without a determination. [FN59] If pursued, the Earlier Motion would have been dismissed, for the reasons given in this decision. It, too, must therefore be dismissed.

VII Disposition

36. For the foregoing reasons, the Trial Chamber:

(i) dismisses the Motion to Separate Trials, filed 14 October 1999; and

(ii) dismisses the Motion for Separation of Trials, filed 9 February 2000.

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

Dated this 9 day of March 2000,

27

At The Hague,

The Netherlands.

Judge David Hunt

Presiding Judge

[Seal of the Tribunal]

Talic, 22 Feb 2000 ('Response'), pars 4-8.

Brdanin

c & Cerkez, Case IT-95-14/2-PT, Decision on Accused Mario Cerkez's Application for Separate Trial, 7 Dec 1998, pars 10-11. In that case, Kordic was charged as a high-ranking political and military leader, whereas Cerkez was charged merely as an HVO Brigad

, Case IT-95-9-PT, Decision on Motion for Separate Trial for Simo Zaric, pp 2, 4.

Decision on Motions by Momir Talic (1) to Dismiss the Indictment, (2) for Release, and (3) for Leave to Reply to Response of Prosecution to Motion for Release, 1 Feb 2000, par 10.

[FN1].. Count 1, Article 4(3)(a) of the Tribunal's Statute.

[FN2].. Count 2, Article 4(3)(e).

[FN3].. Count 3, Article 5(h).

[FN4].. Count 4, Article 5(b).

[FN5].. Count 8, Article 5(d).

[FN6].. Count 9, Article 5(i).

[FN7].. Count 6, Article 5(f).

[FN8].. Count 7, Article 2(b).

[FN9].. Count 5, Article 2(a).

[FN10].. Count 10, Article 2(d).

[FN11].. Count 11, Article 3(b).

[FN12].. Count 12, Article 3(d).

[FN13].. Amended Indictment, par 25. Compare Prosecutor v KRNOJELAC, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, pars 18, 59-60.

[FN14].. Motion for Separation of Trials, 9 Feb 2000 ('Motion').

[FN15].. Motion (English translation), p 4.

[FN16].. Ibid, p 3.

[FN17].. Amended Indictment, par 6.

[FN18].. Ibid, par 7.

[FN19].. Ibid, par 8.

[FN20].. Ibid, par 16.

[FN21].. Ibid, par 16.

[FN22].. Ibid, par 8.

[FN23].. Ibid, par 22.

[FN24].. Ibid, pars 14, 19. The various Crisis Staffs were re-designated as War Presidencies and later as War Commissions, but were still commonly referred to as Crisis Staffs: ibid, par 15.

[FN25].. Ibid, par 19.

[FN26].. Ibid, pars 11, 20.

[FN27].. Ibid, par 20.

[FN28].. Ibid, pars 20-21.

[FN29].. Ibid, par 21.

[FN30].. Ibid, par 16.

[FN31].. Ibid, par 18.

[FN32].. Ibid, par 23.

[FN33].. Motion (English Translation), p 4.

[FN34].. Prosecution's Response to 'Motion for Separation of Trials' filed by Counsel for the Accused Momir

[FN35].. Application for Leave to Reply and the Reply to the Prosecutor's Response of 22 February 2000, 6 Mar 2000 ('Reply').

[FN36].. Reply, par 1.

[FN37].. Ibid, par 2.

[FN38].. This submission appears to be based upon the Order for Filing Motions, 31 Aug 1999 (as amended by the Decision on Motion to Translate Procedural Documents into French, 16 Dec 1999), which provides that the time for filing a response to a motion commences to run from the receipt of the translation of the motion into the working language in which the receiving party has been filing its documents in these proceedings. That Order does not, however, extend any time for filing motions or applications for leave to appeal.

[FN39].. Motion (English Translation), p 4.

[FN40].. Motion to Separate Trials, 14 Oct 1999 ('Earlier Motion'), par 5.

30

[FN41].. Ibid, par 6, referring to the Motion to Dismiss Indictment (filed on behalf of

[FN42].. Response, pars 19-20.

[FN43].. Reply, par 6.

[FN44].. Response, par 13.

[FN45].. Ibid, par 12.

[FN46].. Reply, par 4.

[FN47].. Response, par 9.

[FN48].. Reply, par 3.

[FN49].. Prosecutor v Kovacevic,

[FN50].. Anatole Nsengiyumva v The Prosecutor, Case ICTR-96-12-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, p 12.

[FN51].. Prosecutor v Kordi

[FN52].. Prosecutor v Simic

[FN53].. Motion to Translate Procedural Documents into French, 29 Oct 1999.

[FN54].. See footnote 35, supra.

[FN55].. The one prosecution motion which does relate to both accused, the Motion for Protective Measures, will not be determined until after oral submissions have been heard.

[FN56].. Scheduling Order on the Confidential Prosecution Motion for Protective Measures of 10 January 2000, 27 Jan 2000.

[FN57].. Talic has already correctly followed such a procedure when seeking leave to file a Reply: Decision on Motions by Momir Talic (1) to Dismiss the Indictment, (2) for Release, and (3) for Leave to Reply to Response of Prosecution to Motion

for Release, 1

[FN58].. Motion, par 2.

[FN59]..

END OF DOCUMENT

PROSECUTION AUTHORITIES

2. *Prosecutor v. Barayagwiza,* ICTR-97-19-I, Decision on the Request of the Defence for Severance and Separate Trial, 26 September 2000.

33

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER I

Original : English

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registry: Ms Arninatta N'gum

Decision date: 26 September 2000

THE PROSECUTOR
v.

JEAN BOSCO BARAYAGWIZA
Case N. ICTR-97-19-I

DECISION ON THE REQUEST OF THE DEFENCE FOR SEVERANCE AND SEPARATE TRIAL

Office of the Prosecutor:

M. Sankara Menon
Ms Charity Kagwi
M. Alphonse Van

Counsel for the Accused:

Ms Carmelle Marchessault
M. David Danielson

34

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

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, Presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

CONSIDERING the motion from the Defence for severance and separate trial, filed on 19 July 2000;

CONSIDERING the additional information in support of the motion for severance and separate trial filed by the Defence on 31 July 2000 ;

CONSIDERING the consolidated response of the Prosecutor to Defence's motions for lack of jurisdiction and for separate trial, filed on 23 August 2000;

CONSIDERING the rejoinder of the Defence to the consolidated response of the Prosecutor, filed on 5 September 2000 ;

HAVING heard the Parties at a hearing on 20 September 2000.

The Submissions of the Parties

1. The Defence submitted that even though the decision of 6 June 2000 granting the joinder of the accused was based on Rule 48 *bis* of the Rules a separate trial can be ordered on the basis of Rule 82 B). The Defence further argued that a joint trial will lead to a conflict of interest since the accused could be unlawfully accused, by association, of the crimes allegedly committed by his co-accused, for example the crimes alleged against Ngeze and related to his activities in *Kangura* newspaper. According to the Defence this is an unlawful procedure, which demonstrates that the Prosecutor has no case against the accused and that she is trying to charge him with acts she would not have been able to charge him with in a separate trial. Another conflict of interest will arise, according to the Defence, from the fact that Ngeze will be one of the defence witnesses. The Defence quoted Trial Chamber II which granted a separate trial on the basis, notably, that the three co-accused of Kajelijeli may refuse to testify for him in the case of a joint trial, which would be in violation of the accused's rights under Rule 82 A) of the Rules.[1] The Defence also stated that a joint trial is against the interest of

[1] See *The Prosecutor v. Augustin Bizimana et al*, Case N. ICTR-98-44-T, Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by the Accused Juvenal Kajelijeli of 6 july 2000, para. 39 to 41.

justice for several reasons. Firstly, the amendment of the indictment is null and void since the Chamber did not consider the supporting material and thus could not establish the existence of the "same transaction". Secondly, the joinder decision of 6 June 2000 is also null and void since although the Prosecutor asked for a joinder of trials the Chamber granted a joinder of indictments pursuant to Rule 48 bis, thus ruling *ultra petita*. Thirdly, the joinder decision being based on a motion precedent to the decision granting leave to amend, the joinder is not based on the amended indictment in which the Chamber granted the addition of the count of conspiracy. This means that the joinder is null and void *ab initio*. Fourthly, the Defence was not duly informed of the facts of the case on time and did not have the opportunity to respond on the merits of the case. Although the joinder was granted on 6 June 2000, the accused received part of the documents - audio and videotapes were missing - during the month of July, long after the two co-accused. In these conditions, the accused and his counsels cannot be ready for trial, they need to listen to the content of the tapes and testimonies which form the corner stone of the prosecution evidence. Lastly the Defence submitted that it is in the interest of justice to stay commencement of the trial pending rulings from both the Trial Chamber and the Appeals Chamber on the preliminary motions and on the appeals. The Defence submitted that the commencement of the trial, namely 18 September 2000, has to be postponed in order to be enable them to properly prepare their case.

2. In addition, the Defence submitted a brief, in which it complained about the late and incomplete disclosure of documents by the Prosecutor. The Defence estimated that several months will be necessary to examine the audio and video-tapes, to analyse the expert reports, as well as to identify defence witnesses. Accordingly, the Defence is asking for a postponement of one year of the date set for trial.

3. The Prosecution responded that on 13 June 2000, the accused lodged an appeal against the decision granting the joinder. Although the decision of the Appeals Chamber was pending, the accused is reintroducimg the same issue by filing the present motion. The Prosecution further submitted that a postponement of the date set for trial will prejudice its case. A delay will hinder the protective measures granted to the witnesses, indeed since the identifying information of all the prosecution witnesses having been disclosed to the accused a

postponement will endanger them.

4. In a rejoinder, the Defence submitted that it has received lists of witnesses and cannot determine which one is going to testify against the accused. It reiterated that there is no valid indictment against the accused. The Defence further argued that it had already opposed the date set for the commencement of the trial, that is 18 September 2000, when it was scheduled on 16 May 2000.

The Chamber

With Regard to Conflict of Interest

5. The Trial Chamber notes that this issue has been dealt with, at length, by the same Chamber and reiterates its findings in the case of *The Prosecutor v. Hassan Ngeze*, in which it stated :

> « A determination as to the nature of the specific interests of the accused and a possible conflict of these interests is best made by a Chamber at the trial stage of the proceedings »[2].

6. As for the evaluation of the evidence presented by the Prosecution and the possible incrimination of the accused by the evidence produced against his co-accused, the Chamber is of the view that this is also a matter to be assessed by the Judges at trial and cannot be adjudicated on the basis of the allegations made by the Defence. Furthermore, the Chamber considers that this argument of guilt- by- association is without merit, since in the course of a joint trial, the evidence in respect of each accused will be assessed separately in order to ascertain the guilt of each accused.

7. The Defence in its argument relied on the decision of Trial Chamber II in the case of *The Prosecutor v. Augustin Bizimana et al*, Case N. ICTR-98-44-T, in support of its motion for separation on the premise that co-accused, Hassan Ngeze, is a prospective defence

---

[2] See *The Prosecutor v. Hassan Ngeze*, Case No. ICTR-97-27-I, Decision on the Defence Request for Separate Trials of 12 July 2000, para. 9.

witness.Trial Chamber II ordered a separation of trial on the possibility of co-accused in the joint trial being unable to testify for the accused with attendant prejudice to the accused. Issues as to whether co-accused are compellable witnesses for other accused, or whether a confession made by one is admissible against the other, were not canvassed before that Chamber. It is to be noted that that case is distinguishable from this case on the facts. The Chamber in Bizimana appears to have an informed impression that the co-accused will refuse to testify in a joint trial, whereas in the present case, the Chamber has received no indication from the co-accused, Nahimana or Ngeze, as to the likelihood of their testifying for the accused.

8. In the said decision, Trial Chamber II cited, with approval, the test laid down in *R. v. Silvini*, namely that ''...an accused who wishes to call a co-accused to testify as a witness for his defence may seek a separate trial, on the grounds that he has a right to be tried fairly, that is, to call the best witnesses available for his case. The test in deciding if severance should be granted on this ground, is whether such evidence might reasonably create a doubt as to the guilt of the accused.''[3] The Chamber considers that it is not apparent from the decision whether Trial Chamber II was presented with evidence to enable it to make an assessment, in accordance with the Silvini test, of whether the evidence might reasonably create a doubt as to the guilt of the accused. Moreover, the Silvini case is distinguishable on the grounds that it addressed trial by jury rather than by Judges, and was concerned with the situation where there was representation by one counsel of two accused, one of whom intended to plead guilty.

9. In the instant case, Defence in its brief has made a bare allegation of conflict of interest. A simple intimation that the accused intends to call his co-accused on his behalf is not enough for the Chamber to determine that there will be a conflict of interest sufficient to warrant a separate trial. The Defence was well placed to make a specific showing as to the content of the prospective testimony as it has received substantial disclosure of documents which the Prosecutor intends to use in evidence at the trial. In our view, the Defence has not discharged

---

[3] See the Decision on the Defence motion in oposition to joinder and motion for severance and separate trial filed by the accused Juvenal Kajelijeli of 6 July 2000, para. 37. Refering to *R. v. Silvini* (1991), 68 C.C.C.(3d)251(Ont.C.A.).

its burden of showing potential prejudice under this allegation. If it is the Defence's intention to lead exculpatory evidence from Ngeze, then the request for separation must make a threshold showing of, firstly, a bona fide need for the testimony, secondly the specific substance of the testimony, thirdly the exculpatory nature and effect of the testimony and lastly the reasonable probability that the exculpatory testimony would follow severance, that is, the likelihood that the co-accused would in fact testify.[4]

10. Once the Defence makes the threshold showing, it is for the Chamber to examine the significance of the testimony in relation to the accused's apprehensions, to assess the extent of prejudice caused by the absence of the testimony, to consider the effects on judicial administration and economy and to give weight to the timeliness of the motion.[5] The Trial Chamber considers that the Defence failed to meet these tests and hence the Judges are not persuaded that a conflict of interest arises.

11. A decision to grant or deny a motion for severance is left to the sound discretion of Judges of the Trial Chambers. It must be borne in mind that this is a trial by Judges and not by a Jury. The usual ground advanced by Defence for seeking a separate trial is that evidence which may, in law, be admissible against one accused and not the others, will be heard by the Jury and may be relied upon by them in reaching a verdict. It is generally assumed that judges can rise above such risk of prejudice and apply their professional judicial minds to the assessment of evidence.

With Regard to the Interest of Justice

12. The Defence argues that when considering the Joinder motion, the Judges did not consider the supporting material and thus could not assess the existence of a « same transaction » to grant the joinder. The Judges consider that that issue has already been dealt with and will not rule again on matters raised and disposed of in the decision granting the joinder.

---

4 See U.S v. McKinney, 53F. 3d 664, 667 (5th Circ. 1995)

5 See U.S v. Ramirez, 954F. 2d 1035, 1037 (5th Circ. 1992)

13. For the same reason, the Chamber will not revisit arguments relating to the grant of the joinder on the basis of Rule 48 *bis* of the Rules and not Rule 48[6] which were covered in the decision handed down. The Defence is in fact trying to revisit issues that have been dealt with in the joinder and to have the decision reviewed, which cannot be allowed in first instance in the absence of new facts. Moreover, the Defence lodged an appeal against the joinder decision, which was rejected on 12 September 2000 by a Bench of the Appeals Chamber save in respect of the challenge to the existence of the indictment following the decisions of the Appeals Chamber and in respect of the alleged breach of the temporal jurisdiction. On 14 September 2000, the Appeals Chamber confirmed the ruling of the Trial Chamber, namely that there is a valid indictment, that the indictment has been reinstated by the Decision of 31 March 2000 and that the Chamber had therefore jurisdiction to rule on the Prosecutor's motions to amend the indictment and to join the accused.

14. Concerning the contention made by the Defence that the motion for joinder was filed by the Prosecutor before the decision granting leave to amend the indictment was issued. Even if this were correct, the crux of the matter is that it was the amended indictment that was put to the accused at his Initial Appearance and on which the decision to join was based. Nothing turns on the argument that the Prosecution filed the motion for joinder on the same day as the decision to amend.

15. In its oral decisions of 18 October 1999 and 18 April 2000, the Trial Chamber declined the accused's requests for adjournment which were based on similar grounds to the present request for adjournment. Events have also overtaken the motion, since the Appeals Chamber has, in the meantime, ruled on the interlocutory appeals. The appeals are indeed complete and issues relating to disclosure will be addressed at the Pre-Trial Conference. The Defence's request for an adjournment of one year based on lack of preparedness is considered to be an excessive demand and will cause serious prejudice to the co-accused.

---

[6] See *The Prosecutor v. Jean Bosco Barayagwiza*, Case No. ICTR-97-19-I, Decision on the Prosecutor's Motion for Joinder of 6 June 2000, para. 9, p. 5.

FOR THESE REASONS

THE TRIBUNAL

DENIES the Defence motion for severance and separate trial.

DENIES the Defence request for adjournment of the trial.

Arusha, 26 September 2000

Navanethem Pillay Presiding Judge	Asoka de Zoysa Gunawardana Judge	Erik Møse Judge

Seal of the Tribunal

41

PROSECUTION AUTHORITIES

3. *Prosecutor v. Delalic,* IT-96-21, Decision on Motions for Separate Trial Filed by the Accused Zejnil Delalic and the Accused Zdravko Mucic, 25 September 1996.

IN THE TRIAL CHAMBER

42

Before: Judge Gabrielle Kirk McDonald, Presiding

Judge Ninian Stephen

Judge Lal C. Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 25 September 1996

PROSECUTOR

v.

ZEJNIL DELALIC
ZDRAVKO MUCIC also known as "PAVO"
HAZIM DELIC
ESAD LANDZO also known as "ZENGA"

DECISION ON MOTIONS FOR SEPARATE TRIAL FILED BY THE ACCUSED ZEJNIL DELALIC AND THE ACCUSED ZDRAVKO MUCIC

The Office of the Prosecutor:

Mr. Eric Ostberg Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Residovic, for Zejnil Delalic

Mr. Branislav Tapuskovic, for Zdravko Mucic

Mr. Salih Karabdic, for Hazim Delic

Mr. Mustafa Brakovic, for Esad Landzo

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons

43

Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 ("International Tribunal") is a Preliminary Motion filed pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") on behalf of one of the accused, Zdravko Mucic, on 24 May 1996, seeking a separate trial from two of the co-accused, Hazim Delic and Esad Landzo. On 5 June 1996 the co-accused Zejnil Delalic also filed a Motion for A Separate Trial (together referred to as "the Motions"). The Office of the Prosecutor ("Prosecution") filed its Responses to the Motions on 6 and 28 June 1996. On 18 June 1996 the Trial Chamber ordered the two co-accused, Hazim Delic and Esad Landzo, to respond to the Motions and Replies were filed on 18 and 16 July 1996, respectively. The Prosecution responded to these Replies on 19 July 1996.

On 2 August 1996 the Trial Chamber heard oral argument from counsel for the four accused and for the Prosecution on the Motions. The Decision on those Motions was reserved to a later day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written and oral submissions of the parties,

HEREBY ISSUES ITS DECISION.

II. DISCUSSION

1. The Rules relevant to these Motions are Rule 48, read in the light of the definition of "transaction" in Rule 2, and Rule 82, in particular, Sub-rule (B). These provisions read as follow:

> Rule 48
>
> Joinder of Accused
>
> Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.
>
> Rule 82
>
> Joint and Separate Trials
>
> . . .
>
> (B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

2. The accused properly have been jointly charged with a variety of crimes in the one indictment in accordance with Rule 48, since the acts that were alleged to have to have been committed are part of the same transaction within the meaning of Rule 2. Only if this Trial Chamber considers that under Sub-rule 82(B) it is "necessary in order to avoid a conflict of interests that might cause serious prejudice to an

44

accused, or to protect the interests of justice" may it order that persons accused jointly be tried separately. There is no provision in the Rules for separate trial of distinct issues arising in the one indictment.

3. Neither in written submissions nor in oral argument has it been established that any conflict of interests such as is referred to in the first limb of Sub-rule 82(B) will arise if the accused are tried together in one joint trial, still less that, as a result of any such conflict, there might be caused serious prejudice to any accused. Before referring to the second limb in Sub-rule 82(B), the protection of the interests of justice, the submissions, written and oral, of the accused may be summarised as follow:

(a) The accused Zejnil Delalic

In his motion reliance was placed upon the principle of individual responsibility and on an accused's right to equality before the International Tribunal. It was said that the presentation at his trial of evidence against other accused charged as direct perpetrators will result in serious prejudice to him. In addition, much was said regarding the appropriateness of a separate trial of this accused concerned solely with the question of whether he was ever in a position of superior authority such as would involve him in command responsibility.

However, neither in the written motion nor in oral argument was any question of conflict of interests established, though in argument the fact that all accused would be obliged to be present when evidence that did not concern all of them was given was said to give rise to a conflict of interests. Whatever degree of inconvenience this may involve is no such matter of conflict of interests with which Sub-rule 82(B) is concerned.

As it developed in argument, what this accused was seeking was not so much a separate trial on the present indictment but rather a preliminary and separate trial confined to the sole issue of command responsibility, a procedure which, as stated above, is not contemplated in the Rules of this International Tribunal.

(b) The accused Zdravko Mucic

In his written motion no conflict of interests was alleged and in oral argument his counsel did not in fact oppose a joint trial.

(c) The accused Hazim Delic

Having initially stated that he did not seek a separate trial, this accused in his motion now seeks not one separate trial but, like the accused Zejnil Delalic, a preliminary and separate trial confined to the question of his command responsibility and a second trial concerned with acts allegedly committed by him personally.

In argument this was elaborated on and counsel added that there was no objection to this accused being jointly tried with the accused Esad Landzo in the second of the two trials proposed. Neither in argument nor in the written motion is any question of conflict of interest suggested.

(d) The accused Esad Landzo

45

This accused also initially did not seek a separate trial but in his motion now does so and in argument objected to being tried jointly with Zejnil Delalic and Zdravko Mucic, though not with Hazim Delic. Neither in the motion nor in oral argument was any question of conflict of interests established.

4. In view of the foregoing and the absence of any conflict of interests, the only remaining ground upon which any separate trial might be ordered in accordance with Sub-rule 82(B) would be that of it being necessary to do so in order to protect the interests of justice.

5. In fact, to grant separate trials would be contrary to the interests of justice. Were each of the motions of Zejnil Delalic, Hazim Delic and Esad Landzo granted, the result would be at least three, perhaps more, distinct trials: one or perhaps two (depending on the outcome of the first) for Zejnil Delalic, one for Hazim Delic and perhaps a second (depending again on the outcome of the first) jointly with Esad Landzo and one for Zdravko Mucic, which could perhaps be a joint trial with some other accused.

6. It was said on behalf of the accused that there would be great delay and complexity involved in a joint trial; in fact the separate trials which have been sought would *in toto* be likely to involve much greater delay, at least for those unfortunate enough not to be the first to be tried. They would also mean considerable repetition of evidence, not only in the trials of different accused but even, according to the Prosecution, in cases where two distinct trials of the same accused became necessary as a possible outcome of the orders sought by both Zejnil Delalic and Hazim Delic. What all this would involve for witnesses, for the Prosecution and, indeed, for the functioning of the International Tribunal and the disposition of other cases, is so obvious as to need no exposition.

7. However, these considerations apart, the interests of justice are in any event clearly best served by one joint trial. The Prosecution submits that the evidence of almost all the witnesses it intends to call will be relevant to the case against each of the four accused; this may also prove to be so in the case of witnesses called by the several accused, should they chose to offer evidence. Accordingly, separate trials would involve much duplication of testimony and great hardship for already traumatised witnesses. Moreover, separate trials would, in this International Tribunal, where a bench of three Judges are triers of both fact and law, present especial difficulties. The Judges would have to hear the same witnesses giving the same testimony on at least two, and probably more, occasions and on each occasion would have to try to consider the evidence with minds unaffected by their prior conclusions regarding that evidence reached on earlier occasions. In sum, to grant the separate trials that are sought would, in the opinion of this Trial Chamber, be distinctly adverse to the interests of justice.

8. Although Sub-rule 82(B) entitles accused who have been jointly charged to separate trials upon a proper showing, and provides for no other alternative, some reference should be made to the quite different proposal urged on behalf of several of the accused that there be preliminary separate trials confined to the single issue of command responsibility. Perhaps this would result in a speedier outcome than will a joint trial, at least for the first two accused who might be tried in this way, but only if they were to succeed in establishing the absence of command responsibility. It might, however, even in that event, mean greater delay in the trial of the other accused and would certainly mean very considerably greater delay, not to mention extraordinary hardship and disruption to witnesses, were command responsibility established.

9. This apart, the arguments of the accused proceed very much upon the footing that the issues involved in command responsibility may be disposed of relatively simply and hence speedily. This the Prosecution contests. Only the outcome of such trials would determine in retrospect who was right; but if, as the Prosecution asserts, most of the intended prosecution witnesses will give evidence going to both command responsibility and to direct liability, the likelihood of speedy disposition of the command responsibility issue seems slight. It must be appreciated that the issue of command responsibility is

46

unlikely to turn upon mere proof of the holding or not holding of some particular office.

10. In all the circumstances this Trial Chamber concludes that, for the foregoing reasons, it should refuse to make any orders for separate trial pursuant to Sub-rule 82(B); the accused have been properly joined and no showing of a conflict of interests has been made nor any prejudice to the interests of justice. It also concludes, for the reasons stated, that it should not make any orders for some form of preliminary determination of the issue of command responsibility.

III. DISPOSITION

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER, PURSUANT TO RULE 82,

HEREBY UNANIMOUSLY DENIES the Motions.

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

Gabrielle
Kirk
McDonald

Presiding
Judge

Dated this twenty-fifth day of September 1996

At The Hague

The Netherlands

[Seal
of
the
Tribunal]

PROSECUTION AUTHORITIES

4. *Prosecutor v. Tadic,* IT-94-01-A, Judgement, 15 July 1999, paras. 29-56.

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-94-1-A

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **15 July 1999**

PROSECUTOR

v.

DU[KO TADI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

II. FIRST GROUND OF APPEAL BY THE DEFENCE: INEQUALITY OF ARMS LEADING TO DENIAL OF FAIR TRIAL

A. Submissions of the Parties

1. The Defence Case

29. In the first ground of the Appeal against Judgement, the Defence alleges that the Appellant's right to a fair trial was prejudiced by the circumstances in which the trial was conducted. Specifically, it alleges that the lack of cooperation and the obstruction by certain external entities -- the Government of the *Republika Srpska* and the civic authorities in Prijedor -- prevented it from properly presenting its case at trial.[51] The Defence contends that, whilst most Defence witnesses were Serbs still residing in the *Republika Srpska*, the majority of the witnesses appearing for the Prosecution were Muslims residing in countries in Western Europe and North America whose governments cooperated fully. It avers that the lack of cooperation displayed by the authorities in the *Republika Srpska* had a disproportionate impact on the Defence. It is accordingly submitted that there was no "equality of arms" between the Prosecution and the Defence at trial, and that the effect of this lack of cooperation was serious enough to frustrate the Appellant's right to a fair trial.[52] The Defence therefore, requests the Appeals Chamber to set aside the Trial Chamber's findings of guilt and to order a re-trial.[53]

30. Citing cases decided by both the European Commission of Human Rights ("Eur. Commission H. R.") and the European Court of Human Rights ("Eur. Court H. R.") under the provision in the European Convention on Human Rights ("ECHR") corresponding to Article 20(1) of the Statute, the Defence submits that the guarantee of a fair trial under the Statute incorporates the principle of equality of arms.[54] The Defence

[51] Appellant's Amended Brief on Judgement, paras. 1.1-1.3; T. pp. 35-40 (19 April 1999).
[52] Appellant's Amended Brief on Judgement, para 1.11.
[53] Appellant's Amended Notice of Appeal against Judgement, p. 6.
[54] *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274; *Neumeister v. Austria*, Eur. Court H. R., judgement of 27 June 1968, Series A, no. 8; *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11; *Borgers v. Belgium*, Eur. Court H. R., judgement of 30 October 1991, Series A, no. 214; *Albert and Le Compte v. Belgium*, Eur. Court H. R., judgement of 10 February 1983, Series A, no. 58; *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284; *Kaufman v. Belgium*, Application No. 10938/84, 50 Decisions and

accepts the Prosecution's submission that there is no case law which would support the inclusion of matters outside the control of the Prosecution or the Trial Chamber within the ambit of the principle of equality of arms.[55] However, the Defence argues that this principle ought to embrace not only procedural equality or parity of both parties before the Tribunal, but also substantive equality in the interests of ensuring a fair trial. It is accordingly submitted that the Appeals Chamber, when determining the scope of this principle, should be guided by the overriding right of the accused to a fair trial. [56]

31. Relying on the same cases decided under the ECHR, the Defence further claims that the principle of equality of arms embraces the minimum procedural guarantee, set down in Article 21(4)(b) of the Statute, to have adequate time and facilities for the preparation of the defence. It contends that the uncooperative stance of the authorities in the *Republika Srpska* had the effect of denying the Appellant adequate time and facilities to prepare for trial to which he was entitled under the Statute, resulting in denial of a fair trial.

32. In support of its submissions, the Defence cites paragraph 530 of the Judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely "alleviated" them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible. [57]

Reports of the European Commission of Human Rights ("DR") 98; *X and Y v. Austria*, Application No. 7909/74, 15 DR 160.
[55] T. 30-31 (19 April 1999).
[56] T. 31 (19 April 1999).
[57] Appellant's Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999).

33. The Defence contends that the Appeals Chamber should adopt the following two-fold test to determine whether, on the facts, a violation of the principle of equality of arms, broadly construed, has been established.

1) Did the Defence prove on the balance of probabilities that the failure of the civic authorities in Prijedor and the government of the *Republika Srpska* to cooperate with the Tribunal led to relevant and admissible evidence not being presented by trial counsel, despite their having acted with due diligence, because significant witnesses did not appear at trial?

2) If so, was the imbalance created between the parties sufficient to frustrate the Appellant's right to a fair trial?

34. With respect to the first branch of this test, the Defence asserts that the Appeals Chamber in its Decision on Admissibility of Additional Evidence recognised that certain Defence witnesses were intimidated into not appearing before the Trial Chamber. While acknowledging that the Appeals Chamber denied the admission of the evidence in question on the ground that it found that trial counsel did not act with due diligence to secure attendance of those witnesses at trial, it contends that what is important is that the Appeals Chamber accepted the allegations of intimidation. It adds that the Appeals Chamber in this decision also accepted that there were witnesses unknown to trial counsel during trial proceedings, despite counsel having acted with due diligence in looking for witnesses. From this the Defence draws the conclusion that, had there been some measure of cooperation, trial counsel could have called at least some of these witnesses. Thus, it is argued that relevant and admissible evidence helpful to the case for the Defence was not presented to the Trial Chamber. It is further asserted that the reason why so many witnesses could not be found was due to lack of cooperation on the part of the authorities in the *Republika Srpska*.[58]

35. As regards the second branch of the test, the Defence contends that this is a matter of weight and balance. While recognising that not every inability to ensure the production of evidence would render a trial unfair, it submits that, on the facts of the case, the volume

[58] T. 38-41 (19 April 1999).

and content of relevant and admissible evidence that could not be called at trial was such as to create an inequality of arms that served to frustrate a fair trial.[59]

36. Finally, the Defence contends that the fact that trial counsel did not file a motion seeking a stay of trial proceedings should not be held to prevent the Defence from raising the matter of denial of a fair trial on appeal. In this respect, the Defence maintains that trial counsel might have been unaware of the degree of obstruction by the Bosnian Serb authorities in preventing the discovery of witnesses helpful to the Defence case.[60] It is further pointed out that lead trial counsel in his opening statement emphasised that the prevailing conditions might frustrate the fairness of the trial. Defence counsel opined that trial counsel's decision not to seek an adjournment of the proceedings could be attributed to the wish not to prolong the extended period of the Appellant's pre-trial detention.[61]

2. The Prosecution Case

37. The Prosecution argues that equality of arms means procedural equality. According to the Prosecution, this principle entitles both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their cases. However, in its view, the principle does not call for equalising the material and practical circumstances of the two parties. Accordingly, it is contended that the claim of the Defence that it was unable to secure the attendance of important witnesses at trial does not demonstrate that there has been an inequality of arms, unless that inability was due to a relevant procedural disadvantage suffered by the Defence. It is asserted that while the obligation of the Trial Chamber is to place the parties on an equal footing as regards the presentation of the case, that Chamber cannot be responsible for factors which are beyond its capacity or competence.[62]

38. The Prosecution does not deny that in certain circumstances it could amount to a violation of fundamental fairness or "manifest injustice" to convict an accused who was unable to obtain and present certain significant evidence at trial. In its view, however, this

[59] T. 52-53 (19 April 1999).
[60] T. 50-51 (19 April 1999).
[61] T. 45-49(19 April 1999).
[62] Prosecution's Response to Appellant's Brief on Judgement, paras. 3.8–3.16, 3.30.

is a matter that goes beyond the concept of "equality of arms" as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.[63]

39. In the view of the Prosecution, the issue raised by the present ground of appeal is whether the degree of lack of cooperation and obstruction by the authorities in the *Republika Srpska* was such as to deny the Appellant a fair trial.[64] It submits that the Defence must prove that the result of such non-cooperation was to prevent the Defence from presenting its case at trial, and contends that the Defence has failed to meet this burden. It maintains that the Defence had a reasonable opportunity to defend the Appellant under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution, and that it indeed put forward a vigorous defence by presenting the defences of alibi and mistaken identity.[65] In addition, it is noted that the Defence was helped by the broad disclosure obligation on the Prosecution under the Rules, which extends an obligation upon the Prosecution to disclose all exculpatory evidence of which it is aware. Furthermore, it is submitted that, whereas the Defence received some measure of cooperation from the authorities in the *Republika Srpska*, the Prosecution in fact received no such cooperation at all.[66] Finally, it is alleged that the Defence has not substantiated its claim that any lack of cooperation substantially disadvantaged the Defence as compared to the Prosecution.[67]

40. The Prosecution further argues that the standard which the Defence advocates for establishing a violation of the principle of equality of arms or the right to a fair trial is set too low. It claims that the Defence does not prove a violation of this principle merely by showing that relevant evidence was not presented at trial. In its view, a higher standard is called for, according to which the burden is on the Defence to prove an "abuse of discretion" by the Trial Chamber. The Prosecution maintains that the Defence has not satisfied this burden, as it has not shown that the Trial Chamber acted inappropriately in proceeding with the trial.[68]

---

[63] Prosecution's Response to Appellant's Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).
[64] T. 90-91 (20 April 1999).
[65] T. 97 (20 April 1999).
[66] T. 90, 98-99 (20 April 1999).
[67] Skeleton Argument of the Prosecution, para.10; Prosecution's Response to Appellant's Brief on Judgement, paras. 3.29, 6.9.
[68] Skeleton Argument of the Prosecution, para. 6.

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution's view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the *Republika Srpska*.[69]

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal of the case on the basis that a fair trial was impossible because of lack of cooperation of the authorities of the *Republika Srpska*. It notes that, by not doing so, the Defence failed to give the Trial Chamber the opportunity to take additional measures to overcome the difficulties faced by the Defence. It is submitted that this omission by the Defence further provides an indication that it did not believe that the Appellant's right to a fair trial had been violated.[70]

B. Discussion

1. Applicability of Articles 20(1) and 21(4)(b) of the Statute

43. Article 20(1) of the Statute provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]". This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"),[71] the European Convention on

[69] T. 96 (20 April 1999).
[70] T. 100 (20 April 1999).
[71] Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]."

Human Rights (1950),[72] and the American Convention on Human Rights (1969).[73] The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.[74]

44. The parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee ("HRC") under the ICCPR. The HRC stated in *Morael v. France*[75] that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms. Similarly, in *Robinson v. Jamaica*[76] and *Wolf v. Panama*[77] the HRC found that there was inequality of arms in violation of the right to a fair trial under Article 14(1) of the ICCPR. Likewise, the case law under the ECHR cited by the Defence accepts that the principle is implicit in the fundamental right of the accused to a fair trial. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments. Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.[78] In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the

---

[72] Article 6(1) of the ECHR provides in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[73] Article 8(1) of the American Convention on Human Rights provides in part:
"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature."

[74] T. 29-35 (19 April 1999).

[75] *Morael v. France*, Communication No. 207/1986, 28 July 1989, U.N. Doc. CCPR/8/Add/1, 416.

[76] *Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426.

[77] *Wolf v. Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399.

[78] T. 29-35 (19 April 1999).

parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the *Republika Srpska* could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

46. The Defence contends that the minimum guarantee in Article 21(4)(b) of the Statute to adequate time and facilities for the preparation of defence at trial forms part of the principle of equality of arms, implicit in Article 20(1). It argues that, since the authorities in the *Republika Srpska* failed to cooperate with the Defence, the Appellant did not have adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms.

47. The Appeals Chamber accepts the argument of the Defence that, on this point, the relationship between Article 20(1) and Article 21(4)(b) is of the general to the particular. It also agrees that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence.

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In *Kaufman v. Belgium*,[79] a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[80] In *Dombo Beheer B.V. v. The Netherlands*,[81] another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".[82] The Court decided in a criminal proceeding, *Delcourt v. Belgium*,[83] that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused

---

[79] *Kaufman v. Belgium*, 50 DR 98.
[80] *Ibid.*, p. 115.
[81] *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274.
[82] *Ibid.*, para. 40.
[83] *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11.

unfairly at a disadvantage."[84] It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

49. There is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant.[85]

50. The HRC has interpreted the principle as designed to provide to a party rights and guarantees that are *procedural* in nature. The HRC observed in *B.d.B. et al. v. The Netherlands,*[86] a civil case, that Article 14 of the ICCPR "guarantees procedural equality" to ensure that the conduct of judicial proceedings is fair. Where applicants were sentenced to lengthy prison terms in judicial proceedings conducted in the absence of procedural guarantees, the HRC has found a violation of the right to fair trial under Article 14(1).[87] The communications decided under the ICCPR are silent as to whether the principle extends to cover a party's inability to secure the attendance at trial of certain witnesses where fault is attributable, not to the court, but to an external, independent entity.

51. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States

---

[84] *Ibid.*, para. 34.

[85] In *Kaufman v. Belgium*, 50 DR 98, the Eur. Commission H. R. held that equality of arms did not give the applicant a right to lodge a counter-memorial. In *Neumeister v. Austria*, Eur. Court of H. R., judgement of 27 June 1968, Series A, no. 8, the Court decided that the principle did not apply to the examination of the applicant's request for provisional release, despite the prosecutor having been heard *ex parte*. In *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank's witness was heard.

[86] *B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442.

[87] *Nqalula Mpandanjila et al. v. Zaire*, Communication No 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.

without having the power to compel them to cooperate through enforcement measures.[88] The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59*bis*, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council.[89]

52. In light of the above considerations, the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This includes the power to:

(1) adopt witness protection measures, ranging from partial to full protection;

(2) take evidence by video-link or by way of deposition;

(3) summon witnesses and order their attendance;

---

[88] *See* "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Bla{ki}*, Case No.: IT-95-14-AR108*bis*, Appeals Chamber, 29 October 1997, para. 26.
[89] *Ibid.*, para. 33.

(4) issue binding orders to States for, *inter alia*, the taking and production of evidence; and

(5) issue binding orders to States to assist a party or to summon a witness and order his or her attendance under the Rules.

A further important measure available in such circumstances is:

(6) for the President of the Tribunal to send, at the instance of the Trial Chamber, a request to the State authorities in question for their assistance in securing the attendance of a witness.

In addition, whenever the aforementioned measures have proved to be to no avail, a Chamber may, upon the request of a party or *proprio motu*:

(7) order that proceedings be adjourned or, if the circumstances so require, that they be stayed.

53. Relying on the principle of equality of arms, the Defence is submitting that the Appellant did not receive a fair trial because relevant and admissible evidence was not presented due to lack of cooperation of the authorities in the *Republika Srpska* in securing the attendance of certain witnesses. The Defence is not complaining that the Trial Chamber was negligent in responding to a request for assistance. The Appeals Chamber finds that the Defence has not substantiated its claim that the Appellant was not given a reasonable opportunity to present his case. There is no evidence to show that the Trial Chamber failed to assist him when seised of a request to do so. Indeed, the Defence concedes that the Trial Chamber gave every assistance it could to the Defence when asked to do so, and even allowed a substantial adjournment at the close of the Prosecution's case to help Defence efforts in tracing witnesses.[90] Further, the Appellant acknowledges that the Trial Chamber did not deny the Defence attendance of any witness but, on the contrary, took virtually all steps requested and necessary within its authority to assist the Appellant in presenting witness testimony. Numerous instances of the granting of such motions and orders by the Trial Chamber, on matters such as protective measures for witnesses, approving the giving

[90] T. 47 (19 April 1999); Judgement, para. 32 ("Following a recess of three weeks after the close of the Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10 September 1996 [...].").

of evidence via video-conference link from Banja Luka in the *Republika Srpska*, and granting confidentiality and safe conduct to several Defence witnesses are set forth in the Judgement of the Trial Chamber.[91] Indeed, the Decision on Admissibility of Additional Evidence, by which the Defence was precluded from presenting additional evidence, was based on the fact that the Defence had failed to establish that it would have been in the interests of justice to admit such evidence. This indicates that the fact that it could not present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist in the preparation and presentation of the Defence case is that the Trial Chamber's Presiding Judge brought to the attention of the President of the International Tribunal certain difficulties concerning the possible attendance of three witnesses who had been summoned by the Defence.[92] She requested the President of the International Tribunal to send a letter to the Acting President of the *Republika Srpska*, Mrs. B. Plavsic, to urge her to assist the Defence in securing the presence and cooperation of these Defence witnesses. Consequently, on 19 September 1996, the President of the Tribunal sent a letter to Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in securing the cooperation of these witnesses. In view, *inter alia*, of the accused's right to a fair trial, Mrs. Plavsic was therefore enjoined to "take whatever action is necessary immediately to resolve this matter so that the Defence may go forward with its case."[93]

55. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions

---

[91] Judgement, paras. 29-35.
[92] T. 59, 60 (20 April 1999).
[93] Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen during the hearing on 20 April 1999 (*ibid.*).

would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.