SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

TRIAL CHAMBER

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

Registrar: Robin Vincent

Date filed: 15 February 2005

PROSECUTOR **Against** **SAMUEL HINGA NORMAN**
MOININA FOFANA
ALLIEU KONDEWA

Case No. SCSL-2004-14-T

URGENT
PROSECUTION MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE

Office of the Prosecutor:
Luc Côté
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NEIL GIBSON 16:48

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I. INTRODUCTION

1. The Prosecution seeks a ruling as to the effect of the 'Decision of Prosecution Request for Leave to Amend the Indictment' (the "**Decision**") issued by the Trial Chamber, pursuant to Rules 73 and 90(F) of the Rules of Procedure and Evidence (the "**Rules**"). In particular, the Prosecution seeks clarification as to the extent to which the Decision limits the adduction of particular relevant and admissible evidence, under existing counts of the Consolidated Indictment.
2. The ruling is one which requires expedited attention as it relates to testimony which it is anticipated will be led soon.
3. The need for this ruling arises as the Trial Chamber has suggested the subject evidence may not be admissible as a consequence of the Decision and a ruling would avoid unnecessary arguments prior to the testimony of a number of witnesses.

II. BACKGROUND

4. On 20 May 2004 the Trial Chamber handed down the Decision. The Decision dealt with the application for a proposed amendment, by the Prosecution, to add four new counts which raised allegations of sexual offences or, gender crimes, against the three Accused.
5. By a two to one decision, the Trial Chamber ruled that:

> "the arguments presented by the Prosecution are not convincing enough to sustain the motion, and furthermore, that granting the Prosecution's application for an amendment of the indictment against these three defendants at this stage, would not only prejudice their rights to a fair and expeditious trial, but will amount not only to a violation of those rights guaranteed them under the provisions Articles 17(4)(a), 17(4)(b), 17(4)(c) of the Statute of the Special Court for Sierra Leone, but also to an abuse of process that will certainly have the effect of bringing the administration of justice into disrepute." [1]

[1] *Prosecutor v. Norman, Fofana and Kondewa*, Trial Chamber, SCSL-04-14-PT, "Decision on Prosecution Request for Leave to Amend the Indictment", 20 May 2004, RP 7023.

6. The Prosecution proposes to lead oral testimony from a number of witnesses whose evidence, or a portion of their evidence, although it would have come within the ambit of the specific proposed amendments is nevertheless admissible, concomitantly, under the existing counts.
7. The Prosecution submits that the proposed testimony, contained in the Confidential Annex ("Confidential Annex"), is relevant and admissible in respect of the current Consolidated Indictment against Norman, Fofana and Kondewa. The evidence is of such a nature that it potentially applies to a number of counts on the Consolidated Indictment, standing against each of the Accused.
8. The Prosecution seeks clarification in the form of a ruling that those portions of certain witnesses' testimony, which relate to certain unlawful acts, can be adduced at trial and considered under the existing counts. The particular evidence, although often described as 'Gender Crimes', can be ascribed to either Count 3 in addition to, or in the alternative to, Count 4.
9. That is, the particular evidence can now be categorised as falling under Inhumane Acts, A CRIME AGAINST HUMANITY, punishable against Article 2.i. of the Statute in addition to, or in the alternative to: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a VIOLATION OF ARTCILE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL 11, punishable under Article 3.a. of the Statute.

III. ARGUMENT

10. The Prosecution submits that the evidence of the particular witnesses relating to acts of a sexual nature is admissible against each of the Accused.[2] The subject evidence is contained in the Annex. What is generally known as Sexual offences or "Gender Crimes" contain particular elements, not all of which are unique to those charges; as the comparison of the charges outlined below describes there are both common and disparate elements between offences. Consequently, evidence may be led which relates to more then one count. For example, although there is no charge of Genocide

[2] The witnesses in question are: TF2-108, TF2-109, TF2-129, TF2-133, TF2-134, TF2-135, TF2-187, TF2-188, TF2-189.

in the Consolidated Indictment that does not preclude evidence being led of person being killed because they belonged to a certain tribe.

11. The Prosecution submits that the adduction of the subject testimony is not a means by which impermissible evidence is placed before the court. Any testimony which relates to the unlawful activities of the Civilian Defence Force ("**CDF**") is relevant, in the context of the Indictment against each of the Accused, and is admissible if it satisfies, as it does, the general evidentiary requirements.
12. Evidence may be potentially admissible under more than one count on an Indictment. The test is whether the evidence relates to a count on the indictment.
13. Evidence is relevant in a proceeding if that evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of a fact in issue in the proceedings. Relevant evidence, unless there is a bar to its adduction, is admissible in the proceedings.
14. As it has been stated:

> *"The principle [...] is one of extensive admissibility of evidence - questions of credibility or authenticity being determined according to the weight given to each of the materials by the Judges at the appropriate time"*[3]

15. The proposed evidence relates to the behaviour of members of the CDF, mainly Kamajors, during the relevant period of time covered in the Indictment. It is acknowledged that the evidence could have been legally categorised under the counts rejected by the Trial Chamber, but that does not preclude the evidence from being led under Counts 3-4. Indeed, the evidence is relevant under a number of counts on the current Indictment but is sought to be led under Counts 3 and 4, on the basis of clarity and fairness.
16. As mentioned, portions of the witnesses' testimony relate to issues which are distinct from those categorised as 'gender crimes', such as non-sexual violence and evidence which establishes individual criminal responsibility. Evidence of that nature remains admissible and relevant regardless of the outcome of this ruling.

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[3] *Prosecutor v. Blaskic*, Trial Chamber, IT-95-14, "Judgement", 3 March 2000, para. 34.

17. The Prosecution notes the difference between the elements of the offences contained in the proposed amendments and the elements of Counts 3 and 4; that is between Rape and Sexual Slavery as compared with Violence to life, health and physical or mental well-being of persons, in particular cruel treatment. The difference in the elements highlights the proposition that the subject evidence can be applied to different offences. That is, by comparing the respective elements of the Counts which were rejected by the Trial Chamber with the elements in respect of Counts 3 and 4 one can appreciate that the subject evidence relates to the existing counts, as well as the rejected counts.
18. The respective elements of the offences under discussion are the following:

Rape and Sexual Slavery

19. Rape is defined as an invasion of the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or of any other part of the body. The invasion must be committed by force, or threat of force or coercion, or committed against a person incapable of giving genuine consent.[4]
20. Sexual slavery is committed when (i) a person exercises any or all the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty and (ii) causes such a person or persons to engage in one or more acts of a sexual nature.[5]

Violence to life, health and physical or mental well-being of persons, in particular cruel treatment

21. The crime of cruel treatment under Article 3(a) of the SCSL Statute is a residual category for charges under Article 3 of the SCSL Statute.[6] It is defined by the jurisprudence from our sister Tribunals as an intentional act or omission which causes serious physical and mental suffering or injury or constitutes a serious attack on

[4] See, Article 7(1)(g)-1, ICC Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000).
[5] See Article 7(1) (g)-2, ICC Elements of Crimes.
[6] *Prosecutor v. Krnojelac*, IT-97-25-A, "Trial Judgement", 17 September 2003, para. 130 [hereinafter, "Krnojelac Trial Judgement"].

human dignity.[7] The suffering inflicted needs not be lasting, but must be real and serious.[8] In assessing the seriousness of an act, the Tribunal must take into account the overall factual circumstances including the following: the nature of the act or omission; the context; its duration; the physical, mental and moral effects of the act on the victim; and the personal circumstances of the victim, including age, sex and health.[9] Case law from the ad hoc tribunals has found sexual offences to fall within this category of crimes.[10] The ICTR Trial Chamber, in *Akayesu*, held that "Sexual violence falls within the scope of "other inhumane acts"... "outrages upon personal dignity" ... and "serious bodily or mental harm"..."[11] The ICTY has made similar rulings, for instance the *Delalic Trial Judgement*, where the Trial Chamber held that forcing persons to commit fellatio with each other constituted cruel treatment in that, at the very least, it constituted a fundamental attack on human dignity. The Trial Chamber further noted that the act could also constitute rape.[12]

Crime against Humanity

22. A crime against humanity is any of the enumerated acts in Art. 2 of the SCSL Statute committed as part of a widespread ***or*** systematic attack against a civilian population.
23. An attack is an unlawful act, event or series of events of the kind listed under Art. 2. An attack need not be accompanied by armed force. It could also involve other forms of inhumane treatment of a non violent nature of the civilian population such as a system of apartheid.[13]
24. The definition of widespread refers to the scale of the attack and the multiplicity of victims. It must be on a large scale involving many victims.[14] Systematic refers to

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[7] *Prosecutor v. Delalic et al* (Celebici), IT-96-21-T, "Trial Judgement" , 16 November 1998, para. 552. This definition was affirmed by the Appeals Chamber Judgement dated 20 February 2001 at para. 424. [hereinafter, "**Delalic Trial Judgement**"]

[8] Delalic Trial Judgement, para. 131. See also, *Prosecutor v. Krstic*, IT-98-33, "Trial Judgement", 2 August 2001, paras. 507 – 514 and 516 [hereinafter, "**Krstic Trial Judgement**"].

[9] Krnojelac Trial Judgement, para. 131.

[10] Krstic Trial Judgement, para. 513. The Trial Chamber held that rape and sexual abuse were acts which cause serious bodily or mental injury.

[11] *Prosecutor v. Jean Paul Akayesu*, ICTR-96-4T, "Judgment," 2 September 1998at para. 688.

[12] Delalic Trial Judgement, para. 1066. In this case, however, the act was not pleaded as rape. The Trial Chamber however opined that the act could constitute rape for which liability could have been found if pleaded in the appropriate manner.

[13] Prosecutor v. Musema, ICTR-96-13-A, "Judgement," 27 January 2000 at, para. 204;

[14] Kamuhanda Judgement, para. 664.

organised action, following a regular pattern on the basis of a common policy, involving substantial public or private resources. It is not required that the policy be formally adopted as a policy of a state.[15]

25. The definition of civilian population is that of people who are not taking any active part in the hostilities including people who have laid down their arms, persons hors de combat by sickness, wounds, detention or any other cause. [16]
26. As to the mental element, the Accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population. [17]
27. Where acts of sexual violence have been perpetrated against a civilian as part of a widespread and systematic attack on the civilian population, the ICTR trial Chamber has routinely found that such acts properly fall within the ambit of Crimes Against Humanity (other inhuman acts).[18]
28. The Consolidated Indictment against Norman, Fofana and Kondewa states under Counts 3-4 Physical Violence and Mental Suffering, the following (paragraph 26): Acts of physical violence and infliction of mental harm or suffering included the following:

    a. between 1 November 1997 and the 30 April 1998, at various locations, including Tongo Field, Kenema Town, Blama, Kambona and the surrounding areas, CDF, largely Kamajors intentionally inflicted serious bodily harm and serious mental suffering on an unknown number of civilians;

    b. between November 1997 and December 1999, in the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas, and the District of Moyamba and Bonthe, the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians by the actions of the CDF, largely Kamajors, including screening for **"Collaborators"**, unlawfully killing of suspected **"Collaborators"**, often in plain view of friends

[15] Kamuhanda Judgement, para. 665.
[16] Kamuhanda Judgement, para. 667.
[17] Kamuhanda Judgement, para. 675, 676.
[18] *Prosecutor v. Kayishema and Ruzindana*, ICTR -95-1-T, "Judgement," 21 May 1999 at paras 936.; *Prosecutor v. Niyetegeka*, ICTR, Judgment, paras. 463 – 467; *Prosecutor v. Akayesu*, ICTR-96-14-T, " Judgment," 16 May 2003 at paras. 688 and 69; Prosecutor v. Juvenal Kajelijeli, ICTR-98-44A-T, "Judgement," 1 December 2003 at para. 936.

and relatives, illegal arrest and unlawful imprisonment of **"Collaborators"**, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot.

29. The Prosecution submits that the acts described by the witnesses contained in the Annex, committed allegedly by the CDF, largely Kamajors, fall under the ambit of serious bodily harm and serious mental suffering as well as inhumane acts. The witnesses describe acts inflicted upon them that resulted in both serious bodily harm and/or serious mental suffering.
30. The Prosecution submits that the unlawful acts allegedly committed by the CDF, although not specifically particularised in the Indictment, are subsumed by the broad definitions pertaining to serious bodily harm and serious mental harm. Such terms encompass the extensive range of consequences and injuries suffered by the witnesses.
31. That is, the particulars contained in the Indictment are of an inclusive nature and do not exclude the broad range of unlawful acts which can lead to serious physical and mental harm. It is not practical to include, within the particulars, all the factual variations of unlawful acts that could lead to serious bodily harm and serious mental harm. Rather it is upon the Court to be satisfied that the acts occurred and were of such a nature that they inflicted serious bodily harm and serious mental harm.
32. As to Count 3: Inhumane Acts, a CRIME AGAINST HUMANITY, it is alleged that all relevant acts or omissions were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone. The proposed evidence contributes to that Count.
33. The adduction of the subject evidence will not cause any delay in the trial as the subject material has been disclosed, in some form, for over 12 months. The witnesses will be called, in any event, to testify on other factual issues. The Defence will have adequate notice of the timing of the presentation of evidence, although it must be noted that only the counts to which the evidence relates has changed, not the content of the subject testimony. It is submitted the Defence would have expected and anticipated the adduction of relevant and admissible evidence.

34. The proposed witnesses were subject to a range of violent and unlawful acts. It would be illogical and artificial to differentiate between those acts which can be categorised as 'sexual' acts or 'gender crimes' and those which can be defined as 'non-sexual' acts or crimes of violence. The administration of justice would indeed be brought into disrepute if evidence relating to unlawful acts, which potentially fall under more than one category of offences, was not adduced based on a definitional distinction.
35. The testimony of the subject witnesses, in part, could have been dealt with under the proposed amendments; however the position is not mutually exclusive. The evidence has at all times remained relevant and admissible; at this time, as certain counts have been rejected, the evidence now falls under more general counts which do not address the sexual element of the unlawful acts. However, the totality of the witnesses' testimony remains admissible as it relates to the infliction of serious physical harm and serious mental harm. For example, the act of rape in addition to sexual penetration, a particular element, can also involve the infliction of serious physical and mental harm.
36. The evidence is not excluded from the consideration of the Court because the evidence was admissible on the deleted counts. To do so would be applying the incorrect test. The proper test is whether the evidence is relevant and admissible on the existing counts, in particular Counts 3 and 4. The evidence does not lose its status as being relevant and admissible because it is not being led under particular counts; it would only do so if there were no counts to which the evidence remained relevant.
37. Unlawful acts may attract the potential sanction of more than one category of offences. For example, if a witness was attacked violently in a non-sexual manner evidence could be led under Counts 3 and 4; if the same witness was attacked both violently and sexually the evidence cannot be excluded because a charge of rape may have also been laid against the Accused. Nor would it be proper to lead against the Accused only the evidence of one type of violence.
38. The Prosecution accepts, as a consequence of the Decision that as the proposed evidence now falls under Counts 3 and 4, any potential penalty is subsumed under those counts. Consequently, as the Accused persons are not subject to criminal

liability under the rejected counts, the potential for punishment is reduced. The proposed evidence becomes additional evidence in respect of Counts 3 and 4, rather than evidence that relates separate counts which would have attracted a separate penalty.

39. The admission of this evidence causes no unfairness to the Accused as the evidence has been disclosed to the Defence for over a year. In addition, the majority of the subject particular witnesses will be called to testify, in any event, on other matters and therefore leading the subject evidence will not in any way cause a delay in the proceedings.

IV. CONCLUSION

40. The Prosecution seeks a ruling as to the effect of the Decision of Prosecution Request for Leave to Amend the Indictment. The Prosecution submits that the effect of the Decision should not preclude the adduction of relevant and admissible evidence, as it falls under Counts 3 and 4 of the current Indictment.

41. The Prosecution considers that an expeditious ruling on the motion will avoid numerous debates during the hearings, and interruptions to the testimony of witnesses, and serve the interests of judicial economy and that of a fair trial.

Filed in Freetown,

For the Prosecution,

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Court Management Section – Court Records

CONFIDENTIAL DOCUMENT CERTIFICATE

Pursuant to article _____ of the Directive for the Registry, Court Management Section, this certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Norman Fofana & Kondewa
Case Number: SCSL-2004-14-T
Document Index Number: 341

Document Date: 15/2/05
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Confidential Portion is only page numbers 12000-12001
Document Type:-

☐ Affidavit
☐ Decision
☐ Order
☐ Indictment
☐ Motion
☐ Correspondence
☑ Other

Document Title: **Confidential Annex contained within document titled: Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence**

Name of Officer: Neil Gibson
Signed:

ANNEX A
INDEX OF AUTHORITIES

1. *Prosecutor v. Norman, Fofana and Kondewa*, SCSL Trial Chamber, SCSL-04-14-PT, "Decision on Prosecution Request for Leave to Amend the Indictment", 20 May 2004, RP 7023.

2. *Prosecutor v. Blaskic*, ICTY Trial Chamber, IT-95-14, "Judgement", 3 March 2000.
[http://www.un.org/icty/blaskic/trialc1/judgement/bla-tj000303e.pdf]

3. ICC Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000). Article 7(1)(g)-1, Article 7(1) (g)-2.
The relevant sections are attached.

4. *Prosecutor v. Krnojelac*, ICTY Appeals Chamber, IT-97-25-A, "Judgement", 17 September 2003.
[http://www.un.org/icty/krnojelac/appeal/judgement/krn-aj030917e.pdf]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

5. *Prosecutor v. Delalic et al* (Celebici), ICTY Trial Chamber, IT-96-21-T, "Judgement", 16 November 1998.
[http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e.pdf]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

6. *Prosecutor v. Delalic*, ICTY Appeals Chamber, "Judgement," 20 February 2000.
[http://www.un.org/icty/celebici/appeal/judgement/cel-aj010220.pdf]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

7. *Prosecutor v. Krstic*, ICTY Trial Chamber, IT-98-33, "Judgement", 2 August 2001.
[http://www.un.org/icty/krstic/TrialC1/judgement/krs-tj010802e.pdf]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

8. *Prosecutor v. Jean Paul Akayesu*, ICTR Trial Chamber, ICTR-96-4T, "Judgement," 2 September 1998.
[http://www.ictr.org/ENGLISH/cases/Akayesu/judgement/akay001.htm]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

9. *Prosecutor v. Musema*, ICTR Trial Chamber, ICTR-96-13-A, "Judgement," 27 January 2000.
[http://www.ictr.org/ENGLISH/cases/Musema/judgement/index.htm]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

10. *Prosecutor v. Niyetegeka*, ICTR Trial Chamber, ICTR-96-14-T, "Judgement," 16 May 2003.
[http://www.ictr.org/ENGLISH/cases/Niyitegeka/judgement/index.htm]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

11. *Prosecutor v. Juvenal Kajelijeli*, ICTR Trial Chamber, ICTR-98-44A-T, "Judgement," 1 December 2003.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

12. *Prosecutor v Kamuhanda*, ICTR Trial Chamber, Case No. ICTR-95-54A-T, "Judgement", 22 January 2004.
[http://www.ictr.org/ENGLISH/cases/Kamuhanda/judgement/220104.htm]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

ANNEX A

2. Prosecutor v. Blaskic, Trial Chamber, IT-95-14, "Judgement", 3 March 2000.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

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-95-14-T

Date: 3 March 2000

Original: English
French

IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Almiro Rodrigues
Judge Mohamed Shahabuddeen

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 3 March 2000

THE PROSECUTOR

v.

TIHOMIR BLA[KI]

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

12006

c) The admissibility of the evidence

34. The admissibility of the evidence presented at trial was also the subject of Decisions on several occasions. The principle embodied by the case-law of the Trial Chamber on the issue is the one of extensive admissibility of evidence - questions of credibility or authenticity being determined according to the weight given to each of the materials by the Judges at the appropriate time.

ANNEX A

3. ICC Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000). Article 7(1)(g)-1, Article 7(1) (g)-2.

Cour
Pénale
Internationale

International
Criminal
Court

Elements of Crimes

Adopted by the Assembly of States Parties

First session
New York, 3-10 September 2002

Official Records
ICC-ASP/1/3

Article 7 (1) (f)
Crime against humanity of torture[14]

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

2. Such person or persons were in the custody or under the control of the perpetrator.

3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-1
Crime against humanity of rape

Elements

1. The perpetrator invaded[15] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[16]

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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[14] It is understood that no specific purpose need be proved for this crime.

[15] The concept of "invasion" is intended to be broad enough to be gender-neutral.

[16] It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

Article 7 (1) (g)-2
Crime against humanity of sexual slavery[17]

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.[18]

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-3
Crime against humanity of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

[17] Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

[18] It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

ANNEX A

4. *Prosecutor v. Krnojelac*, ICTY Appeals Chamber, IT-97-25-A, "Judgement", 17 September 2003.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

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-97-25-A
		Date:	17 September 2003
		Original:	English French

IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Wolfgang Schomburg
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Judgement of: **17 September 2003**

PROSECUTOR

v.

MILORAD KRNOJELAC

JUDGEMENT

The Office of the Prosecutor:
Mr Christopher Staker
Ms Helen Brady
Mr Anthony Carmona
Ms Norul Rashid

Defence Counsel:
Mr Mihajlo Bakrač
Mr Miroslav Vasić

from the village of Jaskići, even though neither this form of liability nor any other was pleaded in the indictment. The Prosecution adds that, in this case, it stated in both its Pre-Trial Brief and its opening statement of October 2000 that it intended to rely on the third form of joint criminal enterprise. It further argues that Krnojelac did not claim at trial that the failure of the Indictment to make reference to an extended form of joint criminal enterprise had impaired his defence and that, in its Final Trial Brief, the Defence actually explicitly addressed all the forms of joint criminal enterprise.

127. Krnojelac submits that, on the contrary, the Trial Chamber was right to adopt this approach since the wording of the charges is relevant to the nature of and reasons for the charges against him, of which he must be informed without delay.[160] Krnojelac adds that the indictment was twice returned to the Prosecution for more information[161] and, in response to the Prosecution's argument that he did not object to this form of liability when it was mentioned in the Prosecution's opening statement, he points out that it was not his role to correct his opponent's mistakes.[162] In its reply, the Prosecution points to the principle of waiver and submits that the fact that Krnojelac dealt with the third form in his Final Trial Brief indicates that he considered the charges to be sufficiently precise. This is an important factor which the Trial Chamber should have borne in mind in determining whether it would have been unfair to the Accused to allow the Prosecution to rely on this form of responsibility.[163]

128. The Appeals Chamber holds that, insofar as it affects how precisely the indictment must set out the forms of joint criminal enterprise being pleaded by the Prosecution, the issue raised by the Prosecution is definitely of general importance for the development of the Tribunal's case-law and deserves analysis, even though the Prosecution does not request the Judgment to be reviewed on the point.

129. The Appeals Chamber notes that, pursuant to Article 18(4) of the Statute, the indictment must set out "a concise statement of the facts and the crime or crimes with which the accused is charged". Likewise, Rule 47(C) of the Rules provides that the indictment shall set out not only the name and particulars of the suspect but also "a concise statement of the facts of the case".

130. The Prosecution's obligation to set out a concise statement of the facts of the case in the indictment must be interpreted in the light of the provisions of Articles 21(2), 21(4)(a) and 21(4)(b)

[160] Defence Response, paras. 57 to 61.
[161] *Ibid.*, para. 62.
[162] *Ibid.*, paras. 64 and 65.
[163] Prosecution Reply, para. 3.6.

of the Statute, which provide that, in the determination of charges against him, the accused shall be entitled to a fair hearing and, more specifically, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence.

131. In the case-law of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such facts are to be proven.[164] Hence, the question of whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

132. In the *Kupreškić* case, the Appeals Chamber stressed that the materiality of a particular fact cannot be determined in the abstract. It depends on the objective of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct of the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Clearly, there may be instances where the sheer scale of the alleged crimes makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes:[165]

> 92. It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed. In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.
>
> 114. The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. A defective indictment, in and of itself, may, in certain circumstances cause the Appeals Chamber to reverse a conviction. The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category. For the reasons that follow, the Appeals Chamber finds that this case is not one of them.

[164] *Kupreškić* Appeals Judgement quoting the *Furundžija* Appeals Judgement, para. 147.
[165] *Kupreškić* Appeals Judgement, paras. 89 to 114.

ANNEX A

5. *Prosecutor v. Delalic et al* (Celebici), IT-96-21-T, "Trial Judgement", 16 November 1998.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

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-96-21-T

Date: 16 November 1998

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Adolphus G. Karibi-Whyte, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

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

Judgement of: **16 November 1998**

PROSECUTOR

v.

ZEJNIL DELALI]
ZDRAVKO MUCI] also known as "PAVO"
HAZIM DELI]
ESAD LAND@O also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Re{idovi}, Mr. Eugene O 'Sullivan, for Zejnil Delali}
Ms. Nihada Buturovi}, Mr. Howard Morrison, for Zdravko Muci}
Mr. Salih Karabdi}, Mr. Thomas Moran, for Hazim Deli}
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Land`o

131. With the recognition of Bosnia and Herzegovina as an independent State, the Municipal Assembly in Konjic met to discuss how to respond to the situation in which the municipality found itself. In 1990 the General Staff of the armed forces of the SFRY had issued an order requiring all TO arms to be placed in the JNA warehouses. Thus, the weapons of the Konjic TO were housed in the Ljuta barracks, under JNA control. On 17 April 1992, the Municipal Assembly met for the final time and the appropriate decisions for the defence of the municipality were taken. A mobilisation of the TO was pronounced and Mr. Enver Redzepovic was nominated as its new commander, and subsequently appointed to this post by the TO Republican Staff. The SDS representatives in the Assembly did not support these decisions and abandoned the Assembly, which then ceased to function. As a result, the War Presidency was formed. Dr. Rusmir Hadzihusejnovic, who was the President of the Municipal Assembly, and later on of the War Presidency, told the Trial Chamber how he had received threats from General Kukanjac - commander of the second military district formation of the JNA - which were then broadcast on the radio and television, that Konjic would be razed. [196]

552. In light of the foregoing, the Trial Chamber finds that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.

1066. The Trial Chamber finds that the act of forcing Vaso Dordic and Veseljko Dordic to perform fellatio on one another constituted, at least, a fundamental attack on their human dignity. Accordingly, the Trial Chamber finds that this act constitutes the offence of inhuman treatment under Article 2 of the Statute, and cruel treatment under Article 3 of the Statute. The Trial Chamber notes that the aforementioned act could constitute rape for which liability could have been found if pleaded in the appropriate manner.

ANNEX A

6. *Prosecutor v. Delalic*, ICTY Appeals Chamber, "Judgement," 20 February 2000.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

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-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIC, Zdravko MUCIC (aka "PAVO"), Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("^*ELEBICI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

422. The first pair of double convictions concerned are "wilful killing" under Article 2 and "murder" under Article 3. Wilful killing as a grave breach of the Geneva Conventions (Article 2) consists of the following elements:

a. death of the victim as the result of the action(s) of the accused,

b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,[653]

c. and which he committed against a protected person.

423. Murder as a violation of the laws or customs of war (Article 3) consists of the following elements:

a. death of the victim as a result of an act of the accused

b. committed with the intention to cause death[654]

c. and against a person taking no active part in the hostilities.

The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of wilful killing under Article 2. Therefore, the first prong of the test is not satisfied, and it is necessary to apply the second prong. Because wilful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.

424. The second pair of double convictions at issue are "wilfully causing great suffering or serious injury to body or health" under Article 2, and "cruel treatment" under Article 3. The former is defined as

a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health,[655]

50, on this point. In addition, both Articles 2 and 3 require a nexus between the crimes alleged and the armed conflict.

653 *Blaskic* Judgement, para 153.

654 *Jelisic* Judgement, para 35; *Blaskic* Judgement, para 181.

655 *Blaskic* Judgement, para 156.

b. committed against a protected person.

Cruel treatment as a violation of the laws or customs of war is

a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,[656]

b. committed against a person taking no active part in the hostilities.

The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. As a result, the first prong of the test is not satisfied, and it thus becomes necessary to apply the second prong of the test. Because wilfully causing great suffering under Article 2 contains an additional element and more specifically applies to the situation at hand, that conviction must be upheld, and the Article 3 conviction must be dismissed.

425. The third pair of double convictions at issue are torture under Article 2 and torture under Article 3. Because the term itself is identical under both provisions, the sole distinguishing element stems from the protected person requirement under Article 2. As a result, torture under Article 2 contains an element requiring proof of a fact not required by torture under Article 3, but the reverse is not the case, and so the first prong of the test is not satisfied. Again, it becomes necessary to apply the second prong of the test. Because torture under Article 2 contains an additional element that is required for a conviction to be entered, that conviction must be upheld, and the Article 3 conviction must be dismissed.

426. The final pair of double convictions at issue are "inhuman treatment" under Article 2 and "cruel treatment" under Article 3. Cruel treatment is defined above.[657] Inhuman treatment is

a. an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,[658]

b. committed against a protected person.

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[656] *Jelisi}* Judgement, para 41; Trial Judgement, para 552; *Blaskic* Judgement, para 186.
[657] *See* para 424 above.
[658] *Blaskic* Judgement, para 154; *see* also Trial Judgement, para 543.

ANNEX A

7. *Prosecutor v. Krstic*, ICTY Trial Chamber, IT-98-33, "Judgement", 2 August 2001.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-98-33-T

Date: 02 August 2001

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

PROSECUTOR

v.

RADISLAV KRSTIC

JUDGEMENT

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Peter McCloskey
Mr. Andrew Cayley
Ms. Magda Karagiannakis

Counsel for the Accused:

Mr. Nenad Petrusic
Mr. Tomislav Visnji}

2. Findings

504. Although there is evidence that a small number of killings in Poto~ari and afterwards involved women, children and elderly,[1149] virtually all of the persons killed in the aftermath of the fall of Srebrenica were Bosnian Muslim males of military age. The screening process at Poto~ari, the gathering of those men at detention sites, their transportation to execution sites, the opportunistic killings of members of the column along the Bratunac-Mili}i road as they were apprehended, demonstrate beyond any doubt that all of the military aged Bosnian Muslim males that were captured or fell otherwise in the hands of the Serb forces were systematically executed. The result was that the majority of the military aged Bosnian Muslim males who fled Srebrenica in July 1995 were killed.

505. A crime of extermination was committed at Srebrenica.

D. Mistreatments

506. While the indictment cites mainly the killing of large numbers of Bosnian Muslim men, it also alleges two kinds of mistreatments: serious bodily or mental harm, as a genocidal crime;[1150] and cruel and inhumane treatment, including severe beatings, as an element of the persecutions inflicted on the Bosnian Muslims.[1151]

1. Serious bodily or mental harm

507. The serious bodily or mental harm, cited by the Prosecution in support of the genocide charge, relates to the suffering endured by those who survived the executions.

508. The Prosecution relies upon the definition of serious bodily or mental harm found in the *Akayesu* Judgement, which includes "acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution".[1152] The Prosecution also quotes the *Eichmann* Judgement rendered by the Jerusalem District Court on 12 December 1961, according to which "the enslavement, starvation, deportation and persecution ?and theg detention ?of individualsg in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them

[1149] One witness testified about the slaughtering of a baby. Expert reports on the exhumations show that a small number of the victims were under the age of fifteen of over sixty-five year old. Although those victims may not legally qualify as "military aged men", there were obviously treated by the Bosnian Serb forces as if of military age.
[1150] Indictment, para. 21 (b).
[1151] Indictment, para. 31 (b).
[1152] *Akayesu* Judgement, para. 504, cited in Prosecutor's pre-trial brief pursuant to Rule 65 *ter* (E) (i), 25 February 2000, para. 105, p. 39.

inhumane suffering and torture"[1153] may constitute serious bodily or mental harm. The Defence made no specific submissions on this issue.

509. The Chamber observes that, in the decision on the review of the indictment against *Karad`i} and Mladi}* pursuant to Rule 61, the ICTY stated that cruel treatment, torture, rape and deportation could constitute serious bodily or mental harm done to members of a group under a count of genocide.[1154] The Preparatory Commission for the International Criminal Court indicated that serious bodily and mental harm "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment".[1155]

510. The *Kayishema and Ruzindana* Judgement defined serious bodily harm as "harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses".[1156] The same Judgement held that serious mental harm must "be interpreted on a case-by-case basis in light of the relevant jurisprudence".[1157] Reference to serious mental harm, in the context of the Genocide Convention, appears to have been restricted originally to the injection of pharmacological substances occasioning the serious impairment of mental faculties.[1158] The United States supported this restrictive interpretation, indicating in a statement of interpretation annexed to their instrument of accession that, in their view, "mental harm" meant permanent impairment of the mental faculties brought on through drugs, torture or techniques similar thereto.[1159] In addition, the Preparatory Committee of the International Criminal Court points out that "'mental harm' is understood to mean more than the minor or temporary impairment of mental faculties".[1160] A distinction must thus be drawn between serious mental harm and emotional or psychological damage or attacks on the dignity of the human person not causing

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[1153] *The Israeli Government Prosecutor General v. Adolph Eichmann*, Jerusalem District Court, 12 December 1961 (hereinafter "the *Eichmann* District Court Judgement"), in *International Law Reports* (ILR), vol. 36, 1968, p. 340, cited in the Prosecutor's pre-trial Brief pursuant to Rule 65 *ter* (E) (i), 25 February 2000, para. 105, p. 39.
[1154] *The Prosecutor v. Radovan Karad`i} and Ratko Mladi}*, Review of the Indictments pursuant to Rule 61 of the Rules of Procedure and Evidence, IT-95-5-R61 and IT-95-18-R61, 11 July 1996 (hereinafter "the *Karad`i} and Mladi}* case"), para. 93.
[1155] Report of the Preparatory Commission for the International Criminal Court. Finalised draft text of the elements of crimes, UN Doc. PCNICC/2000/INF/3/Add.2, 6 July 2000, p. 6.
[1156] *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, 21 May 1999, para. 109 (hereinafter "the *Kayishema and Ruzindana* Judgement").
[1157] *Kayishema and Ruzindana* Judgement, para. 113.
[1158] Reference to serious mental harm for this purpose was first proposed by China (UN Doc. E/AC.25/SR.5, p. 9; UN Doc. A/C.6/211; UN Doc. A/C.6/232/Rev. 1; UN Doc. A/C.6/SR.81). Though at first rejected, the proposition was ultimately adopted at the initiative of India (UN Doc. A/C.6/SR.81). See also Nehemia Robinson's *The Genocide Convention; A commentary*, New York, 1960, p. ix.
[1159] 132:15 CONG. REC. S1378. See also the Genocide Convention Implementing Act of 1987, s. 1091(a)(3).
[1160] Report of the Preparatory Committee on the Establishment of an International Criminal Court. Part 2. Jurisdiction, Admissibility and Applicable Law, UN Doc. A/CONF. 183/2/Add.1, 14 April 1998, p. 11.

lasting impairment. The *Akayesu* Judgement stressed, however, that "causing serious bodily or mental harm ?...g does not necessarily mean that the harm is permanent and irremediable".[1161]

511. The serious bodily or mental harm, included within Article 4 of the Statute, can be informed by the Tribunal's interpretation of the offence of wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute. The latter offence was defined in the *^elebi}i* Judgement as "an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury".[1162]

512. The *Bla{ki}* Judgement defined the serious bodily or mental harm required to prove a charge of persecution under Article 5 as follows:

> the victim must have suffered serious bodily or mental harm; the degree of severity must be assessed on a case by case basis with due regard for the individual circumstances;
>
> the suffering must be the result of an act of the accused or his subordinate;
>
> when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim, through his own will or deliberate recklessness.[1163]

513. The Trial Chamber finds that serious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering. The gravity of the suffering must be assessed on a case by case basis and with due regard for the particular circumstances. In line with the *Akayesu* Judgement,[1164] the Trial Chamber states that serious harm need not cause permanent and irremediable harm, but it must involve harm that goes beyond temporary unhappiness, embarrassment or humiliation. It must be harm that results in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life. In subscribing to the above case-law, the Chamber holds that inhuman treatment, torture, rape, sexual abuse and deportation are among the acts which may cause serious bodily or mental injury.

514. The Chamber is fully satisfied that the wounds and trauma suffered by those few individuals who managed to survive the mass executions do constitute serious bodily and mental harm within the meaning of Article 4 of the Statute.[1165]

[1161] *Akayesu* Judgement, para. 502.
[1162] *The Prosecutor v. Zejnil Delali}, Zdravko Muci} a/k/a "Pavo", Hazim Deli} and Esad Land`o a/k/a "Zenga"*, IT-96-21-T, 16 November 1998 (hereinafter "the *^elebi}i* Judgement"), para. 511.
[1163] *Bla{ki}* Judgement, para. 243.
[1164] *Akayesu* Judgement, para. 502.
[1165] *Eichmann* Disctrict Court Judgement, para. 199: "there is no doubt that causing serious bodily harm to Jews was a direct and unavoidable result of the activities which were carried out with the intention of exterminating those Jews who remained alive".

2. Cruel and Inhumane Treatment

515. The Prosecution relies on paragraphs 4, 6, 7, 11 and 22 to 26 of the indictment to allege that persecutions were committed against the Bosnian Muslims by, among other crimes, "the cruel and inhumane treatment of Bosnian Muslim civilians, including severe beatings."[1166] The paragraphs mentioned above, however, do not contain any specifics with respect to cruel and inhumane treatment.

516. Cruel and inhumane treatment has been defined in the jurisprudence of the Tribunal as "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity" and includes such offences as torture.[1167] The Chamber has just explained how the term "serious" should be interpreted.

517. The Trial Chamber has described in detail the ordeal suffered both by the Bosnian Muslims who fled to Poto~ari and the Bosnian Muslims captured from the column. More specifically, the Trial Chamber heard reliable evidence concerning the severe beatings and other cruel treatments suffered by the Bosnian Muslim men after they had been separated from their relatives in Poto~ari. Numerous witnesses further testified about the terrible conditions prevailing both in and outside the UN Poto~ari compound: lack of food and water which the VRS provided in very limited quantity, thousands of people crammed into a small space. More significantly, rapes and killings were reported by credible witnesses and some committed suicide out of terror. The entire situation in Poto~ari has been depicted as a campaign of terror. As an ultimate suffering, some women about to board the buses had their young sons dragged away from them, never to be seen again.[1168]

518. The Trial Chamber thus concludes that the VRS and other Serb forces imposed cruel and inhumane treatment on a large number of Bosnian Muslims who were subjected to intolerable conditions in Poto~ari, cruelly separated from their family members, and, in the case of the men, subjected to the unspeakable horror of watching their fellow captives die on the execution fields, escaping that fate only by chance. The main fact for which the Prosecution alleges inhumane treatment, though, is the forcible transfer of the Bosnian Muslim women, children and elderly outside the enclave of Srebrenica.

[1166] Indictment, para. 31 (b).
[1167] *^elebi}i* Judgement, para. 552; *Bla{ki}* Judgement, para. 186.
[1168] Witness DD.

ANNEX A

8. *Prosecutor v. Jean Paul Akayesu*, ICTR Trial Chamber, ICTR-96-4T, "Judgement," 2 September 1998.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

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688. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.

ANNEX A

9. *Prosecutor v. Musema*, ICTR Trial Chamber, ICTR-96-13-A, "Judgement," 27 January 2000.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Original: ENGLISH

Trial Chamber I

Before Judges:
Judge Lennart Aspegren, President
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Mr. Agwu U. Okali

Judgement of: 27 January 2000

THE PROSECUTOR
v.
ALFRED MUSEMA

Case No. ICTR-96-13-A

JUDGEMENT AND SENTENCE

Office of the Prosecutor:
Ms Carla Del Ponte
Ms Jane Anywar Adong
Mr Charles Adeogun-Philips
Ms Holo Makwaia

Counsel for the Defence:
Mr Steven Kay, QC
Prof Michaïl Wladimiroff

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204. The Chamber considers that "widespread", as an element of crimes against humanity, is a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims, while "systematic" constitutes organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources. It is not essential for such policy to be adopted formally as a policy of a State. However, there must exist some form of preconceived plan or policy.(43) The Chamber notes that these definitions were endorsed in the *Akayesu* and *Rutaganda* Judgements.(44)

ANNEX A

10. *Prosecutor v. Niyetegeka*, ICTR Trial Chamber ICTR-96-14-T, "Judgement," 16 May 2003.

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

12037

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Or. : Eng.

TRIAL CHAMBER I

Before Judges:
Navanethem Pillay, presiding
Erik Møse
Andrésia Vaz

Registrar: Adama Dieng

Judgement of: 16 May 2003

THE PROSECUTOR
V.
ELIÉZER NIYITEGEKA

Case No. ICTR-96-14-T

JUDGEMENT AND SENTENCE

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463. In II.7.2.4 above, the Chamber found that on 28 June 1994, near the Technical Training College, the Accused ordered Interahamwe to undress the body of a Tutsi woman, whom he called "Inyenzi", who had just been shot dead, to fetch and sharpen a piece of wood, which he then instructed them to insert into her genitalia. This act was then carried out by the Interahamwe, in accordance with his instructions.

464. The Chamber finds that the conduct of the Accused formed part of the widespread and systematic attack found in paragraph 440 above.

465. The Chamber finds that the acts committed with respect to Kabanda and the sexual violence to the dead woman's body are acts of seriousness comparable to other acts enumerated in the Article, and would cause mental suffering to civilians, in particular, Tutsi civilians, and constitute a serious attack on the human dignity of the Tutsi community as a whole.

466. Given the Accused's leadership role in attacks against Tutsi, his acts of shooting at Tutsi refugees, his act of procurement of weapons and gendarmes for attacks against Tutsi, his planning of attacks against Tutsi during meetings, his acts of incitement against Tutsi, and his characterization of the old man and young boy as "Inyenzi" or "Tutsi", the fact that Kabanda was generally regarded as a prominent Tutsi, and the characterization of the dead woman by the Accused as "Inyenzi" or Tutsi, and the evidence discussed in paragraphs 416-418 above, the Chamber finds that the Accused intended these acts to be perpetrated on the bodies of Kabanda and the dead woman, and knew that these acts were part of a widespread and systematic attack against the civilian Tutsi population on ethnic grounds.

467. The Chamber finds that by his act of encouragement during the killing, decapitation and castration of Kabanda, and the piercing of his skull, and his association with the attackers who carried out these acts, and his ordering of Interahamwe to perpetrate the sexual violence on the body of the dead woman, the Accused is individually criminally responsible, pursuant to Article 6(1) of the Statute, for inhumane acts committed as part of a widespread and systematic attack on the civilian Tutsi population on ethnic grounds and as such constitute a crime against humanity, as provided in Article 3(i) of the Statute. Accordingly, the Chamber finds that the Accused is guilty of Crime against Humanity (Other Inhumane Acts) as charged in Count 8 of the Indictment.

ANNEX A

11. *Prosecutor v. Juvenal Kajelijeli*, ICTR Trial Chamber, ICTR-98-44A-T, "Judgement," 1 December 2003

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

Westlaw
2003 WL 23190997 (UN ICT (Trial)(Rwa))

International Criminal Tribunal for Rwanda
Trial Chamber II

Before: Presiding Judges William H. Sekule, Winston C. Matanzima Maqutu, Arlette Ramaroson

Registrar: Adama Dieng

Judgment of: 1 December 2003

THE PROSECUTOR
v.

JUVENAL KAJELIJELI

JUDGMENT AND SENTENCE

ICTR-98-44A-T

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Counsel for the Defence: Lennox S. Hinds, Nkeyi M. Bompaka

Original: English

Part I Introduction

A. The Tribunal and its Jurisdiction

1. This Judgment in the case of The Prosecutor v. Juvenal Kajelijeli is rendered by Trial Chamber II ("Trial Chamber" or "Chamber") of the International Criminal Tribunal for Rwanda ("Tribunal"), composed of Judge William H. Sekule, presiding, Judge Winston C. Matanzima Maqutu, and Judge Arlette Ramaroson.

2. The Tribunal was established by the United Nations Security Council after the Council considered official United Nations reports indicating that genocide and widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda. [FN1] The Security Council determined that this situation constituted a threat to international peace and security; determined to put an end to such crimes and to bring to justice the persons responsible for them; and expressed conviction that the prosecution of such persons would contribute to the process of national reconciliation and to the restoration and maintenance of peace. Consequently, on 8 November 1994, the Security Council acting under Chapter VII of the United Nations Charter adopted Resolution 955 establishing the Tribunal. [FN2]

FN1. UNSG Report on Rwanda, 1994/924; Expert Report Pursuant UNSC Resolution 935, 1994/1125; Special Rapporteur Reports, 1994/1157, Annexes I and II.

FN2. UN Doc. S/RES/955 (1994).

3. The Tribunal is governed by the Statute annexed to Resolution 955 ("Statute"), and by its Rules of Procedure and Evidence ("Rules").

4. Pursuant to the Statute, the Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations

934. The Chamber found that, at Rwankeri cellule on 7 April 1994, the Interahamwe raped and killed a Tutsi woman called Joyce. Furthermore, the Chamber found that they pierced her side and her sexual organs with a spear, and then covered her dead body with her skirt.

935. The Chamber found that, at Rwankeri cellule on 7 April 1994, a Tutsi girl named Nyiramburanga was mutilated by an Interahamwe who cut off her breast and then licked it. [FN1113]

FN1113. See above: Part III, Secton L.

936. The Chamber finds that these acts constitute a serious attack on the human dignity of the Tutsi community as a whole. Cutting a woman's breast off and licking it, and piercing a woman's sexual organs with a spear are nefarious acts of a comparable gravity to the other acts listed as crimes against humanity, which would clearly cause great mental suffering to any members of the Tutsi community who observed them. Furthermore, given the circumstances under which these acts were committed, the Chamber finds that they were committed in the course of a widespread attack upon the Tutsi civilian population.

ANNEX A

12. *Prosecutor v Kamuhanda*, ICTR Trial Chamber, Case No. ICTR-95-54A-T, "Judgement", 22 January 2004.
[http://www.ictr.org/ENGLISH/cases/Kamuhanda/judgement/220104.htm]

This authority exceeds thirty pages. As per Practice Direction on Filing Documents Before the Special Court for Sierra Leone, the title page of the authority and relevant section are attached.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:
Judge William H. Sekule, Presiding
Judge Winston C. Matanzima Maqutu
Judge Arlette Ramaroson

Registrar: Adama Dieng

Date: 22 January 2004

The PROSECUTOR
v.
Jean de Dieu KAMUHANDA

Case No. ICTR-95-54A-T

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E. Crimes against Humanity
1. General Elements
a. Indictment

655. The Accused is charged with the following acts as Crimes against Humanity: murder (Count 4), extermination (Count 5), rape (Count 6) and other inhumane acts (Count 7).
b. The Statute

656. Pursuant to Article 3 of the Statute:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation;
(e) Imprisonment;
(f) Torture;
(g) Rape;
(h) Persecutions on political, racial and religious grounds;
(i) Other inhumane acts.

c. Jurisprudence
o Relationship Between the Enumerated Acts and the General Elements

657. The Accused is charged with the acts of murder, extermination, rape, and other inhumane acts as Crimes against Humanity. The commission of any of these acts by the Accused will constitute a Crime against Humanity, only if the Chamber finds that the offence was committed as part of a widespread or systematic attack on a civilian population on any of the following discriminatory grounds: nationality, political persuasion, ethnicity, race, or religion.
658. In relation to each count for which the Accused is charged with a Crime against Humanity, the Prosecution is required to prove the elements indicated above.
659. An act may form part of a widespread or systematic attack without necessarily sharing all the same features, such as the time and place of commission of the other acts constituting the widespread or systematic attack.
o General Elements

The Attack

660. The Chamber adopts the accepted definition of "attack" within this Tribunal, as "an unlawful act, event, or series of events of the kind listed in Article 3(a) through (i) of the Statute." This definition has remained constant throughout the jurisprudence of the Tribunal.
661. Moreover, an attack committed on specific discriminatory grounds need not necessarily require the use of armed force; it could also involve other forms of inhumane treatment of the civilian population.

The Attack Must be Widespread or Systematic
662. The French and the English language versions of the Statute, equally authentic are not consistent

regarding this part of the text. The French language version which uses the conjunction "et" reads in translation, "widespread and systematic", whilst the English language version uses the disjunctive "or" and reads, "widespread or systematic". The practice of the ICTR and ICTY Tribunals has been to accept the English language version, which is in line with customary international law.
663. Trial Chamber III in Semanza held that: "The Chamber does not see any reason to depart from the uniform practice of the two Tribunals." This Chamber also adopts the standard of the Tribunals and accepts the English language version, "widespread or systematic".

Widespread

664. The term "widespread", as an element of the attack within the meaning of Article 3 of the Statute, has been given slightly different meanings within the various Trial Chamber Judgments of the Tribunal. However, all can be said to refer to the scale of the attack, and sometimes the multiplicity of victims. The Chamber, following the definition given in the Niyitegeka and Ntakirutimana Judgments, adopts the test of "large scale, involving many victims".

Systematic

665. There has been some debate in the jurisprudence of this Tribunal about whether or not the term "systematic" necessarily contains a notion of a policy or a plan. The Chamber agrees with the reasoning followed in Semanza and finds that the existence of a plan is not independent legal element of Crimes against Humanity. In Semanza, ICTR Trial Chamber II endorsed the jurisprudence of the Appeals Chamber of the ICTY in Kunarac, that whilst "the existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic, [...] the existence of such a plan is not a separate legal element of the crime".
666. The Chamber finds that "systematic", as an element of the attack within Article 3 of the Statute, describes the organized nature of the attack. Demonstration of a pattern of conduct will also carry evidential value in the Chamber's final analysis.

The Attack Must be Directed against Any Civilian Population

667. Akayesu defined the civilian population as:
[...] people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons hors de combat by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.
668. This definition has been consistently followed in the jurisprudence of the Tribunal. Bagilishema added:
It also follows that, as argued in Blaskic, "the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian".
669. It was also noted in Bagilishema that the term "population" does not require that the Crimes against Humanity be directed against the entire population of a geographic territory or area. Semanza further clarified that:
The victim(s) of the enumerated act need not necessarily share geographic or other defining features with the civilian population that forms the primary target of the underlying attack, but such characteristics may be used to demonstrate that the enumerated act forms part of the attack.
670. The Chamber endorses this jurisprudence.

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The Attack Must be Committed on Discriminatory Grounds

671. Article 3 of the Statute provides that the attack against the civilian population be committed on "national, political, ethnical, racial or religious grounds". This provision is jurisdictional in nature, limiting the jurisdiction of the Tribunal to a narrow category of Crimes, and not intended to alter the definition of Crimes against Humanity in international law.
672. The Akayesu Appeals Chamber clarified the position:
In the opinion of the Appeals Chamber, except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all Crimes against Humanity. To that extent, the Appeals Chamber endorses the general conclusion and review contained in Tadc, as discussed above. However, though such is not a requirement for the crime per se, all Crimes against Humanity, may, in actuality, be committed in the context of a discriminatory attack against a civilian population. As held in Tadc: "[i]t is true that in most cases, Crimes against Humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons". It is within this context, and in light of the nature of the events in Rwanda (where a civilian population was actually the target of a discriminatory attack), that the Security Council decided to limit the jurisdiction of the Tribunal over Crimes against Humanity solely to cases where they were committed on discriminatory grounds. This is to say that the Security Council intended thereby that the Tribunal should not prosecute perpetrators of other possible Crimes against Humanity.

The Appeals Chamber has found that in doing so, the Security Council did not depart from international humanitarian law nor did it change the legal ingredients required under international humanitarian law with respect to Crimes against Humanity. It limited at the very most the jurisdiction of the Tribunal to a sub-group of such crimes, which in actuality may be committed in a particular situation. (...) In the case at bench, the Tribunal was conferred jurisdiction over Crimes against Humanity (as they are known in customary international law), but solely "when committed as part of a widespread or systematic attack against any civilian population" on certain discriminatory grounds; the crime in question is the one that falls within such a scope. Indeed, this narrows the scope of the jurisdiction, which introduces no additional element in the legal ingredients of the crime as these are known in customary international law.
673. In the present case, we follow this jurisprudence of the Appeals Chamber. However, such acts committed against persons outside the discriminatory categories need not necessarily fall outside the jurisdiction of the Tribunal, if the perpetrator's intention in committing these acts is to support or further the attack on the group discriminated against on one of the enumerated grounds.
674. The Chamber notes that a specific discriminatory intent is required for the charge of persecution as Crime against Humanity. However, since the Prosecution informed the Chamber during its closing arguments that it no longer wished to pursue this charge of persecution, the Chamber does not find it necessary to consider the legal elements of this crime.

The Mental Element for Crimes against Humanity

675. A clear statement of the mental element of Crimes against Humanity is to be found in the Semanza Judgment:
The accused must have acted with knowledge of the broader context of the attack and knowledge that his act formed part of the attack on the civilian population.

676. This Chamber fully endorses this position.