SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

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

Registrar: Robin Vincent

Date filed: 4 March 2005

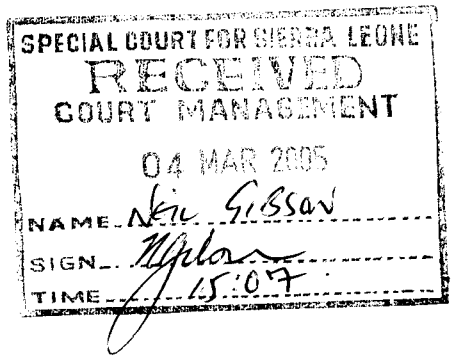
THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No. SCSL-2004-14-T)

PROSECUTION REPLY TO 'RESPONSE OF THIRD ACCUSED TO PROSECUTION'S URGENT MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE'

Office of the Prosecutor:
Luc Côté
James C. Johnson
Kevin Tavener



Defence Counsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr

Defence Counsel for Moinina Fofana
Victor Koppe
Michiel Pestman
Arrow J. Bockarie

Defence Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No. SCSL-2004-14-T)

PROSECUTION REPLY TO 'RESPONSE OF THIRD ACCUSED TO PROSECUTION'S URGENT MOTION FOR A RULING ON THE ADMISSIBILITY OF EVIDENCE'

I. INTRODUCTION

1. The Prosecution files this Reply to the "Response of Third Accused to Prosecution's Urgent Request for a Ruling on the Admissibility of Evidence" filed on 28 February 2005.

2. The Defence opposes the Prosecution's motion on the following grounds:

   a) the proposed evidence is irrelevant as it is outside the scope of the Indictment; there is no mention of the allegations related to acts of a sexual nature in the Indictment;

   b) the lack of precision in the Indictment as to the alleged acts prevented the Accused from preparing a proper defence;

   c) the admission of the proposed evidence would unduly delay the proceedings.

II. ARGUMENT

The Evidence is Within the Scope of the Existing Indictment

3. The Prosecution submits that the proposed evidence is both relevant and admissible because it falls within the scope of the counts on the existing Indictment. As stated by the International Criminal Tribunal for Rwanda,

"Sexual violence falls within the scope of 'other inhumane acts'... and 'serious bodily or mental harm,'...."[1]

4. The Prosecution, at the time of the filing of the Indictment, was not in possession of the proposed evidence. Consequently, the Prosecution was unable to plead the allegations relating to the sexual offences with optimum specificity in the particulars. The Defence, however, were later provided with the relevant statements.

5. Although the amendment sought to allow specific counts, in relation to sexual offences, was not allowed, that decision did not have the consequence of eliminating relevant and admissible evidence; if the evidence is relevant to existing counts on the Indictment then it may be properly adduced during the course of the trial.[2] That is, while the Prosecution recognises it is precluded from leading evidence under the rejected counts, that does not preclude the Prosecution from leading evidence of sexual violence under Counts 3 and 4 of the existing Indictment, pursuant to articles 3(a) and (i) of the Statute for the Special Court for Sierra Leone (the "Statute"). Indeed, the other international tribunals have entered convictions for of these offences in respect of sexually based offences[3].

6. The lack of specificity does not take the evidence outside the scope of the Indictment as Counts 3 and 4 anticipate such material. Lack of specificity in

---

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

[2] Cumulative charging, that is alleging numerous counts in respect of the same conduct, is the standard practice of international tribunals. As stated by the ICTY in *Prosecutor v. Delalic*, ICTY Appeals Chamber, "Judgement," 20 February 2001 at para 400*c*:

> *Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.*

[3] *Akayesu* at para. 688: "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."

the indictment, in the light of all the circumstances, cannot support a claim that relevant and admissible evidence should be excluded.

The Accused Had Sufficient Notice to Prepare His Defence

7. The Prosecution stresses that even though the counts in the Indictment could have been pleaded with more specificity, the central consideration is whether the accused's ability to prepare his case has been materially impaired.[4] As, the ICTY has stated:

> *Where...the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of notice which the accused had been given that such evidence is to be led in relation to that offence.*[5]

8. The Third Accused has been on notice for a considerable time as to the particular nature of the evidence laid against him. Witness statements describing acts of sexual violence were disclosed more than one year ago. The initial disclosure was in July of 2003.[6] Several more statements were disclosed in February of 2004.[7] In its Supplementary Pre-trial Brief of 22nd April 2004, the Prosecution outlined the evidence it intended to call in relation to sexual allegations against the Third Accused, under Counts 3 and 4, at paragraphs 91(b), 92, 93(f), 96(g), 131(b), 220(b), 222(h), 222(i), 221, 225(f), 260(b), 351(b) and 391(b).[8] The Prosecution also filed the "Prosecution Chart Indicating Documentary and Testimonial Evidence by Paragraph of

---

[4] *Prosecutor v. Kupreskic*, ICTY Appeals Chamber, "Judgement," at para 122.
[5] *Prosecutor. v. Brdanin & Momir Talic*, ICTY Trial Chamber II, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend," 26 July 2001 at para. 62; see also *Prosecutor v. Stanislav Galic*, ICTY Trial Chamber, "Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should be Considered as the Amended Indictment," 19 October 2001 at para. 16; *R. v. Kupreskic*, ICTY Appeals Chamber, "Judgement," at para. 114; *Prosecutor v. Enver Hadzihasanovic, Amir Kubara*, ICTY Trial Chamber, IT-01-47-T, "Decision on Motion of Accused Hadzihanovic Regarding the Prosecution's Examination of Witnesses Alleged Violations Not Covered by the Indictment," 16 March 2004.
[6] Witness Statements for TF2-108, TF2-109.
[7] Witness Statements for TF2-188, TF2-134, TF2-135, TF2-187, TF2-189, TF2-133, TF2-129.
[8] *Prosecutor v. Norman, Kondewa and Fofana*, Case No. 2004-14-PT, 'Prosecution Supplemental Pre-trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-trial Brief of 1 April 2004,' 22 April 2004.

Consolidated Indictment Pursuant to the Trial Chamber Order Dated 1 April 2004"[9] where the proposed evidence was directly linked again to Counts 3 and 4. In the "Prosecution Motion for Modification of Protective Measures for Witnesses"[10] the Prosecution created a distinct category for Sexual Assault Witnesses and Victims to be called at trial, requesting special protective measures for those witnesses. The proposed witnesses were named on the Prosecution witness lists with the witnesses intended to be called at trial and filed with the Trial Chamber.

7. Consequently, the Prosecution respectfully submits there was, for an adequate period, an abundant indication and notice to the Defence, of the Prosecution's intention to adduce the proposed evidence at trial. The Defence's assertion that "there was no reasonable basis for the Accused to have focused his defence with such charges in mind" is unfounded in view of all the circumstances. As submitted, relevant and admissible evidence always remains a live issue, regardless of the assumptions of the Defence counsel. The charges have not altered against the Accused.
8. The Third Accused may have been under the misapprehension that the Prosecution would not lead evidence of sexual violence after the Prosecution's Appeal was denied in August 2004 Appeal[11]. However, the Prosecution submits that the Court should take into account the intervening 13 months, during which time the Accused had the opportunity investigate the proposed evidence.
9. In the *Delalic*[12] case, the Trial Chamber opined with respect to acts that were not specifically pleaded in the Indictment under a particular count that:

> *To the extent that the Prosecutor attempts to prove other incidents that may be classified as "acts causing great suffering" the accused will be protected from surprise at trial by his ability to obtain discovery of materials in the Prosecution's possession and the*

---

[9] SCSL-14-PT, 4 May 2004.
[10] SCSL-14-PT, 4 May 2004.
[11] *Prosecutor v. Norman, Kondewa and Fofana*, Case No. 2004-14-PT, 'Majority decision on the Prosecution's application for leave to file an interlocutory appeal against the decision on the prosecution's request for leave to amend the indictment against Norman, Fofana and Kondewa", 2 August 2004.
[12] *Prosecutor v Delalic*, IT-96-21,Decision on the Accused Mucic'c Motion for Particulars", 26 June 1996.

Proseuction's [sic] obligation to provide the Defence with a witness list prior to trial.

10. The Prosecution submits that the discovery of the proposed evidence was donein a timely manner and the intention to lead the evidence was stated by the Prosecution on repeated occasions. Equally, the counts under which the Prosecution seeks to adduce the relevant evidence were always present on the existing Indictment. Consequently, no element of surprise exists and the Defence had ample notice to analyze the evidence, investigate and prepare its defence.

The Presentation of the Proposed Evidence will not Unduly Delay the Proceedings

11. The adduction of the proposed evidence at trial will not cause undue delay as the Defence was provided with the material more than a year ago and had time to accordingly conduct investigations.

12. The Prosecution has reduced the witness list since the beginning of the CDF trial. Furthermore the leading of the proposed evidence would require calling at the most 10 witnesses, the majority of whom testify in any event on other matters.

13. Even in the case where the Defence would be granted more time to prepare its defence, the Prosecution submits that there would be no undue delay. The substance of the proposed testimonies in the determination of the trial clearly overweighs any such minimal delays that could result. Any prejudice to the Accused must be assessed in the context of the overall interest of justice in a full and final determination of the guilt of the Accused.

14. The Prosecution submits that any adverse consequence that may have arisen from the Defence not being informed, in detail, of the particular allegations are not such as to demand the exclusion by the court of relevant and admissible evidence. To do so would be unfair to the victims of sexual offences when weighed against the consequences to the Accused of what is, in effect, a timing and procedural issue.

III. CONCLUSION

15. The Prosecution seeks to adduce the evidence in question in support of Counts 3 and 4 of the existing Indictment. The evidence is highly probative in relation to the Counts and cannot be construed as prejudicial or inflammatory merely because it includes testimony of sexual violence. The Third Accused has had been on notice of the nature of the charges for some time now and cannot, in fairness, now claim to be caught by surprise. A fair trial means fair treatment to the Prosecution and to witnesses as well as to the Accused.[13]

Freetown, 4 March 2005.

For the Prosecution,

Luc Côté

Kevin Tavener

for James C. Johnson

[13] *Prosecutor v Tadic*, ICTY Trial Chamber, IT-94-1, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995 at para. 55.

ANNEX A

INDEX OF AUTHORITIES

1. *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.

2. *Prosecutor v. Delalic*, ICTY Appeals Chamber, "Judgement," 20 February 2001.
   http://www.un.org/icty/celebici/appeal/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.

3. *Prosecutor v. Kupreskic*, ICTY Appeals Chamber, "Judgement," 23 October 2001.
   http://www.un.org/icty/kupreskic/appeal/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.

4. *Prosecutor. v. Brdanin & Momir Talic*, ICTY Trial Chamber II, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend," 26 July 2001.
   http://www.un.org/icty/brdjanin/trialc/decision-e/10626FI215879.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.

5. *Prosecutor v. Stanislav Galic*, ICTY Trial Chamber, "Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should be Considered as the Amended Indictment," 19 October 2001.
   http://www.un.org/icty/galic/trialc/decision-e/11019FI117058.htm#10

6. *Prosecutor v. Enver Hadzihasanovic, Amir Kubara*, ICTY Trial Chamber, IT-01-47-T, "Decision on Motion of Accused Hadzihanovic Regarding the Prosecution's Examination of Witnesses Alleged Violations Not Covered by the Indictment," 16 March 2004.

http://www.un.org/icty/hadzihas/trialc/decision-e/040316.htm

7. *Prosecutor v Tadic*, ICTY Trial Chamber, IT-94-1, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses," 10 August 1995.
http://www.un.org/icty/tadic/trialc2/decision-e/100895pm.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.

8. *Prosecutor v. Norman, Kondewa and Fofana*, Case No. 2004-14-PT, 'Prosecution Supplemental Pre-trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-trial Brief of 1 April 2004,' 22 April 2004.

9. *Prosecutor v. Norman, Kondewa and Fofana*, Case No. 2004-14-PT, 'Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa", 2 August 2004.

10. *Prosecutor v Delalic*, IT-96-21,Decision on the Accused Mucic'c Motion for Particulars", 26 June 1996.
[http://www.un.org/icty/celebici/trialc2/decision-e/60626MS2.htm]

ANNEX A

1. *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.

12382

United Nations
Nations Unies

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

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.

12384

6. THE LAW

6.1 Cumulative Charges

461. In the amended Indictment, the accused is charged cumulatively with more than one crime in relation to the same sets of facts, in all but count 4. For example the events described in paragraphs 12 to 23 of the Indictment are the subject of three counts of the Indictment - genocide (count 1), complicity in genocide (count 2) and crimes against humanity/extermination (count 3). Likewise, counts 5 and 6 of the Indictment charge murder as a crime against humanity and murder as a violation of common article 3 of the Geneva Conventions, respectively, in relation to the same set of facts; the same is true of counts 7 and 8, and of counts 9 and 10, of the Indictment. Equally, counts 11 (crime against humanity/torture) and 12 (violation of common article 3/cruel treatment) relate to the same events. So do counts 13 (crime against humanity/rape), 14 (crimes against humanity/other inhumane acts) and 15 (violation of common article 3 and additional protocol II/rape).

462. The question which arises at this stage is whether, if the Chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the Indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.

463. The Chamber notes that this question has been posed, and answered, by the Trial Chamber of the ICTY in the first case before that Tribunal, *The Prosecutor v. Dusko Tadic*. Trial Chamber II, confronted with this issue, stated:

> "In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged

> cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading". (Prosecutor v. Tadic , Decision on Defence Motion on Form of the Indictment at p.10 (No. IT-94-1-T, T.Ch.II, 14 Nov, 1995)

464. In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing *concurrent* sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

465. The Chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime. 79

466. It is clear that the practice of concurrent sentencing ensures that the accused is not twice punished for the same acts. Notwithstanding this absence of prejudice to the accused, it is still necessary to justify the prosecutorial practice of accumulating criminal charges.

467. The Chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under certain circumstances. Rwandan law allows multiple convictions in the following circumstances:

> Code pénal du Rwanda: Chapitre VI - Du concours d'infractions:
>
> > Article 92.- Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le mˆme auteur sans qu'une condamnation soit intervenue entre ces infractions.
> >
> > Article 93.- Il y concours idéal:
> > 1) lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications;
> > 2) lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant

> d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.
>
> Seront seules prononcées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra ˆtre alors élevé de moitié.

468. On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.

469. Having regard to its Statute, the Chamber believes that the offences under the Statute - genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II - have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations

of common article 3 would accurately reflect the accused general's course of conduct.

470. Conversely, the Chamber does not consider that any of genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all cricumstances alternative charges to genocide and thus lesser included offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible.

ANNEX A

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

12389

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")

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovic 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

12390

399. **A. Discussion**

1. Cumulative Charging

400. Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR.

ANNEX A

3. *Prosecutor v. Kupreskic*, ICTY Appeals Chamber, "Judgement," 23 October 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.

12392

IN THE APPEALS CHAMBER

Before:
Judge Patricia Wald, Presiding
Judge Lal Chand Vohrah
Judge Rafael Nieto-Navia
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mr. Hans Holthuis

Judgement of:
23 October 2001

PROSECUTOR

v

ZORAN KUPRESKIC
MIRJAN KUPRESKIC
VLATKO KUPRESKIC
DRAGO JOSIPOVIC
VLADIMIR SANTIC

APPEAL JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. Anthony Carmona
Mr. Fabricio Guariglia
Ms. Sonja Boelaert-Suominen
Ms. Norul Rashid

Counsel for the Defendants:

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.

122. The Appeals Chamber emphasises that the vagueness of the Amended Indictment in the present case constitutes neither a minor defect nor a technical imperfection . It goes to the heart of the substantial safeguards that an indictment is intended to furnish to an accused, namely to inform him of the case he has to meet. If such a fundamental defect can indeed be held to be harmless in any circumstances, it would only be through demonstrating that Zoran and Mirjan Kupreskic's ability to prepare their defence was not materially impaired. In the absence of such a showing here, the conclusion must be that such a fundamental defect in the Amended Indictment did indeed cause injustice, since the Defendants' right to prepare their defence was seriously infringed. The trial against Zoran and Mirjan Kupreskic was, thereby , rendered unfair.

ANNEX A

4. *Prosecutor. v. Brdanin & Momir Talic*, ICTY Trial Chamber II, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend," 26 July 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.

12396

IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar:
Mr Hans Holthuis

Decision of:
26 June 2001

PROSECUTOR

v

RADOSLAV BRDANIN & MOMIR TALIC

DECISION ON FORM OF FURTHER AMENDED INDICTMENT AND PROSECUTION APPLICATION TO AMEND

The Office of the Prosecutor:

Ms Joanna Korner
Mr Andrew Cayley
Mr Nicolas Koumjian
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application and its background

61. The right of the prosecution to lead evidence in relation to facts not pleaded in the indictment is not as unlimited as its response to this complaint may suggest . Article 21.4(a) entitles the accused "to be informed promptly and in detail [...] of the nature and cause of the charge against him". For example, it would not be possible, simply because the accused was not alleged to be directly involved, to lead evidence of a completely new offence which has not been charged in the indictment without first amending the indictment to include the charge. Where, however, the offence charged, such as persecution and other crimes against humanity, almost always depends upon proof of a number of basic crimes (such as murder), the prosecution is not required to lay a separate charge in respect of each murder. The old pleading rule was that a count which contained more than one offence was bad for duplicity , because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count. Such a rule is completely impracticable in this Tribunal, given the massive scale of the offences which it has to deal with.[184] But the rule against duplicity was nevertheless also one of elementary fairness, and the consideration of fairness involved was that the accused must know the nature of the case he has to meet.

62. Where, therefore, the prosecution seeks to lead evidence of an incident which supports the general offence charged, but the particular incident has not been pleaded in the indictment in relation to that offence, the admissibility of the evidence depends upon the sufficiency of the notice which the accused has been given that such evidence is to be led in relation to that offence.[185] Until such notice is given, an accused is entitled to proceed upon the basis that the details pleaded *are* the only case which he has to meet in relation to the offence or offences charged. Notice that such evidence will be led in relation to a particular offence charged is *not* sufficiently given by the mere service of witness statements by the prosecution pursuant to the disclosure requirements imposed by Rule 66(A). This necessarily follows from the obligation now imposed upon the prosecution to identify in its Pre-Trial Brief, in relation to *each* count, a summary of the evidence which it intends to elicit regarding the commission of the alleged crime and the form of the responsibility incurred by the accused.[186] If the prosecution intends to elicit evidence in relation to a particular count additional to that summarised in its Pre-Trial Brief, specific notice must be given to the accused of that particular intention.

ANNEX A

7. *Prosecutor v Tadic*, ICTY Trial Chamber, IT-94-1, "Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses," 10 August 1995.

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.

12399

Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

DECISION ON THE PROSECUTOR'S MOTION REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Milan Vujin
Mr. Krstan Simic

DECISION

Pending before the Trial Chamber is the Motion Requesting Protective

55. However, the interest in the ability of the defendant to establish facts must be weighed against the interest in the anonymity of the witness. The balancing of these interests is inherent in the notion of a "fair trial". A fair trial means not only fair treatment to the defendant but also to the prosecution and to the witnesses. In a case before the Supreme Court of Victoria, Australia, *Jarvie and Another v. The Magistrates' Court of Victoria at Brunswick and Others*, (1994) V.R. 84, 88, Judge Brooking, when pronouncing on whether anonymity of a witness is in conformity with the principle of a fair trial stated:

> The "balancing exercise" now so familiar in this and other fields of the law must be undertaken. On the one hand, there is the public interest in the preservation of anonymity . . . On the other hand, there is the public interest that . . . the defendant should be able to elicit (directly or indirectly) and to establish facts and matters, including those going to credit, as may assist in securing a favourable outcome to the proceedings. There is also the public interest in the conduct by the courts of their proceedings in public.