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SCSL-2004-15-PT

(5941 – 5962)

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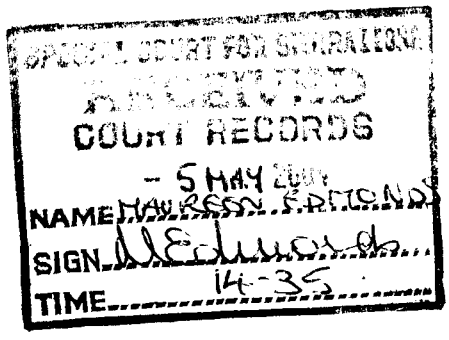
THE SPECIAL COURT FOR SIERRA LEONE

BEFORE THE TRIAL CHAMBER:

Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 5th May 2004



The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2003 – 15 – PT

Defence Response to the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL – 2004 – 15 – PT And SCSL – 2004 – 16 - PT

Office of the Prosecution
Luc Cote
Robert Petit

Defence Counsel
Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

INTRODUCTION

1. Pursuant to the Trial Chambers Order of the 30th April 2004 for expedited filing of the defence response to the Prosecution's Motion for Concurrent Hearing of Evidence Common to Cases SCSL – 2004 – 15 PT and SCSL – 2004 – 16 – PT ("the Motion") the defence herein files its response.

BACKGROUND

2. On the 27th January 2004, the Trial Chamber refused to grant the Prosecution application for joinder of the trials of the RUF and the AFRC. The Chamber held that in the interests of justice and the right of the Accused the two groups ought to be tried separately to prevent conflicts and mutual recriminations between members of the two groups jeopardising the Accused's rights to a fair and expeditious trial[1]. The trial Chamber thus recognised the inherent dangers of hearing evidence (whether common or otherwise), which concerned the RUF and the AFRC in a joint trial or joint hearing.
3. On 3rd February 2004 the Prosecution filed an application for leave to file an interlocutory appeal against the Trial Chamber's decision of 27th January 2004, pursuant to Rule 73(B). On 13th February 2004, the Trial Chamber refused to grant the Prosecution leave to appeal.
4. On the 3rd March 2004 at the Status Conference for Mr Sesay, Mr Kallon and Mr Gbao, Mr Cote for the Prosecution indicated their intention to seek to amend the Rules of Procedure and Evidence of the Special Court in order to make provision for the concurrent hearing of witnesses in the cases of the accused alleged to be members of the RUF and the AFRC. It was therefore within the Prosecution's stated contemplation and strategy at that time to file the present eleventh motion. (It was also noted by the defence at that hearing that this approach was merely an attempt by the Prosecution to re – open the issue of joinder and circumvent the Trial Chambers order of the 27th January 2004).
5. At the Status conference the Prosecution also sought to argue (as they do now) that in order to allow for the concurrent hearing of evidence the current Trial Chamber

[1] Joinder decision, 27 January 2004.

should be assigned the cases of Prosecutor v Brima, Kasmara and Kanu and this case. The Trial Chamber did not rule on the issue but the possibility that the Trial Chamber might not accede to the Prosecution's request was apparent to all.

6. On the 11 – 14 March 2004 at the 5th Plenary, the Prosecution, consistent with their stated intention, applied to amend the Rules of Procedure and Evidence. The Rules were duly amended by the Learned Judges by the inclusion of the new rule 48(C) which for the first time made provision for the concurrent hearing of witnesses.
7. On the 28th April 2004, according to the Prosecution, the Chamber stated that it may be minded to commence the trial in the matter of Norman, Fofana and Kondewa with either the AFRC trial or this trial. This could have been a surprise to no one given the aforementioned background and the fact that it was one of only three realistic possibilities. On the 29th April 2004 the Pre – Trial Conference for the present case was held. At no time did the Prosecution indicate their intention to file the present motion nor did they see fit to ask the Chamber to delay its decision on fixing the trials until resolution of the issue. Instead the Prosecution explicitly asked the Trial Chamber to request of the defence their view of their respective trial readiness. The defence note that their answers have been included within the present motion and are relied upon as supporting the Prosecution motion.

EQUALITY OF ARMS "TRIAL BY AMBUSH"

8. The defence deplore the timing of the Prosecution application, which by design or otherwise, risks causing serious prejudice to the accused in the preparation of his defence pursuant to Article 17(b) of the Statute. It is a disgrace that the intention to file this motion has been suppressed throughout the time when the Pre –Trial conferences were taking place. We invite the Trial Chamber to require the Prosecution to explain why they did not make known their intention to submit this motion to all interested parties in the RUF cases at that time.
9. In particular the timing of the motion allows the Prosecution to take advantage of their permanent presence within Freetown in contradistinction to the majority of the defence team. It must have been crystal clear to the Prosecution that the present

motion would need to be filed to allow them to pursue their oft stated strategy of concurrent hearings.

10. It could (and should) have been filed therefore well in advance of the 30th April 2004. This would have given the Trial Chamber the opportunity to proceed to resolve this issue in an orderly and unhurried manner as best befits issues as contentious and wide reaching in their implications as those the subject of this motion.
11. Instead the Prosecution preferred to remain silent as to their intentions, even when the issue of trial date was discussed at Mr Sesay's Pre –Trial conference. Instead they appear content to wait until Counsel for Mr Sesay, employed (alongside his Lead Counsel) to deal with the International aspects of the case, was making final preparations to leave Freetown (and even then only after working hours on the 30th April 2004) before making explicit their request to the Trial Chamber and the defence.
12. As a consequence the Trial Chamber has been denied the assistance it might have gained from oral argument and the accused has been denied the choice to present oral argument according to the best resources at his disposal. The Prosecution have effectively hijacked the proceedings and by doing so have forced a delay of the decision of the Trial Chamber to fix the trial date. This delay assists no one except the Prosecution, least of all the accused who remains an innocent man until and if the Prosecution are able to discharge their onerous burden.
13. The approach taken is therefore surprising and is antithetical to the orderly process of the court and the interests of justice.
14. The defence sincerely hope that this type of strategy (advertent or otherwise) is not to be a feature of the forthcoming trials. It is hoped that the forthcoming trials are to be search for the truth rather than a demonstration of the means by which the vastly superior resources of the Prosecution might be employed to define and dictate the court process. The defence are forced through the limited resources provided to be based away from the seat of the Court. They have also other commitments and unlike the Prosecution do not enjoy the luxury of working only upon the present case. The defence would respectfully request that the Trial Chamber recognise the

onerous burdens placed upon it in situations such as these which require the instant juggling of pre – arranged diaries in order to defend their client to the full extent required and expected of them.

DEFENCE SUBMISSIONS ON THE MOTION

15. The Prosecution motion contains two requests:
    (i) The Trial Chamber should order that one hearing be held where evidence common to both the RUF and AFRC case will be presented concurrently (para 1/32 of the Motion)
    (ii) The Trial Chamber should assign the cases of the RUF and the AFRC to the same chamber to facilitate the common hearing of the common witnesses.

SEPARATE AND DISTINCT CONSIDERATIONS

16. It is important that the two requests are considered separately. The first request ought to be rooted in a line by line assessment of the specific evidence which is the subject of the Prosecution application. It is an evidential matter which ought to be decided when and if the Prosecution seek to rely upon the common witnesses.
17. It can not be decided in the abstract but involves an analysis of the evidence as it arises in its context in the trial process. The Prosecution's attempt to have this issue decided once and for all on the basis of their own summaries, assertions and predictions is a dangerous one which suggests that the issue is rooted in their own assessment of the evidence and its impact rather than the Chambers
18. It fails to provide the Trial Chamber with the precise evidence which they suggest should be the subject of the suggested common hearing and in the circumstances of this expedited response and reply procedure fails to provide sufficient time for the specific evidence and its impact on the rights of the accused to be assessed. The specific evidence needs to be analysed according to the Prosecution case at that time and with due reference to the respective defences which are being relied upon. In the absence of this level of specificity in the investigation the right of the accused to a

fair trial, unencumbered by conflicts in defence strategy and mutual recriminations between members of the two groups, is in grave danger.

19. Moreover the Prosecution approach seeks, by its global approach to the evidence to shift the burden of proof onto the defence in relation to this issue. They suggest that it should be for the defence to prove (despite the Chambers ruling on joinder that there are real risks implicit in the holding of a joint trial) that the examination of a particular witness may adversely affect their rights. In other words they invite the defence to subject their arguments to a level of evidential scrutiny within the trial process and within the specific context of their defences but appear unwilling to accept that the same should be expected of them. Instead they seek to have their global request decided on the basis of their "tentative"[2] witness list[3]; their approximation that there are 56% common witnesses ("about 56%"[4]) and their own pre- prepared witness summaries.

DISAGREEMENT ON THE FUNDAMENTAL PREMISE OF THE PROSECUTION APPLICATION

20. It should be noted that there is substantial disagreement and uncertainty on many of the issues upon which the Prosecution's first application is based. In particular their request to hold concurrent hearings in relation to the common witnesses is based upon the assertion(s) contained within paragraphs 16, 17 and 20 of their Motion that the evidence to be called during these hearings is simply "crime base"[5] "which does

[2] See paragraph 8 of the Motion

[3] The Prosecution asserts at paragraph 15 of its Motion that "in accordance with its submissions in the Status Conferences held on 2-3 March 2004 and 8 March 2004 that the total number of witnesses it intends to lead in both cases is presently estimated at 267". Leaving aside the unwillingness of the Prosecution to identify with the accuracy their witness list this was not the submission of the Prosecution either at the Status conference or the recent Pre -Trial Conference. At the Pre – Trial conference in contradistinction to the present submission, the Prosecution made clear that they were not seeking to call 267 witnesses; this list contained both witnesses to be called and "back up" witnesses in the event that the former express unwillingness to testify. The Prosecution were not willing to be more specific on these issues but clearly their 56% estimation can not be accurately assessed without a greater degree of specificity nor is their latter suggestion in paragraph 15 ("Hence, conducting two trials involves the calling of over one hundred and fifty (150) witnesses twice, to testify before the Special Court at two different occasions") likely to be even close to the real position.

[4] See paragraph 8 of the Motion.

[5] See paragraph 16 of the Motion.

not directly implicate the individual Accused persons"[6] and does not go "to prove the criminal responsibility of the Accused under Article 6(1) and under Article 6(3)"[7] is specious to say the least.

21. This so called "crime base evidence" goes directly to the heart of the Prosecution case against Mr Sesay. The majority of the evidence does not implicate him in direct acts himself but seeks to implicate him through the common purpose doctrine (vis a vis acting in concert with his co –accused) or through the command responsibility doctrine. If the Prosecution are correct in their assessment that the evidence does not implicate him either under Article 6(1) or Article 6(3) then the evidence ought to be excluded pursuant to Rule 89(C) as being irrelevant to the proceedings. In these circumstances the current motion is therefore otiose.

THE SECOND REQUEST

22. The second request might more properly be decided at this stage as a matter of principal and practicality. It requires no more than an assessment of whether in some circumstances it *might* on occasion be in the interests of justice to advance as the Prosecution suggest. It does not entail prediction or speculation as to the precise impact of a particular swathe or piece of evidence but simply an assessment of principle. In the event that the Trial Chamber considered that as a matter of general principal it *might* be possible to proceed with common hearings a single Trial Chamber would, in order to provide the practical arrangements to make this possible, be required to try both this case and the AFRC case.

DEFENCE SUBMSSIONS

The Prosecution argument that the holding of common hearings will "promote the rights of all six Accused to a fair and expeditious trial enshrined in Article 17(see Para.13 of the Motion).

The Prosecution argument that the holding of common hearings will operate to reduce costs, logistical undertakings and security risks to witnesses, as well as to

[6] See paragraph 17 of the Motion.
[7] See paragraph 20 of the Motion.

enhance judicial economy by minimising trial days substantially (see Para. 23 of the Motion).

23. The Prosecution fail to appreciate the impact of their application on the trial process. Whether the burden is placed upon the Prosecution or defence to satisfy the interests of justice test in relation to common hearings (as suggested by the Prosecution[8]) it will be incumbent on the defence to challenge the admissibility of (and seek severance of) every witness it perceives may affect the rights of the Accused or the interests of justice. This raises the unwelcome prospect of up to six separate and competing legal submissions on behalf of the various Accused before each and every one of the (supposed) 150 witnesses.
24. The Prosecution approach risks turning the trial into a deluge of admissibility challenges where the real issues become obscured in extraneous argument.
25. In the event that the Trial Chamber upholds any defence submission the witness in question will have travelled to Freetown requiring their stay in the witness protection program at great inconvenience to both the witness and the Witness and Victims Support unit but will have to then be returned to their home only to return **again twice** (at great inconvenience to them) when the common hearings are completed. The suggestion that the proposed course will shorten the proceedings, reduce the risk to the witnesses and increase the efficiency of the proceedings is a simply a triumph of hope over reality.
26. In the event that the RUF trial is to be interposed with another trial on a month by month basis the respective team members will be able to sustain themselves at the time their trial is not sitting with other professional commitments. In the event that the Prosecution application is acceded to the defence teams of each accused will be required to effectively abandon all other commitments during the course of these months as they will become obliged by the Prosecution strategy, to make them selves available during the alternative month. This is unworkable given the limited resources available to the defence.
27. The resources available to the defence are already stretched to the point of being intolerable. In the event that we are required to abandon all other commitments and

[8] See Para 21 of the Motion

(for those based overseas) be required to keep house and home in two places over a prolonged period it will become impossible to live on the resources available. It goes without saying that we should not be expected to fund ourselves for the privilege of working on our respective cases! The defence will undoubtedly seek additional resources and some might financially be unable to continue.

The Prosecution argument that the present motion, neither implicitly nor indirectly, entails the holding of a joint trial (See Paragraph 17 of the Motion)

28. The Prosecution argument is a semantic one; a knife may be called a spoon but it remains a sharp implement. The arguments they use to seek to persuade the Trial Chamber are the same arguments used (and if not rejected then ruled to be outweighed in the interests of justice) to seek to justify joinder[9]. The Prosecution accept that if their motion is granted the issue of severance arises.[10] In reality they seek to have the two trials merge for at least 56% of the time and in relation to both eye witness testimony and expert witness testimony. There is also no guarantee (given the vagueness of the present application) that this application will be so restricted – it may simply be the thin end of a very long wedge.

THE LAW

29. The defence agree that there is limited case law on this subject.[11] Sadly the defence have not been given the opportunity to research to the same extent as the Prosecution due to the procedure forced upon it by the inconvenience of the present Motion. It is noteworthy however that the Prosecution rely upon two cases[12] both of which rejected the proposal for joint hearings. These cases would appear to have recognised the huge difficulties which arise from applications such as the present Motion. In the instant case the Prosecution application effectively joins the two

[9] See Paragraphs 22, 23, 25, 27 and 29 of the present motion. The defence do not seek to reargue these issues but refer the chamber to their response therein.
[10] See Paragraphs 21 of the Motion.
[11] See Paragraph 24 of the Motion.
[12] See Kovacevic et al, IT – 97 – 24 – AR73, Decision on Joinder and Concurrent Presentation of Evidence, 14 May 1998, Brdanin, Talic and Stakic, IT – 99 – 36 – PT & IT – 97 – 24 – PT, Decision on Prosecution's Motion for a Joint Hearing, 11 January 2002 and

cases for the majority of the time. This was something the Trial Chamber in Kovacevic was unwilling to countenance due to the risk (already recognised in this case in the joinder decision of 27th January 2004, paras 41 and 46) of "conflicts of interests between the accused in conducting their defence. Such conflict would cause serous prejudice to all the accused".[13]

30. Moreover in the same case the Trial Chamber recognised that the proposed course would lead to confusion of the issues and evidence.[14] The defence in this regard note the limited temporal and geographical nature of the trials considered in the case of Kovacevis et al which contrasts with those under consideration in the present Motion which span the whole country and beyond as well as in excess of ten years. The Prosecution submission[15] that the factual allegations are the same in this instance is of little assistance given (i) on their own assessment 44% are different and these differences may well be relevant to issues raised in any common hearing and (ii) the defences may well be different and will impact substantially (aside from the resulting and inevitable conflicts) on any common hearings.

31. The Defence also agree that the ICTY Trial Chamber may well, when rejecting the Prosecution application for joint hearings, have taken into account the possibility that the Office of the Prosecutor in the case of Brdanin et al[16] would apply for joinder. In other words the Trial Chamber recognised that this was the correct mechanism by which joint hearings ought to be held. In the present case the Prosecution failed in that regard, for very good reason. This application has in effect (unlike in Brdanin) has already been adjudicated upon.

CONCLUSION

32. The defence submit for all the reasons aforementioned that the Prosecution motion be rejected in its entirety. In the event that the Trial Chamber considers that in principal concurrent hearings might be in the interests of justice, the defence request that the evidence to be the subject of any concurrent hearing, ought to be assessed

[13] See Koravecevic (ante) para. 10.b
[14] See para 10.d
[15] See para 25 of the Motion
[16] See footnote 12

and adjudicated upon within the trial process and not in abstract on the basis of the Prosecutions untested and little scrutinised assertions.

Dated the 3rd day of May 2004

Tim Clayson

Wayne Jordash

Serry Kamal

Sareta Ashraph

BOOK OF AUTHORITIES

1. Prosecutor v. Kovacevic et al, IT – 97 – 24 – AR73, Decision on Motion for joinder of Accused and Concurrent Presentation of Evidence, 14 May 1998.
2. Prosecutor v. Brdanin, Talic and Stakic, IT – 99 – 36 – PT & IT – 97 – 24 – PT, Decision on Prosecution's Motion for a Joint Hearing, 11 Jan. 2002.

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IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding

Judge Antonio Cassese

Judge Florence Ndepele Mwachande Mumba

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 14 May 1998

PROSECUTOR

v.

**MILAN KOVACEVIC,
MIROSLAV KVOCKA, MLADEN RADIC, and ZORAN ZIGIC,
ZORAN ZIGIC a.k.a "Ziga"**

DECISION ON MOTION FOR JOINDER OF ACCUSED AND CONCURRENT PRESENTATION OF EVIDENCE

The Office of the Prosecutor:

Mr. Michael Keegan
Ms. Brenda Hollis
Ms. Ann Sutherland

Counsel for the Accused:

Mr. Dusan Vucicevic and Mr. Anthony D'Amato for Milan Kovacevic
Mr. Veljko Gubrina for Mladen Radic
Mr. M. Krstan Simic and Ms. Slavica Grahovac for Miroslav Kvocka
Mr. Simo Tosic for Zoran Zigic

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("the International Tribunal") is a Motion for Joinder of Accused and Concurrent Presentation of Evidence ("Motion for Joinder") filed by the Office of the Prosecutor ("Prosecution") on 22 April 1998. Defence counsel for the accused

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Milan Kovacevic filed a Reply and an appended Motion on 1 May 1998, seeking "bifurcation" of the trial of Milan Kovacevic. Also on 1 May 1998, Defence counsel for Mladen Radic filed a Brief in response. The Prosecution filed a Response to the Defence Motion for a "Bifurcated" Trial on 7 May 1998. Defence counsel for Zoran Zigic filed a Response to the Motion for Joinder on 8 May 1998, whereas Defence counsel for Miroslav Kvocka filed its response on 11 May 1998.

The Trial Chamber heard oral argument on 11 May 1998 at which time the Trial Chamber refused the Motion for Joinder in an oral decision, reserving the written decision to a later date.

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

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS

2. In its Motion for Joinder the Prosecution makes the following requests:

> (a) to join the trials of the accused Zoran Zigic, Miroslav Kvocka, and Mladen Radic pursuant to Article 20, paragraph 1, of the Statute of the International Tribunal and Rules 48 and 75 (A) of the Rules of Procedure and Evidence;
>
> (b) that there be concurrent presentation of evidence against all four accused pursuant to Rules 54 and 75 (A) (and as a practical matter, that these cases therefore be heard by the same Trial Chamber).

3. The Prosecution argues that:

> (a) each of the indictments against the accused Zoran Zigic, Miroslav Kvocka, and Mladen Radic concerns crimes committed in the Omarska camp; Milan Kovacevic as their superior is also charged with responsibility for these crimes, as well as the crimes alleged against Zoran Zigic relating to Keraterm camp, under Article 7, paragraph 3, of the Statute;
>
> (b) evidence against Zoran Zigic of crimes committed in the Keraterm camp and evidence against Milan Kovacevic of crimes committed in the Prijedor area prior to the establishment of the camps, constitute proof of a widespread or systematic attack against the civilian population which is relevant to charges under Article 5 of the Statute against the accused Zoran Zigic, Miroslav Kvocka, and Mladen Radic; all these crimes are part of the "same transaction" (ethnic cleansing) under Rule 48;

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(c) all the indictments are therefore based on the same facts, and as the trial process is a search for the truth, the facts revealed in the process of concurrent presentation of evidence are relevant to all the accused;

(d) the concurrent presentation of evidence would apply only to the Prosecution case;

(e) any prejudice caused to the accused, including the delay caused to the trial of Milan Kovacevic, would not be substantial, and would be outweighed by the following considerations;

(i) separate trials would have adverse consequences on the health, welfare, and

security of Prosecution witnesses, and could result in the Prosecution losing crucial witnesses for subsequent prosecutions;

(ii) separate trials would have an adverse effect on the rights of all four accused to be tried expeditiously under Article 20, paragraph 1, of the Statute;

(iii) the concurrent presentation of evidence in these trials is the most efficient use of the resources of the International Tribunal and therefore in the interest of judicial economy.

4. Defence counsel for the accused Milan Kovacevic opposes the Motion for Joinder on the following grounds:

(a) as the crime of genocide with which Milan Kovacevic is charged differs from the crimes alleged against the other accused (and the relevant evidence differs), the concurrent presentation of evidence against all four accused would lead to a conflict of interest in their defence strategies, which would substantially prejudice the accused in their right to a fair trial. Such a conflict would constitute a ground for separation of trials under Rule 82 (B);

(b) the concurrent presentation of evidence would lead to further delay in the trial of Milan Kovacevic, thus violating his right to an expeditious trial;

(c) the Prosecutor's argument that Milan Kovacevic was the superior of the other defendants and therefore bears responsibility for their crimes under Article 7, paragraph 3, is a mere assertion, unsupported by proof;

(d) the important concerns for the health, welfare and security of

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victims and witnesses, the rights of the accused to an expeditious trial, and judicial economy could be redressed by a "bifurcation" of the trial of Milan Kovacevic, so that witnesses could give evidence in one trial in the morning and the other in the afternoon;

(e) such a "bifurcation" would be consistent with the fact that Milan Kovacevic is not charged with any alleged atrocities that took place within the camps.

5. Defence counsel for Mladen Radic, Miroslav Kvocka, and Zoran Zigic also oppose the Motion for Joinder:

(a) Defence counsel for Mladen Radic states that he had not received all the supporting materials in the native language of the accused, and therefore cannot state his position further at this time;

(b) Defence counsel for Miroslav Kvocka opposes the Motion for Joinder on these grounds:

(i) this situation is not covered by Rule 48 since there is no question of joining the indictments, nor is it covered by Rule 54;

(ii) protection of victims and witnesses is enhanced by separate trials;

(iii) the accused Miroslav Kvocka's position is a specific one; it bears no relation to that of the accused Zoran Zigic and Milan Kovacevic;

(iv) arguments of expediency and efficiency cannot justify the violation of the right of the accused to a fair trial;

(c) Defence counsel for Zoran Zigic also states he has not received the supporting materials, and at the hearing of 11 May 1998 commented that

(i) joinder of trial without joinder of indictments would be an irregular procedure;

(ii) since there is no complete overlap of witnesses, it would in fact be beneficial to have separate trials;

(iii) judicial economy is not a valid reason to join trials.

6. The Prosecution responds by arguing:

(a) the supporting materials have all been handed over to the respective

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Defence counsel in English;

(b) Defence counsel for Milan Kovacevic is under a basic misapprehension of the indictment against Milan Kovacevic when stating that crimes committed in Omarska are not relevant, as the indictment charges Milan Kovacevic not just with planning genocide, but with complicity in genocide under Article 7, paragraph 1 and Article 7, paragraph 3;

(c) concerns for the protection of victims and witnesses would not be met by

the "bifurcation" of the trial of Milan Kovacevic as they would still be required to testify twice.

III. APPLICABLE LAW

7. Both sides rely on Article 20, paragraph 1, of the Statute, which states:

> The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

8. The Prosecution argues joinder of trial would be pursuant to Rule 54, and provided for in Rule 48 which states:

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

The Prosecution also relies on Article 22 in conjunction with Rule 75 (A). Article 22 provides:

> The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. . . .

Rule 75 (A) states:

> A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

9. The Defence counsel for Milan Kovacevic argues that Rule 82 (B) was drafted with

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this situation in mind, as it states:

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

IV. REASONS

10. At the hearing of 11 May 1998, the Trial Chamber rejected the Motion for Joinder. Its reasons for doing so are set out below.

(a) The practical effect of the course proposed by the Prosecution would be to order joint trials. At the moment the four accused appear in three indictments. Therefore to order the concurrent presentation of evidence would be to order a joint trial of all four accused. In the view of the Trial Chamber, such a course is not justified in the circumstances before it in this case, for the following reasons.

(b) The Trial Chamber recognises that some victims and witnesses called to give evidence suffer hardship thereby, and has well in mind its duty to protect witnesses. On the other hand, pursuant to Article 20, paragraph 1, the accused have the right to a fair and expeditious trial. Rule 75 (A) specifies that any measures for protection of witnesses may only be ordered if they are consistent with the rights of the accused. The Trial Chamber considers that the course requested by the Prosecution may endanger the rights of all the accused to a fair trial, because it may lead to conflict of interests between the accused in conducting their defence. Such conflict would cause serious prejudice to all the accused. Rule 82 (B) empowers a Trial Chamber to separate trials if "it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused . . .". Had the four accused been jointly indicted in this case, the Trial Chamber would have had to consider separating their trials.

(c) Furthermore, to allow this Motion for Joinder would result in a violation of the right of the accused Milan Kovacevic to an expeditious trial (his trial already having been postponed from 11 May 1998). This violation is not justified by the argument that joinder may expedite the trials of the other accused.

(d) Since the proposed course of action might cause substantial prejudice to the accused, as well as infringing the right of the accused Milan Kovacevic to be tried without undue delay, the Trial Chamber finds that arguments of judicial economy are no longer relevant. The Trial Chamber also takes the view that it is impractical for it to conduct two trials at the

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same time; this would be liable to lead to confusion of the issues and evidence.

11. The Trial Chamber need not rule at this stage on the Motion for a "Bifurcated" Trial. Nothing in the present ruling is intended to discourage compromise between the parties on how to conduct the trials in a manner which will minimise the potential hardship to witnesses.

V. DISPOSITION

For the foregoing reasons

PURSUANT TO RULES 54 AND 73;

THE TRIAL CHAMBER REFUSES the Prosecution's Motion for Joinder of Accused and Concurrent Presentation of Evidence of 22 April 1998 to this extent:

1. The request for the concurrent presentation of evidence against all four accused, with the suggestion that these cases all be heard by the same Trial Chamber, is rejected.

2. The request for the two indictments against the accused Zoran Zigic, Mladen Radic, and Miroslav Kvocka to be tried together is adjourned, as it is not a matter for this Trial Chamber to determine, but for the Trial Chamber which will try those accused.

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

_____

Richard
May

Presiding
Judge

Dated this 14th day of May 1998

At The Hague

The Netherlands

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[Seal
of
the
Tribunal]

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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: IT-99-36-PT & IT-97-24-PT

Date: 11 January 2002

Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding Judge
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr Hans Holthuis

Decision of: 11 January 2002

THE PROSECUTOR

v.

RADOSLAV BRĐANIN
MOMIR TALIĆ
and
MILOMIR STAKIĆ

DECISION ON PROSECUTION'S MOTION FOR A JOINT HEARING

The Office of the Prosecutor:
Ms. Joanna Korner
Mr. Andrew Cayley
Ms. Susan Somers

Counsel for Accused Radoslav Brđanin:
Mr. John Ackerman
Ms. Milka Maglov

Counsel for Accused Momir Talić:
Mr. Xavier De Roux
Mr. Michel Pitron

Counsel for the Accused Stakić:
Mr. Branko Lukić

TRIAL CHAMBER II of the 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 (hereafter "International Tribunal"),

BEING SEISED of the "Prosecution's Motion for a Joint Hearing of evidence common to the cases of *Prosecutor v. Brđanin and Talić* and *Prosecutor v. Milomir Stakić*", dated 8 January 2002 (hereafter "Motion");

NOTING that the Motion, pursuant to Article 20(1) of the Statute of the International Tribunal (hereafter "the Statute"), and Rules 54 and 73 of the Rules of Procedure and Evidence (hereafter "the Rules"), requests a joint hearing of evidence with regard to witnesses who are due to give evidence in both cases, relating to the same events that have taken place in the municipality of Prijidor;

NOTING that at the same time, the Office of the Prosecutor mentioned the possibility of applying for a joinder of the two cases;

NOTING the "Réponse á la Requête du procureur aux fins d'obtenir la présentation simultanée des éléments de preuve communs aux affaires *le procureur c. Brdjanin et Talic* et *le procureur c. Stakic*" filed by the accused Momir Talić arguing that the granting of the Motion would infringe upon the requirements of Article 20 (1) of the Statute and the rights of the accused;

CONSIDERING that the trial of *Prosecutor v. Brđanin and Talić* is due to commence on 21 January 2002 and that it is not in the interest of justice to delay the start of this trial;

CONSIDERING that a joinder would inevitably delay the start of the case of *Prosecutor v. Brđanin and Talić*;

CONSIDERING FURTHER the fact that, due to budgetary problems the trial of *Prosecutor v. Milomir Stakić* cannot start according to the envisaged court schedule of the International Tribunal, there is no basis for a joint hearing;

FOR THE FOREGOING REASONS

PURSUANT TO Article 20(1) of the Statute and Rules 54 and 73 of the Rules of Procedure and Evidence of the International Tribunal;

HEREBY DISMISSES THE MOTION.

Done in both English and French, the English version being authoritative.

W. Schomburg

Wolfgang Schomburg
Presiding Judge

Done this eleventh day of January 2002
At The Hague,
The Netherlands

[Seal of the Tribunal]