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SCSL - 2004 - 16 - PT
(278 - 283)**SPECIAL COURT FOR
SIERRA LEONE**

Case No. SCSL-2004-16-PT

Before: Judge Bankole Thompson
 Judge Benjamin Itoe
 Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: February 17, 2004

THE PROSECUTOR

against

SANTIGIE BORBOR KANU

**DEFENSE RESPONSE TO PROSECUTION'S REQUEST FOR LEAVE
 TO AMEND THE INDICTMENT**

Office of the Prosecutor:

Mr. Luc Coté
 Mr. Robert Petit
 Mr. Christopher Santora

Defense Counsel:

Mr. Geert-Jan Alexander Knoops, Lead Counsel

SPECIAL COURT FOR SIERRA LEONE	
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17 FEB 2004	
NAME	MAURISSA EDWARDS
SIGN	<i>MAURISSA EDWARDS</i>
TIME	4:30

I INTRODUCTION

1. Pursuant to the Prosecution's "Request for Leave to Amend the Indictment" of February 9, 2004 ("**Request**"), the Defense of Mr. Kanu ("**Defense**") herewith files its "Defense Response to the Request for Leave to Amend the Indictment."

II THE ADDITION OF A NEW CHARGE

2. In para. 4 of the Request, the Prosecution requests leave to amend the Indictment with a new charge of crimes against humanity – other inhumane acts, as a new count in the Indictment, namely the act of 'forced marriage'. The Defense respectfully submits that the Trial Chamber should not grant amendment of the Indictment with this new charge for the following reasons.
3. **In the first place**, the Defense holds that the act of 'forced marriage' does not amount to a crime against humanity – other inhumane act, according to customary international law. The following arguments support this proposition:
 - (i) Article 2(g) and (i) of the Statute, nor any other provision in the Statute specifically criminalizes the act of forced marriage. Specifically the Geneva Conventions, nor their Additional Protocols are familiar with these acts as part of the concept of "*inhumane acts*".
 - (ii) The act of forced marriage is not mentioned under Article 7(1)(k), Article 7(2)(f), nor in any other provision of the ICC Statute.
4. Therefore, the requested amendment does not comply with the principle of legality, which principle does form part of customary international law, and is now embedded in Articles 22 and 23 of the ICC Statute.¹ The rationale of this principle, part of

¹ See A. Cassese, *International Criminal Law*, 2003, at 139 – 147.

protection of basic human rights of individuals, is that international crimes should be defined as precisely as possible. The same principle is set out in the third and fourth Geneva Conventions of 1949, namely Article 99(1) of Convention III, Article 67 of Convention IV, and Article 75(4)(C) of Additional Protocol I.

5. **In the second place**, in addition to the non-compliance with the principle of legality, the requested amendment as to the act of forced marriage does not comply with the principle of specificity. In the context of the interpretation of the wording “*other inhumane acts*”, the ICTY Trial Chamber in *Prosecutor v. Kupreskic et al.* stated that “*there is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the specificity of criminal law. (...) The phrase ‘other inhumane acts’ was deliberately designed as a residual category (...) in interpreting the expression at issue, resort to the ejusdem generis rule of interpretation does not prove to be of great assistance (...).*”²

6. Instead, the Trial Chamber dwelt on less broad parameters for the interpretation of “*other inhumane acts*”, which could be identified in international standards on human rights, such as those laid down in the Universal Declaration of Human Rights of 1948, and the two United Nations Covenants of Human Rights of 1966. The Trial Chamber thus identified several basic rights appertaining to human beings, the infringement of which may amount, depending on the circumstances of the case, to a crime against humanity. It specifically mentioned, by way of example, serious forms of cruel or degrading treatment of persons belonging to a particular group, serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent, such as the ones enshrined by Article 7 of the ICCPR, Article 3 of the ECHR, Article 5 ACHR, and Article 1 of the Torture Convention. Similarly, it referred to forcible transfer of groups of civilians (Article 49 Geneva Convention IV), enforced prostitution and enforced disappearance of persons. In view of the Trial Chamber all these, and other similar acts, must be carried out in a systematic manner and on a large scale.

² *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Trial Chamber Judgment January 14, 2000, paras. 563 – 566.

7. It should be noted that the Trial Chamber made no reference to forced marriage whatsoever, and in itself such an act does not automatically merit the qualifications provided for by the Trial Chamber in the *Kupreskic* case.
8. In conclusion, the Defense holds the opinion that the amendment sought for concerning the act of forced marriage, should be denied as being contrary to the principle of specificity.
9. **In the third place**, in *Prosecutor v. Kovacevic*,³ the Appeals Chamber of the ICTY in its “Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998”, of 2 July 1998 held that a new indictment or a proposed amendment of the indictment with a new count, should be looked at in the context of the case, especially in relation of fairness to an accused. In this respect, the Appeals Chamber looked specifically at two elements:
- (i) As to whether there had been a failure to disclose the new charges to the accused *promptly* upon his arrest; and
 - (ii) As to whether there existed a specialty principle under customary international law, which would prohibit the prosecution of the accused on charges other than those on which he was previously arrested.
10. Both elements are not complied with in the instant case. It may be observed that the Accused was not initially arrested for a charge relating to forced marriage. Although the principle of speciality is not specifically addressed in the Statute nor in the Rules of Procedure and Evidence, it amounts to a principle under customary international law.⁴ The abovementioned second element applies especially when it concerns a new charge for an act which is not as such explicitly criminalized, which is the case with respect to the act of forced marriage (see Section II).
11. In this light, the proposed amendment does prejudice the rights of the Accused in terms of non-compliance with the principle of legality, as well as the mentioned

³ Case No. IT-97-24-A.

⁴ See Cassese, *supra* note 1, at 145 – 147.

specialty principle. Consequently, in this respect the Request cannot be deemed in the overall interest of justice, and should therefore be denied.

12. In any event, the application of Rule 50(B) does arise, in the event the Trial Chamber would grant the Request concerning the new charge of forced marriage.

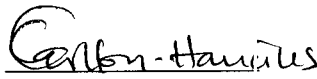
III OBJECTIONS TO PROPOSED MODIFICATIONS TO THE CONSOLIDATED INDICTMENT

13. In addition to the abovementioned arguments, the Defense submits the following objections against the proposed modifications to the Consolidated Indictment as formulated on p. 3 and 4 of the Prosecution Request under E – H:
 14. First, similar to the application of the principle of specificity in the abovementioned section of this Motion, it may be asserted that the proposed wording “*between about* (...)” in subparagraph E of the Request, amounts to vagueness from the perspective of the Accused and thus infringes the principle of specificity.
 15. Secondly, in para. G of its Request, the Prosecution asks for a modification in para. 68 of the Consolidated Indictment. The scope of mentioned time period is suggested to be “*Between about 14 February 1998 to January 2000*” instead of “*Between about 14 February 1998 and 30 June 1998,*” therefore an extension of one year and a half. This extension would seriously prejudices the rights of the Accused, and therefore the Defense respectfully requests the Trial Chamber to deny this modification. The Defense is moreover limited in its investigation possibilities, as the dates have now been set by the Trial Chamber for the filing of Pre-Trial Briefs by the Prosecution and the Defense on March 5 and 26 respectively in the Order for Filing Pre-Trial Briefs (Under Rules 54 and 73*bis*), filed on February 13, 2004. In this light, the proposed amendment seems also untimely.
 16. Therefore, the requested modifications under subparagraphs E and G of the Request should be denied.

IV CONCLUSION

17. In view of these arguments, the Defense holds that the proposed amendment as the the act of 'forced marriage' does prejudice the rights of the Accused, namely the fundamental principle both of legality and specificity.
18. The rights of the Accused are moreover prejudiced with regard to the proposed modifications under paras. E and G of the Request. Accordingly, this Request may not be considered in the overall interest of justice.
19. Especially considering the limited time provided by the Trial Chamber for filing the Pre-Trial Briefs, the Defense is limited in its time to investigate additional charges and extensions thereof.
20. The Defense respectfully prays the Trial Chamber to deny the Prosecution's Request, more specifically to deny:
- (i) the Prosecution leave to amend the Indictment with respect to the act of forced marriage, as amended in the Amended Indictment attached to the Request as Annex I;
 - (ii) the Prosecution to make the modifications as mentioned under paras. E – G of the Request;
 - (iii) the Prosecution's request to issue an order approving the Amended Indictment.

Respectfully submitted,
Done at this 17th day of February, 2004

P.P. 
Geert-Jan Alexander Knoop
Lead Counsel