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SCSL-04-15-T
(26832 - 26858)

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

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

Registrar: Mr. Herman von Hebel

Date filed: 30 May 2008

THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC
PROSECUTION RESPONSE TO SESAY APPLICATION FOR NOTICE TO BE TAKEN OF ADJUDICATED FACTS PURSUANT TO RULE 94(B)

Office of the Prosecutor:
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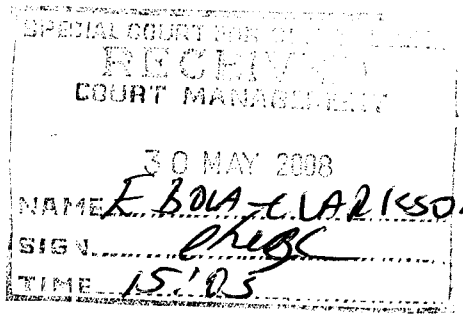

I. INTRODUCTION

1. On 23 May 2008, the Accused Sesay filed an application for notice to be taken of adjudicated facts pursuant to Rule 94(B) ("**Application**").[1] Annex A lists statements attributed to the *Prosecutor v. Brima et al* Trial Judgement of 21 June 2007[2] ("***Brima* Trial Judgement**"), for which the Application asks that notice be taken of adjudicated facts, Annex B lists statements attributed to the *Prosecutor v. Fofana et al* Trial Judgement of 2 August 2007[3] ("***Fofana* Trial Judgement**"), for which the Application asks that notice be taken of adjudicated facts.
2. The Appeal Chamber delivered its judgement in *Prosecutor v. Brima et al* on 22 February 2008,[4] and the appeal judgement in *Prosecutor v. Fofana et al*, was rendered on 28 May 2008.[5] The Trial Chamber ordered that the Accused Sesay close his case by 13 March 2008.[6]

II. RULE 94(B)

3. Rule 94(B) gives the Trial Chamber the discretion to take judicial notice of adjudicated facts or documentary evidence from other proceedings. The discretionary nature of Rule 94(B) is different from the mandatory nature of Rule 94(A).[7] The Rule states:

> (A) A Chamber shall not require proof facts of common knowledge but shall take judicial knowledge thereof.
>
> (B) At the request of a party or its own motion, a Chamber, after hearing the parties, may decided to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Special Court relating to the matter at issue in the current proceedings. [underlining added]

4. Unlike facts of common knowledge within the meaning of Rule 94(A), an adjudicated

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[1] *Prosecutor v. Sesay et al,* SCSL-04-15-T-1144, "Public Sesay Defence Application for Notice to be Taken of Adjudicated Facts Pursuant to Rule 94(B)," 23 May 2008.
[2] *Prosecutor v. Brima et al*, SCSL-04-16-T-613, "Judgement," Trial Chamber, 21 June 2007.
[3] *Prosecutor v. Fofana et al,* SCSL-04-14-T-785, "Judgement," Trial Chamber, 2 August 2007.
[4] *Prosecutor v. Brima et al,* SCSL-04-16-A-675, "Judgement," Appeals Chamber, 22 February.
[5] *Prosecutor v. Fofana et al,* SCSL-04-14-829, "Judgement," Appeals Chamber 28, May 2008.
[6] *Prosecutor v. Sesay et al,* SCSL-04-15-T-1031, "Written Decision on Sesay Defence Application for a Week's Adjournment – Insufficient Resources in Violation of 17(4)(B) of the Statute of the Special Court," 5 March 2008, p. 18.
[7] *Prosecutor v. Popović et al,* IT-05-88-T p. 6261, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts," 26 September 2006, ("***Popović"***), para. 3; *Prosecutor v. Karemera et al,* ICTR-98-44-R94, Appeals Chamber "Decision on Prosecution's Interlocutory Appeal of Decision on Judicial Notice," 16 June 2006, ("***Karemera***"), para. 41.

fact under Rule 94(B) may be challenged at trial. Rule 94(B) creates a presumption, but a party is entitled to call evidence to rebut the presumption.[8] In *Prosecutor v. Milošević* the ICTY Trial Chamber held:

> According to the Appeals Chamber, by taking judicial notice of an adjudicated fact, the Trial Chamber establishes a presumption of the accuracy of that fact, which therefore does not have to be proved again at trial, but which can be challenged at trial, i.e. a rebuttable presumption.[9]

5. The same view was expressed by the ICTR Appeals Chamber in *Prosecutor v. Karemera:*

> For this reason, they cannot simply be accepted, by mere virtue of their acceptance in the first proceeding, as conclusive in proceedings involving different parties who have not had the chance to contest them.
>
> ....
>
> In the case of judicial notice under Rule 94(B), the effect is only to relieve the Prosecution of its initial burden to produce evidence on the point; the defence may then put the point in to question by introducing reliable and credible evidence to the contrary.[10]

6. The Trial Chamber in *Prosecutor v. Krajišnik* observed that the facts contemplated in Rule 94(B) are "substantially different in character from the facts contemplated in Rule 94(A)".[11] While judicial notice of "facts of common knowledge" under Rule 94(A) "normally implies that such facts *cannot* be challenged during trial", facts under Rule 94(B) are only facts for which the Chamber establishes a "well-founded presumption" of their accuracy and "therefore does not have to be proven at trial –*unless* the other party brings out new evidence and successfully challenges and disproves the fact at trial".[12] In other words, the Trial Chamber held that "the procedural legal impact of taking judicial notice of an adjudicated fact is *not* that the fact cannot be challenged or refuted at trial,

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[8] *Prosecutor v. Prlić et al,* IT-04-74-PT, "Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)," 14 March 2006, ("***Prlić***"), para. 10; *Prosecutor v. Milošević,* IT-02-54-T, "Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts," 16 December 2003, ("***Milošević***"), para. 19; *Karemera*, para. 40.

[9] *Milošević,* para. 5 (footnotes omitted).

[10] *Karemera* , paras 40 and 42.

[11] *Prosecutor v. Krajišnik,* IT-00-30-PT, "Decision on the Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis," 28 February 2003, ("***Krajišnik***"), para. 16.

[12] *Krajišnik*, para. 16.

but rather that the *burden of proof to disqualify the fact is shifted* to the disputing party".[13]

7. The ICTY Trial Chamber then held that, "[i]f, during a trial, a party wishes to dispute an adjudicated fact of which the Trial Chamber has taken judicial notice, accordingly, that party must then bring out evidence in support of its contest and request the Chamber to entertain the challenge". "If the Chamber accepts the challenge, the other party will be provided with an opportunity to respond within a short time frame set out by the Chamber and the Chamber will then decide on the matter".[14]
8. All of the decisions reviewed by the Prosecution show that applications pursuant to Rule 94(B) were filed during the party's case, and in the case of Prosecution applications, they were filed prior to the commencement of the trial.[15] The logic for this is obvious. One is not in a position to rebut anything if your case has closed and the case of the opposing party has closed its case. All that can be done in such instances is to apply to call rebuttal evidence. This would be contrary to a purpose of Rule 94(B), to facilitate judicial economy in proceedings.
9. The ICTR adopted its Rule 94(B) at its Ninth Plenary Session on 3 November 2000. That provision was discussed at length in *Prosecutor v. Ntakirutimana*, where a Prosecution motion was denied, and the Trial Chamber made the following findings:

> 25. According to Rule 94(B) a Chamber may take judicial notice of "adjudicated facts" and of "documentary evidence from other proceedings of the Tribunal". In the present case the Prosecution's request refers only to the former. Under Rule 94(A) judicial notice shall be taken of "facts of common knowledge". It is the Chamber's view that "facts of common knowledge" and "adjudicated facts" constitute different, albeit possibly overlapping, categories: a fact of common knowledge is not necessarily an adjudicated fact, and vice versa.

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[13] *Krajišnik*, para. 16.
[14] *Krajišnik*, para. 17.
[15] *Prosecutor v. Popović et al*, IT-05-88-T p. 6261, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts," 26 September 2006; *Prosecutor v. Karemera et al*, ICTR-98-44-AR73(C), "Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice," 16 June 2006; *Prosecutor v. Milošević*, IT-02-54-T, "Final Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts," 16 December 2003; *Prosecutor v. Prlić et al*, IT-04-74-PT, "Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)," 14 March 2006; *Prosecutor v. Krajišnik*, IT-00-30-PT, "Decision on the Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92bis," 28 February 2003; *Prosecutor v. Delić*, IT-04-83-PT, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts", 9 July 2007.

26. It follows from Rule 94(B) that the facts proposed for notice must have been "adjudicated" in other proceedings of this Tribunal. The Chamber is of the view that this reference to previous findings of the ICTR does not include judgements based on guilty pleas, or admissions voluntarily made by an accused during the proceedings. Such instances, which do not call for the same scrutiny of facts by a Chamber as in a trial situation where the Prosecutor has the usual burden of proof, are not proper sources of judicial notice. Consequently, the Chamber will not take account of facts allegedly adjudicated in the *Kambanda* and the *Serushago* judgements, as urged by the Prosecution. As for the *Musema* judgement, the Chamber will not take judicial notice of admissions by the accused during the trial. Moreover, it notes that in a decision in the *Kupreskic* case, the Appeals Chamber observed that only facts in a judgement, from which there has been no appeal, or as to which any appellate proceedings have concluded, can truly be deemed "adjudicated facts" within the meaning of Rule 94(B).

27. Rule 94 (B) also requires that the proposed adjudicated facts must "relate" to matters at issue in the current proceedings. This means that matters which have only an indirect or remote bearing on the present case should not be the subject of judicial notice. That would not serve the main purpose of such notice, which is to ensure judicial economy (see para. 28).

28. If the above-mentioned conditions are fulfilled, the Chamber "may" take judicial notice. Unlike Rule 94(A), litra (B) therefore is discretionary. It is for the Chamber to decide whether justice is best served by its taking judicial notice of adjudicated facts. In this connection, the Chamber recalls that the doctrine of judicial notice serves two purposes, judicial economy and consistency of case law. These aims must be balanced against the fundamental right of an accused to a fair trial. Reference is made to Article 20 of the Statute. The Chamber agrees with the *Simic* decision, in which an ICTY Trial Chamber, in relation to a motion pursuant to Rules 94(A) and (B), stated that "a balance should be struck between judicial economy and the right of the accused to a fair trial". Similar statements have been made by ICTR and ICTY Chambers under Rule 94 (A). The Chamber endorses previous case law of the ICTR which has emphasised that the discretion to take judicial notice must not be exercised in a way that may result in prejudice to the accused.

29. In striking this balance, the Chamber will avoid taking judicial notice of facts that are the subject of reasonable dispute. Such matters should not be settled by judicial notice, but should be determined on

> the merits after the parties have had the opportunity to submit evidence and arguments.
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> 30. Moreover, the Chamber is not inclined to take judicial notice of legal characterisations or legal conclusions based on interpretation of facts. This is consistent with the position adopted by other Trial Chambers in decisions on judicial notice, such as the *Simic* and the *Sikirica* decisions. The Chamber's apprehension in relation to judicial notice of such matters would be alleviated in the event of clear guidance from the Appeals Chamber.
>
> 31. In its assessment the Chamber will also consider whether taking judicial notice would significantly assist judicial economy. The Chamber observes that in the present case, the Prosecution's case rested after 27 trial days. The witnesses for the Defence will be heard in the period from 14 January to 15 February 2002. Consequently, at this stage of the proceedings, the Chamber is not inclined to view judicial notice as significantly influencing judicial economy.[16]

III. SUBMISSIONS ON THE LAW

10. No judicial economy is attained through the present application. Second, the application is contrary to the principles of a fair trial. An application that notice be taken of adjudicated facts seeks to have evidence before the Trial Chamber that the moving party deems to assist its case.[17] It is further evidence that may be relied on, and just as *viva voce* testimony is not permitted after a party closes its case, so too an application pursuant to Rule 94(B) should not be permitted because the opposing party is no longer in a position to contest that evidence.

11. In *Ntakirutimana* the Rule 94(B) motion was filed on 26 July 2001,[18] and the Prosecution case commenced on 18 September 2001.[19] In *Prosecutor v. Sikirica et al*, the Prosecution filed its Rule 94(B) motion at the beginning of the Prosecution case, and there the Trial Chamber dismissed the motion except for those facts agreed to by the parties. The Trial Chamber held:

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[16] *Prosecutor v. Ntakirutimana and Ntakirutimana,* Case No. ICTR-96-10 and ICTR-96-17-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts," 22 November 2001, paras. 25-31 (***"Ntakirutimana"***).

[17] *Popović*, para. 21.

[18] *Ntakirutimana*, p. 1.

[19] *Prosecutor v. Ntakirutimana and Ntakirutimana,* Case No. ICTR-96-10 and ICTR-96-17-T, "Judgement and Sentence," 21 February 2003, p. 1.

> **CONSIDERING** that the Trial Chamber can only take judicial notice of facts which are not the subject of reasonable dispute and that facts involving interpretation or legal characterisations of facts are not capable of admission under Rule 94,
> **CONSIDERING** that it is appropriate for the Trial Chamber to take judicial notice of facts which are agreed between the parties,
> **CONSIDERING** that, otherwise, the facts which are sought to be admitted by the Prosecution pursuant to Rule 94 (B) are mainly facts which can be characterised either as controversial, or involving legal conclusions or mixed findings of fact and law,
> **CONSIDERING** that the Prosecution also invites the Trial Chamber to draw legal conclusions from the facts sought to be admitted on the basis that this was done by another Trial Chamber of the International Tribunal,
> **CONSIDERING FURTHER** that this Trial Chamber is not bound by decisions of another Trial Chamber and that it is not the purpose of Rule 94 (B) to allow findings on contested matters of law at this stage of the proceedings, the purpose of Rule 94 (B) being to narrow the factual issues in dispute in the relevant proceedings,[20]

12. Other criteria that must be met before a court will take judicial notice of a purported adjudicated fact include: the fact must be relevant and pertinent to an issue in the proceedings;[21] the fact must be distinct, concrete and identifiable;[22] the fact as formulated in the application must not differ in any substantial way from the formulation in the original judgement;[23] the fact must not be unclear or misleading in the context in which it is placed in the motion;[24] the fact must be identified with adequate precision;[25] the fact must not contain characterizations of an essentially legal nature;[26] the fact must not be based on an agreement between the parties or on facts voluntarily admitted in a previous case;[27] the fact must not relate to the acts, conduct or mental state of the accused;[28] and

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[20] *Prosecutor v. Sikirica et al,* IT-95-8-PT,"Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts," 27 September 2000, Disposition.
[21] *Prosecutor v. Delić,* IT-04-83-PT, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts and Joint Motion Concerning Agreed Facts", 9 July 2007, para. 10 (ii) (***"Delić")***; *Popović*, para. 5.
[22] *Popović*, para. 6; *Delić*, para. 10 (ii).
[23] *Delić*, para. 10(vii); *Krajišnik*, para. 14; *Prlić*, para. 21; *Popović*, para. 7.
[24] *Popović*, para. 8.
[25] *Popović*, para. 9.
[26] *Prosecutor v. Milošević*, IT-98-29, "Decision on Interlocutory Appeals Against Trial Chamber's Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts", 26 June 2007, paras 19-22; *Popović*, para. 10.
[27] *Popović*, para. 11; *Delić,* para. 10(iv).
[28] *Karemera*, para. 51; *Popović*, para. 12; *Delić,* para. 10(vi).

the fact must not be subject to pending appeal.[29]

13. The result in *Popović* was that the Trial Chamber exercised its discretion not to take notice of a number of the Prosecution's proposed adjudicated facts:

> The principle of judicial economy is more likely to be frustrated in this manner where the judicially noticed adjudicated facts are unduly broad, vague, tendentious, or conclusory. Moreover, the Trial Chamber has also had regard to whether the volume or type of evidence the Accused can be expected to produce in rebuttal may place such a significant burden on them that it jeopardizes their right to a fair trial.[30]

14. The *Popović* Trial Chamber said of the proposed adjudicated facts that:

a) they were inadequate or unclear in the original judgement, even though the proposed fact may have been formulated in the same way as in the original judgement;[31]

b) the proposed adjudicated facts from one trial judgement were fundamentally inconsistent with a second trial judgement;[32]

c) due to a lack of specificity in the original judgement the Trial Chamber was unable to readily discern whether the fact referred to the acts, conduct or mental state of one of the accused;[33] and

d) "...some of the proposed adjudicated facts go to issues which are at the core of this case. In balancing judicial economy with the Accused's right to a fair and public trial, the Trial Chamber is of the view that a number of these facts should be excluded in the interests of justice."[34]

15. In *Ntakirutimana* the Trial Chamber held that it would not take judicial notice of facts that are the subject of reasonable dispute, and that such matters should not be settled by judicial notice.[35] Similarly, the Trial Chamber in *Prosecutor v. Milošević* held that it was proper to consider the tendentiousness of the proposed adjudicated facts in a Rule 94(B) application.[36] The *Milošević* Trial Chamber also stated:

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[29] *Prosecutor v. Bizimungu,* ICTR-99-50-T, "Decision on Bicamumpaka's Motion for Judicial Notice," 11 February 2004, paras 7-8; *Popović*, para. 14; *Krajišnik* para. 14; *Prlić* paras 12, 15, *Delić*, para. 10(v).
[30] *Popović*, para. 16.
[31] *Popović*, para. 17.
[32] *Popović*, para. 17.
[33] *Popović*, para. 18.
[34] *Popović*, para. 19 (footnote omitted).
[35] *Ntakirutimana*, para. 29.
[36] *Milošević*, para. 10.

> 9. Furthermore, as we said in our Initial Decision, the wholesale admission of facts taken from a judgement based on an assessment of evidence by another Trial Chamber is not an appropriate exercise of the Trial Chamber's discretion under Rule 94 (B), and this is a matter the Trial Chamber will take into consideration in determining the admissibility of the facts.
>
> ....
>
> 11. An additional issue concerns the basis for the admission of adjudicated facts. As the Appeals Chamber acknowledges in its Decision, the principle behind the exercise by the Chamber of its discretion to admit facts pursuant to Rule 94 (B) is judicial economy. It is clear, however, that the admission on a wholesale basis of the 332 remaining facts the Prosecution seeks now to have admitted, may have the contrary effect on the proceedings. This is because, as the Appeals Chamber states, the admission of a fact only creates a presumption as to the accuracy of that fact, which may be rebutted by the Accused by way of evidence. Not only does this raise the possibility of placing a heavy burden upon the Accused in the preparation and conduct of his case, but attempts by an accused to rebut these facts may absorb considerable time and resources during the course of the proceedings, thereby not promoting judicial economy or expeditiousness.[37]

16. In the recent *Delić* case the Trial Chamber held that: "... the Trial Chamber always retains the right to withhold judicial notice of a fact even if it fulfils all the requirements above, when it believes that such notice would not serve the interests of justice.[38]

17. The adjudicated facts proposed by the Defence are not relevant to issues in the present case, since they largely refer to findings which concern the armed groups AFRC and CDF, their command structure and positions, acts or omissions of the convicted persons in *Prosecutor v. Fofana et al* and in *Prosecutor v Brima et al.* Different evidence was heard in the various cases and the principle of orality is the general evidentiary rule adopted by the Trial Chamber from the outset.

18. The guarantee of a fair trial and the principle of equality of arms apply to the Defence and the Prosecution equally. The ICTY Appeals Chamber said in *Aleksovski*:

> This application of the concept of a fair trial in favour of both parties is understandable because the Prosecution acts on behalf of and in the interests of the community, including the interests of the victims of the offence charged (in cases before the Tribunal the Prosecutor acts on behalf of the international community). This principle of equality does

[37] *Milošević*, paras 9 and 11 (footnotes omitted).
[38] *Delić*, para. 11.

not affect the fundamental protections given by the general law or Statute to the accused, and the trial proceeds against the background of those fundamental protections. Seen in this way, it is difficult to see how a trial could ever be considered to be fair where the accused is favoured at the expense of the Prosecution beyond a strict compliance with those fundamental protections.[39]

IV. CONCLUSION

19. The Application was brought two months after the First Accused closed his case, and after the Second Accused has closed his case, save for the completion of the cross-examination of one of the Second Accused's witnesses. By the time the pleadings close for this Application it is likely that several of the Third Accused's witnesses will have testified, and the Third Accused may well have closed his case (estimated at mid-June 2008) by the time a decision is rendered.

20. A Rule 94(B) application must be filed during the party's case so that the proposed adjudicated facts can, at a minimum, be put to the witnesses of the moving party. It also has to be done at such a time that judicial economy is actually served. Filing a Rule 94(B) motion after the witnesses have completed would be the opposite of judicial economy. It seeks to admit evidence which the party chose not to call during its case and then leads to the calling of rebuttal witnesses. Rule 94(B) is a discretionary remedy. It is for the Trial Chamber to determine whether, in the circumstances, it should exercise its discretion to take notice of the proposed adjudicated facts. The circumstances of the Application weigh heavily against the Trial Chamber exercising its discretion to take notice of the proposed adjudicated facts.

Filed in Freetown, on 30 May 2008

For the Prosecution,

P. H. Harrison

Pete Harrison

[39] *Prosecutor v. Aleksovski*, IT-95-14/1, "Decision on Prosecutor's Appeal on Admissibility of Evidence," 16 February 1999, para. 25 (footnote omitted); Also: *Prosecutor v. Delalić et al*, IT-96-21-T, "Decision on the Prosecution's Motion for an Order Requiring Advance Disclosure of Witnesses by the Defence," 4 February 1998, para. 49.

List of Authorities

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Prosecutor v. Ntakirutimana and Ntakirutimana, Case No. ICTR-96-10 and ICTR-96-17-T, "Decision on the Prosecutor's Motion for Judicial Notice of Adjudicated Facts," 22 November

2001. http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/decisions/221101.htm

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Prosecutor v. Popović et al, IT-05-88-T p. 6261, "Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts," 26 September 2006. http://www.un.org/icty/popovic88/trialc/decision-e/060926-2.pdf

Prosecutor v. Prlić et al, IT-04-74-PT, "Decision on Motion for Judicial Notice of Adjudicated Facts Pursuant to Rule 94(B)," 14 March 2006. http://www.un.org/icty/prlic/trialc/decision-e/060314.htm

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Statute and Rules

Statute for the Special Court of Sierra Leone, Article I, para. 1.

Rules of Procedure and Evidence, as amended, Rule 92*bis* and Rule 92*ter*.

International Criminal Tribunal for Rwanda
Trial Chamber II

Before: Presiding Judge Asoka de Zoysa Gunawardana, Judge Khalida Rachid Khan, Judge Lee Gacuiga Muthoga

Registrar: Adama Dieng

Date: 11 February 2004

THE PROSECUTOR
v.

CASIMIR BIZIMUNGU JUSTIN MUGENZI JEROME BICAMUMPAKA PROSPER MUGIRANEZA

DECISION ON **BICAMUMPAKA'S MOTION** FOR **JUDICIAL NOTICE**

ICTR-99-50-T

Office of the Prosecutor: Paul Ng'arua, Ibukunolu Babajide, Elvis Bazawule, George Mugwanya

Counsel for the Defence: Michelyne C. St. Laurent for Casimir Bizimungu, Howard Morrison and Ben Gumpert for Justin Mugenzi, Pierre Gaudreau and Michel Croteau for Jerome Bicamumpaka, Tom Moran and Christian Gauthier for Prosper Mugiraneza

Original: English

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

SITTING as Trial Chamber II, composed of Judge Asoka de Zoysa Gunawardana, Presiding, Judge Khalida Rachid Khan and Judge Lee Gacuiga Muthoga (the "Trial Chamber");

BEING SEIZED of "Motion of Defendant Bicamumpaka for Judicial Notice, Rule 94 of the Rules of Procedure and Evidence", filed on 20 January 2004, (the "Motion");

HAVING RECEIVED the "Prosecutor's Response to Motion of Defendant Bicamumpaka For Judicial Notice" filed on 26 January 2004;

CONSIDERING the matter pursuant to Rule 94(B) of the Rules of Procedure and Evidence (the "Rules"), solely on the basis of the written submissions of the Parties.

ARGUMENTS OF THE PARTIES

26845

Defence Submissions

1. The Defence seeks that the date on which Juvénal Kajelijeli was appointed bourgmestre of Mukingo commune, that is 26 June 1994, be taken judicial notice of as an adjudicated fact by the Trial Chamber. According to the Defence, the fact was adjudicated by Trial Chamber II in paragraphs 6 and 268 of the Judgment in Prosecutor v. Kajelijeli of 1 December 2003.

Prosecution Submissions

2. The Prosecutor submits that the exact date on which Juvénal Kajelijeli was appointed bourgmestre of Mukingo commune cannot be judicially noticed as requested by the Defence because the fact has not acquired the status of common knowledge. Consequently, the Prosecutor prays the Chamber to dismiss the Defence Motion.

DELIBERATIONS

3. Rule 94 (B) of the Rules reads as follows:

(B) At the request of a party or proprio motu, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings.

4. Rule 94 (B) does not delimit the nature or scope of "adjudicated facts". Nevertheless, "adjudicated facts" has been defined as including within its ambit those facts which have been finally determined in a proceeding before the Tribunal. The Trial Chamber may at the request of a Party or proprio motu take judicial notice of any facts or documentary evidence which has been adjudicated upon in proceedings before this Tribunal, if such facts or documentary evidence relate to the matter at issue in the proceedings before it.

5. The Trial Chamber finds that an adjudicated fact is one upon which it has deliberated, and thereupon made a finding in proceedings that are final, in that no appeal has been instituted therefrom or if instituted, the facts have been upheld.

6. The Trial Chamber recalls that the Appeals Chamber has considered that "a request must specifically point out the paragraph s) or parts of the judgement of which it wishes judicial notice to be taken, and refer to facts, as found by the trial chamber". In this case, the Trial Chamber notes that the Defence has set out the facts and the paragraphs of the Judgment of which it wishes this Chamber to take judicial notice of under the Rule 94 (B).

7. The Trial Chamber notes that the fact sought to be judicially noticed was adjudicated in paragraphs 6 and 268 of the Judgment in Prosecutor v. Kajelijeli of 1 December 2003. Nevertheless, the Chamber does not deem it proper to consider as an adjudicated fact an issue which is yet to be settled by way of a possible review

by the Appeals Chamber, or on which the right of appeal has not yet been exhausted. The Chamber notes that "such decision must be conclusive in that it is not under challenge before the Appeals Chamber or, if challenged, the Appeals Chamber upheld it".

8. The Trial Chamber notes that the Judgment in Prosecutor v. Kajelijeli is still the subject of appeal by the Accused as well as by the Prosecutor . For that reason on the facts contained in the Kajelijeli Judgement are not "adjudicated facts" within the meaning of the Statute. Therefore the Chamber is of the view that, this motion should be dismissed because the finality required has not been reached on the fact that is required to be taken judicial notice.

FOR THE ABOVE REASONS, THE TRIBUNAL:

DENIES the Motion in its entirety.

Arusha, 11 February 2004.

Asoka de Zoysa Gunawardana, Presiding Judge

Khalida Rachid Khan, Judge

Lee Gacuiga Muthoga, Judge

Seal of the Tribunal

END OF DOCUMENT

26847

International Criminal Tribunal for the Former Yugoslavia
IN THE TRIAL CHAMBER
Decision
Trial Chamber
Decision
PROSECUTOR
v.
ZEJNIL **DELALIC**
ZDRAVKO MUCIC also known as 'PAVO'
HAZIM DELIC
ESAD LANDZO also known as 'ZENGA'
Decision of: 4 February 1998

DECISION ON THE **PROSECUTION'S MOTION** FOR AN **ORDER REQUIRING ADVANCE DISCLOSURE** OF **WITNESSES** BY THE **DEFENCE**

DECISION ON THE **PROSECUTION'S MOTION** FOR AN **ORDER REQUIRING ADVANCE DISCLOSURE** OF **WITNESSES** BY THE **DEFENCE**

The Office of the Prosecutor: Mr. Grant Niemann, Ms. Teresa McHenry, Mr. Giuliano Turone

Counsel for the Accused: Ms.Edina Residovic, Mr. Ekrem Galijatovic, Mr. Eugene O'Sullivan, for Zejnil **Delalic**, Mr. Zeljko Olujic, Mr. Michael Greaves, for Zdravko Mucic, Mr. Salih Karabdic, Mr. Thomas Moran, for Hazim Delic, Mr. John Ackerman, Ms. Cynthia McMurrey, for Esad Landzo

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

Registrar:Mrs. Dorothee de Sampayo Garrido-Nijgh

I. INTRODUCTION

Pending before this Trial Chamber 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 ('International Tribunal') is a motion for an order requiring advance disclosure of witnesses by the Defence, filed 10 December 1997, by the Office of the Prosecutor ('Prosecution'), (Official Record at Registry Page ('RP') D5364 - D5368), ('Motion').

On 12 January 1998 at a hearing of this Trial Chamber ('Hearing'), the Prosecution and Counsel for each of the accused ('Defence') made oral submissions whilst speaking to the Motion. At the conclusion of the Hearing the Trial Chamber issued an oral decision granting the Motion and reserved its reasons to a written decision, to be rendered at a later date.

THE TRIAL CHAMBER, HAVING CONSIDERED the Motion and the oral submissions of the Prosecution and the Defence at the Hearing,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

A. Applicable Provisions

1. The following provisions of the Statute of the International Tribunal ('Statute') and the Rules of Procedure and Evidence of the International Tribunal ('Rules') are relevant to the ensuing discussion:

Article 20

Commencement and conduct of trial proceedings

1. 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.

Article 21

Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

Rule 54

General Rule

At the request of either party or proprio motu, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 67

Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

(ii) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

B. Pleadings

1. The Prosecution

2. The Prosecution concedes and accepts that there is no obligation under the Rules on the part of the Defence, before the commencement of the trial to notify the Prosecution of the witnesses it intends to call at the trial. There is, however, a mandatory requirement to do so where the Defence relies on the defences prescribed in Sub-rules 67(A)(i) and (ii).

3. The Prosecution submits that Sub-rule 67(A)(ii) is the only Rule governing exchange of witness lists and that it relates only to the pre-trial phase. The Rule is, therefore, not applicable in this context. The circumstances where trial has commenced are not covered by Sub-rule 67(A). In the absence of any specific rule on the issue, the Trial Chamber may make an order under Rule 54. This is not a circumvention of Rule 67.

4. The Prosecution argues that Rule 54 can be resorted to in situations other than that in Sub-rule 67(A)(ii). The Trial Chamber had already exercised it powers under Rule 54 in the Scheduling Order (Prosecutor v. **Delalic** et al, IT-96-21-PT, 25 January 1997) (RP D2674-2675) ('Scheduling Order'), and the Decision on the Applications filed by the Defence for the Accused Zejnil **Delalic** and Esad Landzo on 14 February 1997 and 18 February 1997 Respectively (Prosecutor v. **Delalic** et al, IT-96-21-PT, 21 February 1997) (RP D2776-2784) ('Decision of 21 February 1997'), where the Defence was given a list of the Prosecution witnesses it intended to call. In the

Order of 28 November 1997 (Prosecutor v. Slavko Dokmanovic, IT-95-13a-PT, 28 November 1997) (RP D1317- 1319) ('Dokmanovic Order') the Trial Chamber, pursuant to Article 20 paragraph 1, and Article 21 paragraph 4(c), of the Statue, decided that the Defence shall provide written statements of contested allegations together with the grounds and also to provide copies of all witness statements.

5. The Prosecution, relying on Article 20 of the Statute, submits that to ensure the fairness of the trial between the parties as required, the Prosecution should be able to cross-examine the defence witnesses effectively. This is only possible where advance notice of these witnesses has been given to the Prosecutor before the witnesses are due to testify. This will obviate seeking adjournments after the testimony of such witnesses, and prevent consequent delays and accompanying inconvenience.

6. The Prosecution accordingly submits that in the circumstances it is appropriate for the Trial Chamber to exercise its authority under Rule 54 to ensure continuity of the trial in a fair and expeditious manner.

7. The Prosecution suggests that at the close of the Prosecution case, each accused provide its list of anticipated witnesses, at least seven days before the beginning of each two week court session. As far as possible each accused should indicate the order in which they intend to call their witnesses.

8. In reply to the submission of the Defence that an order had already been made under Sub-rule 67(A) and that the Trial Chamber accordingly lacked the requisite jurisdiction, the Prosecution submits that the Decision of 21 February 1997, was in a pre-trial context and was an interlocutory order. Interlocutory orders deal with the situation at the given moment and within the confines of the case. The situation in this case is different. Rule 67 is concerned with a specific circumstance. An Order made under Rule 54 will not in any way seek to override the operation of Rule 67.

9. Finally, the Prosecution submits that the Motion has nothing to do with a fair trial. It is aimed at the orderly conduct of proceedings. The Prosecution contends that the application has nothing to do with assisting the Prosecution to discharge its burden in the case.

2. The Defence

10. Mr. Greaves, Counsel for Zdravko Mucic, the second accused, replied on behalf of the Defence. The other Defence counsel adopted his submissions and associated themselves with his arguments with minor contributions and without contradicting the argument in any material particular.

11. Mr. Greaves submitted that in view of the Decision of 21 February 1997, the Trial Chamber is functus officio and lacked the jurisdiction to decide the matter, having previously decided the issue.

12. Mr. Greaves referred to Rule 67 as dealing with reciprocal disclosure. He pointed out that Sub-rules 67(A)(i) and (ii) and Sub-rule 67(C) are relevant. It was pointed out that the only elements of reciprocal disclosure are those set out in this Rule. He added that nowhere in the Rules is there any requirement authorising the Trial Chamber to require the Defence to disclose the names and addresses of witnesses and witness statements to the Prosecution.

13. The only requirement under Rule 67 for the Defence to disclose its witnesses is under Sub-rules 67(A)(ii)(a) and (b). This is in respect of alibi or special defences. No other requirement was decided by the Rule makers as appropriate. It was submitted, that if it was intended by the Rules to require the filing of a list of Defence wit-

nesses, they would have expressly so provided.

14. It was submitted that the Rules are silent on the disclosure of the names of witnesses in other cases and that Rule 67 is a Rule of specific application, which cannot be circumvented by resort to Rule 54. Counsel rested on the opinion of the Trial Chamber in paragraphs 9 to 11, of the Decision of 21 February 1997.

15. Mr. Greaves disapproved of the Dokmanovic Order. He argued that the Trial Chamber lacked the power to make such an order.

16. Counsel referred to the difficulties the Prosecution may face in the absence of the exercise of such a power, and submits, that this is in the nature of the accusatory procedure where the burden is on the Prosecution to prove its case. There is no obligation on the Defence to assist the Prosecution. Counsel referred to the nature of the defence of alibi as an "ambush' defence.

17. Mrs. Residovic for the first Accused supported Mr. Greaves. She relied on Article 20 of the Statute and the concept of fair trial. It was submitted, that the requirements of the list of Prosecution witnesses is to enable adequate preparations of the Defence in accordance with Article 21 paragraph 4(b), of the Statute. There is no reciprocity in the requirement of the Defence assisting the Prosecution. Under the Rules there is no obligation on the Defence to provide a witness list to the Prosecution.

18. The provisions of Rule 67 is lex specialis in relation to Rule 54. Both are in the same section of the Rules. The Rules relate to pre-trial proceedings and cannot be extended to the trial stage.

C. Findings

19. The issue for determination in this application is one of a very narrow compass. It is whether the Trial Chamber has power under Article 20 paragraph 1, of the Statute and Rule 54 to make an order requiring the Defence to file with the Prosecution a list of witnesses it intends to use in the trial. The Defence, relying on Subrule 67(A)(ii) and Article 20 paragraph 1, and Article 21 paragraph 4(e), of the Statute contend that no such power exists. The Prosecution contends that there is such a jurisdiction; and that the Trial Chamber can make the order. The Trial Chamber is of the view that a resolution of this question requires construction of the applicable provisions of the Statute and Rules necessary to state the general legal environment within which these provisions operate before discussing the meaning of each of the provisions.

( ) General Considerations

20. The general philosophy of the criminal procedure of the International Tribunal aims at maintaining a balance between the accusatory procedure of the common law systems and the inquisitorial procedure of the civil law systems; whilst at the same time ensuring the doing of justice. There is little doubt about the predominating influence of the common law system and the impact of the accusatory procedure in the majority of the Articles of the Statute and the Rules. Notwithstanding this, both the Statute and the Rules adhere strictly to the elementary principles of justice, and the protection of the essential rights of the accused.

21. The Trial Chamber, by virtue of Article 20 of the Statute, has a tripartite mandate. It is enjoined to ensure a fair and expeditious trial and that the proceedings before it are conducted in accordance with the Rules and having regard for the protection of victims and witnesses. This is why the Trial Chamber is not only concerned with according full respect for the rights of the accused, it is also required, in the conduct of the trial to have due regard for the protection for victims and witnesses.

22. The rights of the accused have been clearly set out in Article 21 of the Statute. This includes; the equality of all persons before the International Tribunal pursuant to Article 21 paragraph 1, of the Statute, the right to a fair and public hearing pursuant to Article 21 paragraph 2, of the Statute and the presumption of innocence pursuant to Article 21 paragraph 3, of the Statute. Article 21 paragraph 4(e) of the Statute, which is pari materia with Article 14 paragraph (3)(e), of the International Covenant on Civil and Political Rights and Article 6 paragraph (3)(d), of the European Convention of Human Rights, prescribes the minimum guarantees to which the accused shall be entitled in full equality. Of the seven rights of the accused, contained in Article 21, paragraphs (4)(a) to (4)(g) of the Statute, we are concerned in this decision only with the fifth which states that:

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(Emphasis added.)

The Trial Chamber is of the view that the object of Article 21 paragraph (4)(e), of the Statute is to ensure, except as otherwise provided, procedural equality between the accused and the accuser, namely the Prosecution. (See Neuwrister v. Austria (1979 - 80) I EHRR 1991). The Trial Chamber will now proceed to discuss the scope of Rule 67 which involves the power of the Trial Chamber to order advance disclosure of witnesses.

23. The power of the Trial Chamber to order advance disclosure of witnesses is contained in Sub-rules 67(A) and 67(B). The subtitle 'Reciprocal Disclosure" gives a lead to the interpretation of the Rule. It is important and instructive to note the introductory sentence of Sub-rule 67(A) which undoubtedly limits the scope of the application of the Rule to any time prior to commencement of trial. It requires the Prosecution to notify the Defence of the names of witnesses it intends to call in proof of the guilt of the accused and in rebuttal of any Defence plea of alibi or special defence of which it has received notice in accordance with Sub-rules 67(A)(ii)(a) or (b). Such notification of the witnesses, shall be as early as practicable and in any event prior to the commencement of the trial. Concisely stated, the notice of witnesses required by Sub-rule 67(A) is, by the use of the word 'shall', mandatory and is to be served on the Defence prior to the commencement of the trial. It is, as Part 4 of the Rules indicates, a pre-trial requirement.

24. The Trial Chamber is of the opinion that Sub-rule 67(A)(i) is the procedural compliance with the mandatory requirement of Article 21 paragraph 4(b), of the Statute which guarantees the accused 'to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing'. Trial Chamber 1 adopted this view in its Decision on the Production of Discovery Materials (Prosecutor v. Tihomir Blaskic, IT-95-4-PT, 27 January 1997) (RP D 1-25/ 3177-3201) ('Decision on Discovery Materials of 27 January 1997') where Sub-rule 67(A)(i) was construed. It was there said:

The Trial Chamber notes that Sub-rule 67(A) does not refer to an official list. However, by stipulating that the Prosecution has the obligation to inform the Defence of the names of the prosecution witnesses 'as early as reasonably practicable, and in any event prior to the commencement of the trial', the Rules support the idea that all the names of the prosecution witnesses must be disclosed at the same time in a comprehensive document which thus permits the Defence to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations.

(Emphasis added.)

The Trial Chamber accordingly, accepts the submissions of the Prosecution that prior to the commencement of trial there is no obligation on the Defence under the Rules to notify the Prosecution of the witnesses it intends to call, other than its compliance with Sub-rules 67(A)(ii) and (ii).

25. The Trial Chamber agrees with the submission of the Defence that Sub-rules 67(A)(i) and (ii) are concerned with reciprocal disclosure, and that these are the only elements of disclosure set out in the Rules. It is also conceded that nowhere in the Rules, except pursuant to Sub-rules 67(A)(ii)(a) and (b), is there any requirement authorising the Defence to disclose the names and addresses of witnesses to the Prosecution. The Trial Chamber is satisfied that Sub-rules 67(A) and (B) are self-sufficient with respect to pre-trial reciprocal disclosure; and are exhaustive of the applicable provisions.

26. A careful reading of Sub-rule 67(A)(i) discloses that the Prosecution is required to notify the Defence before the commencement of trial of the names of witnesses it intends to call at the trial. However, if the Defence intends to raise the defence of alibi or any special defence at the trial it shall so notify the Prosecution before the commencement of trial with the names and addresses of its witnesses, as the Prosecution's list of witnesses at the trial is expected to contain certain witnesses in rebuttal of alibi or any special defence raised by the Defence. The reciprocal disclosure in Sub-rules 67(A)(i) and (ii) clearly appear to be confined to pre-trial discovery, in respect of the defences in Sub-rules 67(A)(i) and (ii).

27. The Trial Chamber agrees with the contentions of the Defence that on the plain terms of Rule 67(A)(i), the Prosecution is only required to notify the Defence before the commencement of the trial, of the names of the witnesses it intends to call at the trial. The reciprocity of disclosure of witnesses in Sub-rule 67(A)(i) is tied to the defences in Sub-rules 67(A)(ii)(a) and (b). The literal construction of the plain words of Sub-rules 67(A)(i) and (ii) suggests that only the defences prescribed in Sub-rules 67(A)(i) and (ii) are involved in the reciprocal disclosure of the list of witnesses required in Sub-rule 67(A). This is by virtue of the maxim expressio unis est exclusio alterius, that is, the express mention of the defence of alibi, and special defences including diminished or lack of mental responsibility. Any other defence not expressly mentioned is excluded from the reciprocal obligation on the Defence to give to the Prosecution a list of witnesses. There is, therefore, no general requirement of reciprocal obligation on the Defence to give notice to the Prosecution of the witnesses it intends to call at trial. (See, Decision of 21 February 1997).

28. It is important to observe that the right of the Defence to testify in respect of alibi and special defences is not denied by the Rules because of the failure of the Defence to give notice under Sub-rules 67(A)(ii)(a) and (b). This is clearly brought out by Sub-rule 67(B).

29. Although there is no express provision requiring notification of witnesses subsequent to commencement of trial, the necessity for such notification may arise pursuant to Sub-rule 67(D), which provides 'SiCf either party discovers additional evidence or material which should have been produced earlier pursuant to the Rules, that party shall promptly notify the other party and the Trial Chamber of the existence of the additional evidence or material.' Thus, on discovery of additional evidence, the parties must notify each other of such evidence, including any necessary witness or witnesses.

(ii) Application under Article 20 paragraph 1, of the Statute and Rule 54

30. The Prosecution, relying on Article 20 of the Statute and the concept of fair trial, submits that in the interests

of a fair trial the Prosecution should be able to cross-examine Defence witnesses effectively. The Prosecution can only achieve this objective if given advance notice of these witnesses. This measure will obviate the need and avoid a delay from the Prosecution seeking an adjournment after each witness.

31. Sub-rule 67(A)(ii), which refers to the Defence giving its list of witnesses applies to the pre-trial phase. There is no provision, express or implied, requiring the Defence to give its list of witnesses at the pre-trial phase. In the absence of any specific Rule on the issue governing the trial phase, the Trial Chamber is entitled to rely on the general provision in Rule 54. This is not a circumvention of Rule 67. There can only be a circumvention of Rule 67 by Rule 54, if the requirement in Rule 67 is facilitated by an Order under Rule 54. Rule 67 does not prohibit the Defence giving its list of witnesses to the Prosecution during trial. It is a valid argument that it prohibits an order requiring the pre-trial filing of a Defence witnesses list outside its specific requirements. This follows from the maxim expressio unius est exclusio alterius. But it does not prohibit giving of Defence lists of witnesses at the commencement of the defence.

32. The contention of the Defence that this Trial Chamber, having earlier decided the issue involved in this application, is functus officio and cannot exercise appellate jurisdiction over its own decision, seems to the Trial Chamber to be demonstrably erroneous. What fell for decision in the Decision of 21 February 1997, is whether the Defence is under an obligation to notify the Prosecution of the names of its witnesses before the commencement of the trial reciprocal to the duty of the Prosecution to notify the accused of the names of the witnesses it intends to call at trial.

33. The Trial Chamber pointed out in that decision, that although there is no general reciprocal obligation on the Defence to give notice to the Prosecution of the witnesses it intends to call at trial, Sub-rule 67(A)(ii) however imposes such an obligation upon the Defence when it intends to offer a defence of alibi or any other special defence, including that of diminished or lack of mental responsibility. We still hold this opinion. The Trial Chamber has pointed out that Sub-rules 67(A) and (B) deal with pre-trial reciprocal disclosure and the construction of the provisions should be so confined. We agree with the submissions of the Defence that it is a Rule of specific application. There is no specific provision in the Rules imposing an obligation on the Defence to provide a list of witnesses during the trial.

34 A discussion in summary form of the decided case referred to by the Defence will be helpful. In the Decision on Discovery Materials of 27 January 1997, the Trial Chamber was concerned with the request of the Defence that the Prosecution produce the list of witnesses it intends to call at the trial. The Defence relied on the obligation imposed on the Prosecution by Rule 67, and contended that a Prosecution witness whose name did not appear on the list of witnesses filed by the Prosecution is not entitled to be heard at the trial. In its decision the Trial Chamber noted that the issue in contention concerned the notions of a list of witnesses and the punctus temporis of the disclosure of the list. It held that Sub-rule 67(A) did not refer to an official list but the idea that all the names of the Prosecution witnesses intended to be called at the trial, must be disclosed at the same time in a comprehensive document. The Rule stipulates that the Prosecution has the obligation to inform the Defence of the names of the Prosecution witnesses 'as early as reasonably practicable, and in any event prior to the commencement of the trial.' The Trial Chamber ordered that all names of the Prosecution witnesses shall be disclosed not later that 1 February 1997. It allowed for addition or supplements which shall be limited to any possible new developments in the investigations, and which must never result in the circumvention of the rights of the Defence.

35. In the Decision of 21 February 1997, the Defence argued that it is under no obligation to notify the Prosecu-

tion of the names of its witnesses, whilst by virtue of Sub-rule 67(A)(i), the Prosecution must notify the accused of the names of the witnesses that it intends to call at the trial. The Defence requested an amendment of the Scheduling Order such that only the Prosecution is obliged to provide a witness list to the Defence.

36. It is important in the discussion of the issue to set out the Scheduling Order sought to be amended by the Defence, which is as follows:

(1) both the Prosecution and the Defence shall file their pre-trial briefs by Monday 4 February 1997;

(2) the parties are to exchange list of witnesses they intend to call as soon as practicable and to file those lists with the Trial Chamber by Friday 7 March, 1997, stating the order in which the witnesses are to be called. The Prosecution shall indicate for each witness, to the extent possible, the counts to which each witness will testify and the estimated length of testimony.

37. It is obvious from the Orders that the issue between the parties related entirely to pre-trial transactions. It is to such transactions that the construction of Sub-rule 67(A) was directed. Hence the Trial Chamber, in interpreting the provision of Sub-rule 67(A) in the Decision of 21 February 1997, said:

10. The Trial Chamber accepts the submission of the Defence that under the Rules there is no general reciprocal obligation on the Defence to give notice to the Prosecution of the witnesses it intends to call at trial. Sub-rule 67 (A)(ii), however, imposes such an obligation upon the Defence when it intends to offer a defence of alibi or any other special defence, including that of diminished of lack of mental responsibility.

11. The Defence for the accused Zejnil **Delalic** has not given notice of its intent to offer any of the defences contemplated by Sub-rule 67(A)(ii). The Trial Chamber, therefore, accepts its submission that, at the present time, it is not obliged to provide a witness list to the Prosecution.

(Emphasis added.)

38. The Defence of Zejnil **Delalic** who had not relied on any such defences was held not obliged to provide a list of his witnesses to the Prosecution. On the other hand Esad Landzo, who had notified the Prosecution of lack of mental responsibility as well as limited physical disabilities was held obliged to notify the Prosecution of the names and addresses of witnesses upon which he intends to rely upon to establish defences of alibi and diminished or lack of mental responsibility.

39. In the Decision on Prosecution Motion for the Production of Defence Witness Statements (Prosecutor v. Dusko Tadic, IT-94-1-T, 27 November 1996) (RP D15324- 5376) ('Decision on Production of Witness Statements of 27 November 1996'), Sub-rule 67(A)(i) was similarly construed, relieving the Defence of any obligation to notify the Prosecution of the list of witnesses except where it pleads alibi or special defence under Sub-rules 67(A)(i) and (ii).

40. It has been contended that Rule 54 cannot be used to circumvent the provision of Sub-rules 67(A)(i) and (ii). Mr. Greaves has submitted that there is no provision in the Rules for filing a list of Defence witnesses, and if it was so intended it would have been provided for expressly as it was in the case of alibi and special defences. It was further argued that to require a list of defence witnesses is tantamount to making the Defence assist the Prosecution. It was further claimed that, to make such an Order would be inconsistent with the concept of fair trial and the presumption of innocence in Article 21 of the Statute. Mr. Greaves argued that there is no reciprocity in

the concept of fair trial between the Prosecution and the Defence.

(iii) Construction of Rule 54 vis-\-vis Rule 67

41. It is important to observe that Sub-rules 67(A)(i) and (ii) apart from being self-sufficient, are sui generis. The provision deals with a specific requirement which can only be satisfied by compliance with the provision therein. On the other hand Rule 54 contains a general power vested in the Trial Chamber to fill up lacuna in the procedural requirement. The power may be exercised at the request of either party. The words of this Rule are so plain as to require very little, if any, interpretation. There is, expressly vested in the Trial Chamber, a general power to regulate the conduct of the trial. That application may be made by either party or the Trial Chamber proprio motu. The power may be exercised if the Trial Chamber is satisfied that the order sought is necessary for the purposes of an investigation, or for the preparation or conduct of the trial. The Trial Chamber regards this element of "necessary for...the conduct of the trial', as the litmus test in this application. Accordingly, where the Trial Chamber is satisfied that the order sought is necessary for the conduct of the trial the application will be granted.

42. The Defence has argued that Rule 54 which gives a general power cannot be used to circumvent the specific provisions of Sub-rules 67(A)(i) and (ii). There is no doubt, if valid, that it is a formidable legal proposition that cannot be faulted. There is the well settled maxim of the construction of statutes generalia specialibus non derogant. It is pertinent to observe that both Rules 54 and 67 are in Part 4 of the Rules, which regulate pre-trial proceedings. It is an accepted principle of construction of statutes that where a general intention is expressed, and also a particular intention which is incompatible with the general one, the particular intention is considered as an exception to the general one. It is also the rule that when the later part of the same enactment is in the negative, it is reconcilable with the earlier enactment by so treating it. It is a recognised maxim of construction of a statute that a general later law does not abrogate an earlier special law by mere implication - generalia specialibus non derogant. In Seward v. The Vera Cruz (1884) 10 App.Cas. 59 at p. 68, Lord Selbourne expressed it thus:

Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly, repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so.

Thus where, in the same enactment, there is an earlier special provision followed by a later general one, the presumption is in favour of the later general provision and not the special cases which have already been provided for under the special provision. Having already provided for the special cases, the legislation is reasonably presumed not to intend to alter it by a subsequent general provision unless such intention is manifested in explicit language, or the implication is that the general provision embraces the special provision. The maxim does not operate in reverse. For it to apply there must be an earlier special provision and a subsequent general provision.

43. The situation before us is an earlier general provision in Rule 54 and a subsequent special provision in Rule 67. In such a situation, the general provision is read in isolation as silently excluding in its operation the cases which have been provided for in the special cases. But these two provisions do not by any means fall into this category. For instance, the special provision of Sub-rules 67(A)(i) and (ii) which deal with pre-trial reciprocal disclosure are completely different from the exercise of a general power by the Trial Chamber to require the Defence to furnish the Prosecution with a list of witnesses at trial. There is no way Rule 54 can be exercised to af-

fect the special provisions of Rule 67. The fact that Rule 54 is found in Part Five of the Rules, entitled 'Pre - Trial Proceedings', can not alter the plain literal meaning of its terms. Such headings are only intended to be used as guidance to the content of the Rules. Accordingly, there is no doubt that the Rules are silent on the issue of reciprocal disclosure after the commencement of the trial and there is a lacuna in the procedure which can be filled by exercise of powers under Rule 54.

(iv) Concepts of Fair Trial and Equality of Arms

44. The important question is whether the Trial Chamber is competent in the light of Article 20 paragraph 1, and Article 21 paragraph 4(e), of the Statute, Rule 54 and Sub-rule 67(A), to exercise such a power. The Defence has argued very strongly that Article 20 paragraph 1, of the Statute in conjunction with the Rules, ensure a fair trial. It is contended that nowhere in the Rules, except for Sub-rules 67(A)(i) and (ii), is there a requirement on the part of the Defence to give the Prosecution a list of its witnesses. There is accordingly no reciprocity in the obligation of the Prosecution to provide the Defence with a list of its witnesses at the trial.

45. The Trial Chamber is of the opinion that this is not a matter of reciprocity but a matter of the concept of fair trial. The rationale of Article 21 paragraph 1, of the Statute is to ensure a fair trial in accordance with the Rules. One of the minimum guarantees for the accused in Article 21 paragraph 4(e), of the Statute, is equality of arms, which is the most important criteria of a fair trial. This principle requires the maintenance of a fair balance between the parties and applies to both civil and criminal cases. Manfred Nowak, has expressed the view, that:

The right to call, obtain the attendance of and examine witnesses under the same conditions as the Prosecutor is an essential element of 'equality of arms" and thus a fair trial. The right of the accused to obtain the examination of witnesses on his behalf is, however, not absolute...SitC is subject to the restriction that this be 'under the same conditions as witnesses against him'... SoCf principle importance here is that the parties are treated equally with respect to the introduction of evidence by way of interrogation of witnesses [FN1].

46. The Trial Chamber is of the opinion that it is necessary for the proper conduct of the trial and for the effective cross-examination of Defence witnesses by the Prosecution for the Defence to provide its list of witnesses to the Prosecution at the trial. This measure will not shift the balance of advantage from the Defence, rather, it will ensure the observance and maintenance of the parity of opportunity safeguarded by the Statute.

47. Very closely associated with the concept of equality of arms is the related concept of a judicial process, affectionately referred to as the right to have an adversarial trial. In Ratz-Mateos v. Spain, Judgement of June 23, 1993 Series A, No. 262 (1993)16 EHRR, 505, paragraph 63, the court observed that "StChe right to have an adversarial trial means the opportunity for the parties to have knowledge of and comment on the observation filed or evidence adduced by the other party.' Hence, an adversarial process can only function effectively where relevant material is available to the parties. In the instant case the Prosecutor is not asking for any material. All that is being sought is the names of the witnesses of the Defence intended to be called at the trial. Such information, the Prosecution says and justifiably too, will facilitate information about the witnesses and evidence they are likely to give and enable effective cross-examination by the Prosecution at the trial. The Trial Chamber does not agree with the submission of the Defence that granting the application will be assisting the Prosecution. Rather it will be contributing immensely to a fair trial. It will shorten delays and reduce unnecessary and avoidable tension on the victims and witnesses.

48. The Prosecution has claimed that if the required notice is not given, adjournments after the testimony of each of the witnesses would be inevitable to enable the investigation of their antecedents and facilitate effective

cross-examination. Accordingly, the giving of the required notice will obviate consequent delays through adjournments. The principle of equality of arms has been referred to by this Trial Chamber in the Decision on Production of Witness Statements of 27 November 1996. In expatiating on the principle of equality of arms, Judge Vohrah, said;

The principle is intended in an ordinary trial to ensure that the Defence has means to prepare and present its case equal to those available to the Prosecution which has all the advantages of the State on its side... the European Commission of Human Rights equates the principle of equality of arms with the right of the accused to have procedural equality with the Prosecution.

Judge Vohrah, after referring to decided cases, concluded as follows;

It seems to me from the above authorities that the application of the equality of arms principle especially in criminal proceedings should be inclined in favour of the Defence acquiring parity with the Prosecution in the presentation of the Defence case before the Court to preclude any injustice against the accused.

49. There is no doubt that procedural equality means what it says, equality between the Prosecution and the Defence. To suggest, as has been done in the above quotation, an inclination in favour of the Defence is tantamount to a procedural inequality in favour of the Defence and against the Prosecution, and will result in inequality of arms. This will be inconsistent with the minimum guarantee provided for in Article 21 paragraph 4(e), of the Statute. In the circumstances of the International Tribunal, the Prosecutor and the Defence rely on State co-operation for their investigation, so, prima facie, the basis for the inequality argument does not arise. The Prosecution has given its list of witness before the commencement of the trial. We are unable to conceive why the Defence should not give its list of witnesses to the Prosecution before the witnesses appear before the Trial Chamber. The reasons given by the Prosecution as to why the list of witnesses should be submitted are valid and reasonable.

V Conclusion

50. Finally, the Prosecution has been ordered to give its list of witnesses to the Defence before the commencement of the trial, to enable the Defence to prepare for the case against it by the Prosecution. It seems to the Trial Chamber, consistent with the principle of equality of arms, only fair and proper and in the interest of justice for the Defence to give its list of witnesses to enable the Prosecution to answer any issues which might be raised in the Defence. We do not think the exercise of such a power will offend the provisions of Article 20 paragraph 1, and Article 21 paragraph 4(e), of the Statute. In our opinion it conforms with and sits comfortably within the provisions of Rule 54, which enables the Trial Chamber to issue such orders as may be necessary for the preparation or conduct of the trial. The order sought for the Defence to give the Prosecution the list of its witnesses is, in our considered opinion, necessary for the conduct of the trial before us. We accordingly so order.

Dated this fourth day of February 1998

[FN1].. Nowak M. U.N. Covenant on Civil and Political Rights CCPR Commentary at p. 261-262.

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