SCSL-04-14-T
(11718 - 11811)

SPECIAL COURT FOR SIERRA LEONE

The Trial Chamber

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

Registrar: Robin Vincent

Date: 03 February 2005

The Prosecutor Against Sam Hinga Norman
Moinina Fofana
Allieu Kondewa
Case No. SCSL -04-14-T

ABUSE OF PROCESS MOTION

By First Accused for Stay of Trial Proceedings

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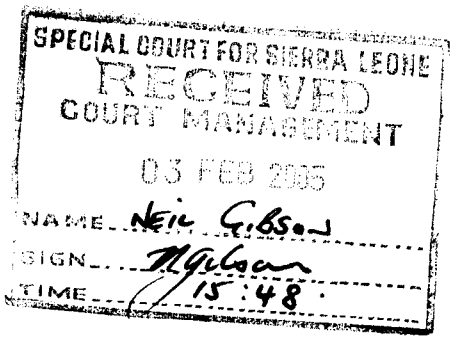

I. INTRODUCTION: THE APPLICATION

1. Pursuant to rules 54 and 73 (A) of the Rules of Procedure and Evidence (the Rules) of the Special Court for Sierra Leone (SCSL), the First Accused in the current Civil Defence Forces (CDF) trial before the SCSL hereby applies to the Trial Chamber(TC) for "appropriate relief"(Rule 73(A)) in view of gross and sustained abuses of the process of the SCSL since its inception and since commencement of the present trial proceedings upon the current consolidated indictment right up until the present moment, whereby the First Accused, with other accused persons, has been and continues to be deprived of crucial due process rights, thereby irretrievably prejudicing his rights to a fair trial, contrary to the interests of justice and degrading to the integrity of the process of international criminal adjudication.

II. BACKGROUND PROCEDURAL HISTORY

2. The First Accused, together with the Second and Third Accused, is at present standing trial upon the current consolidated indictment (the CCI), following application by the prosecution in that regard (the Joinder Motions) and the TC's decision thereon dated 27th January 2004 (the Joinder Decision), the said CCI having been filed 5th February 2004 with trial proper commencing thereon 14th June 2004 and having already completed three sessions thereof and the 4th session to commence 8th February 2005(See ANNEX for references).

3. A separate individual indictment had been approved against the now First Accused under Rule 47 of the Rules on 7th March 2003 (Original Norman Indictment or ONI), who was then arrested on 10th March 2003, making his initial appearance or being arraigned thereon in accordance with Rule 61 before a Designated Judge on 15th, 17th and 21st March 2003, wherein he pleaded not guilty to all eight counts against him in the ONI. As for the now 2nd and 3rd Accused, they were arrested on 29th May 2003, with individual indictments approved separately against each dated 26th June 2003, and both separately making respective initial appearances or being arraigned thereon separately before the same Designated Judge on 30th June 2003, with each of them pleading not guilty to the eight counts in his own indictment, in accordance with the relevant Rules 47 and 61 respectively. All three were facing virtually the same kinds of offences in their respective original individual indictments with their separate case numbers, except that ONI did not contain certain specific additional factual allegations or "specific examples of crimes committed" (Joinder Decision, para. 2), which were included in the other two separate indictments(See ANNEX for references).

4. On 9th October 2003, the prosecution filed its Joinder Motions, expressly pursuant to rules 48 (B) and 73 of the Rules seeking both joint trial of the three hitherto separately indicted persons and consolidation of their separate indictments into a unified instrument upon which their joint trial would be conducted(see paras. 1, 6, 36 thereof). However, no draft consolidated indictment was annexed to the Joinder Motion either on filing or throughout the hearing to which counsel for First Accused objected in vain. The Joinder Decision was delivered 27th January 2004 granting the request as prayed, with further orders that the Registry assign a new case number to the consolidated indictment (CCI) and that the said CCI be served upon each of the three accused persons in accordance with Rule 52 of the Rules. The Joinder Decision did not see the need for prior annexation of a draft indictment to the Joinder Motions or further approval of or re-arraignment of the Accused on the said CCI (see paras. 10 – 14, 31 – 36, for example, inclusive respectively thereof), even though one of the three Trial Chamber Judges passionately pleaded with his colleagues for orders to those effects to be included in the said Joinder Decision(See ANNEX for references).

5. Since then, just before commencement of the trial proper of the three accused persons on 14th June 2004, the now First Accused, in his Opening Statement pursuant to Rule 84, raised oral objections to the effect that there was/were no charge(s) standing against him before the Trial Chamber and that he had neither been served with nor arraigned upon or taken pleas of

any sort on the charges in the CCI. The Trial Chamber merely decided to note his protest but to proceed with the trial without further comment, and the trial went on.

6. Subsequently, the First Accused found cause to withdraw from the proceedings after nearly two sessions of the proceedings with him as self-defending accused and some standby counsel, who were re-designated Court Appointed Counsel after the withdrawal of his person from the trial proceedings. Still thereafter, on 21st September 2004, the First Accused filed his Service and Arraignment motion. The other two accused persons filed similar motions on 21st October 2004 and 4th November 2004 respectively(See ANNEX).

7. The First Accused's main submissions against the CCI in his Motion of 21st September 2004 were as follows: That it had not been served upon him in accordance with either Rule 52 or the order of the Trial Chamber in its Joinder Decision; that it contained new or additional elements and even new offences or charges necessitating his arraignment and plea-taking thereupon pursuant to Rule 61; that he stood in danger of being adversely affected by the rule against double jeopardy since ONI had not yet been withdrawn against him under Rule 51 and that the said ONI should be quashed or otherwise stayed.

8. In effect and broadly speaking, in its decision of 29th November 2004, the Trial Chamber agreed with First Accused as to the presence, nature, scope and materiality of the perceived differences, changes and additions as between ONI and CCI, but differed from him as to whether such changes or differences were tantamount to new offences/charges, or had prejudiced his fair trial or whether the CCI need be subjected to the arraignment and plea-taking processes in terms of rule 61(see paragraphs 19-38 inclusive, especially 30, of the said decision of 29th November 2004). In this decision the Trial Chamber concluded that if the CCI were not amended by either expunging or formally reinstating the material additions therein then, but presumably only then, the failure to serve the CCI or to arraign the Accused upon it would be prejudicial to the Accused's right to free trial and his other rights as an accused person being tried thereupon (See in particular paragraphs 19, 30, and 38 thereof). The Trial Chamber accordingly decided to "stay" the specified material portions and to give the prosecution an option to seek leave to either expunge those portions or to "amend" the CCI by retaining them in it intact. The minority Dissenting Opinion broadly agreed with the foregoing conclusions of the majority, but crucially differed from them by finding that the changes and additions included new charges and new offences, that non-service of or non-arraignment on the CCI had led to violation of the Accused's rights to fair trial, and that the non-withdrawal of ONI was tantamount to double jeopardy being suffered by the Accused (see in particular paragraphs 63, 64, 93, 120-135 inclusive thereof).(See ANNEX).

9. Since then both prosecution and First Accused have sought and been granted leave to appeal to the Appeals Chamber and have respectively separately so appealed, against the aforesaid Amendment Decision, but with the prosecution also separately seeking to comply with it by seeking leave from the Trial Chamber to amend the CCI, the two sides having duly traded responses and replies between themselves in respect of the said processes(See ANNEX).

III. SUBMISSIONS: ABUSES OF PROCESS

10. The First Accused globally submits that, in their entirety, both the current consolidated indictment and the trial proceedings conducted upon it so far have been from their inception not only completely null and void but also contrary to the interests of justice and a disservice to the integrity of the process of international criminal adjudication. This is primarily because of their original mode of genesis and their subsequent application as a basis for and a process of administering international criminal justice, all of which have conjointly engendered a gross and sustained abuse of process in which the accused persons are deprived of crucial due process rights and thereby irretrievably prejudiced in their rights to a fair trial.

A. Mode of Genesis

11. The First Accused submits that the application under Rule 48(B), in so far as its joint-charging or consolidation of existing indictments aspect was concerned, was a violation of the relevant material rules, actual in some cases but constructive in others, and that the failure to annex the draft consolidated indictment to the motion either on filing or throughout the hearing was also a violation of or non-compliance with a regular rule of standard practice in the international criminal tribunals. In each case, it is further submitted, the process and procedure applied were without jurisdiction and so fatally flawed that the ensuing consolidated indictment was a nullity ab initio, thereby making it a huge abuse of process that the CDF trial was founded and is being sustained upon it.

(i). Violation of Standard Practice

12. The Trial Chamber frowned upon and rejected Defence concerns about the prosecution failure to annex a draft text of the proposed consolidated indictment to the motion because of what it called "the need for expeditiousness and flexibility in processes and proceedings before the Special Court"(para. 11 of Joinder Decision).

13. However, the truth of the matter, quite simply, is that it seems to be quite a hard and fast rule of regular practice in both the sister international criminal tribunals of the ICTY and ICTR that drafts of such proposed consolidated or proposed amended indictments tend invariably to be attached to the relevant request motions at the time of filing and sometimes to be even submitted in advance of such request motions, especially where crucial textual alterations, additions, new charges or offences or such other amendments are anticipated, as was the case with this consolidated indictment(See ANNEX Item 5).

14. There is also the question of jurisdiction under the relevant rules. On the one hand, the relevant joinder rules (SCSL Rules 48(A), 48(B), 48(C), 49, and 50) all seem to envisage only specific, identifiable extant items or texts for consideration, rather than future, prospective or anticipated texts or items. So that there is no express jurisdiction for the latter. By the same token, the said rules have no express provision for the Trial Chamber to consider any such supposed, anticipated or non-existent items or texts for consideration or decision under the said rules. And so the said rules are reasonably to be construed as having implied prohibitory injunctions against either seeking or granting any joinder on such a putative or hypothetical basis. As Trial Chamber I at the ICTR ruled only the day before the SCSL Joinder Decision:

> "The Chamber has no jurisdiction to decide motions on Indictments which have been superseded; nor to decide motions in respect of Indictments which did not exist at the time of filing" (Emphasis added).[1]

(ii). Violations of Joinder Rules

15. The second set of procedural violations in the mode of genesis of the current consolidated indictment is in the area of the actual joinder rules and their related processes, to wit SCSL Rules 48(A), 48(B), 48(C), 49, 50 and 51. Here, quite simply, the prosecution indulged in what it is peremptorily enjoined against and studiously avoided or evaded precisely what it is enjoined to do or at least not to avoid or evade, in its quest for a consolidated indictment for the trial of the three previously separately and individually indicted persons.

16. The First Accused submits, however, that although SCSL Rule 48(B) governs applications for "joint trial", it is however purposely designed to do only that and nothing more, thereby rendering it definitively inappropriate and unavailable as a vehicle for seeking or granting

[1] Simba, ICTR-01-76-I: "Decision on Defence Motion Alleging Defects in the Form of the Indictment", 26th January 2004, para. 5.

leave for a "consolidation" of pre-existing indictments or indeed even a "joint-charging" of accused persons. It is submitted furthermore that there is in fact a relative mutual exclusivity or a distinctive individuating emphasis in the regime of SCSL joinder rules proper, whereby they are each designed exclusively and specifically for their respective purposes and functions, as individually defined. For example, sub-rule 48(A) provides conjunctively for both the joint charging and joint trial of the appropriate set of accused persons, thereby making it the natural normal vehicle for applying for the joint charging and joint trial of such accused persons, including, where applicable, the consolidation of two or more separate indictments of such accused persons. And sub-rule 48(C), as a distinctive function specific provision, seems to be peculiar to the SCSL among the sister international criminal tribunals. It provides for the "concurrent hearing of evidence common to" two or more trials that are otherwise going on separately.

17. It is submitted that, so long as the prosecution was seeking a consolidation of the previous individual indictments, whether with or without joint trial, then both Rule 48(B) and Rule 48(C) were foreclosed and unavailable for that purpose, because it is obvious that they are not designed to accommodate consolidations of indictments. Rule 49 also was ultimately foreclosed and unavailable in the circumstances, because even though in its own case it does accommodate consolidations of indictments, it may however only do so in respect of conjoint crimes or indictments against one and the same person, whereas the prosecution had three accused persons and their respective indictments to contend with here.

18. The First Accused further submits that the prosecution could otherwise have made appropriate non-consolidation applications under either Rule 48(B) or Rule 48(C) separately, wherein however it would not have been able to make the additions or changes in respect of the First Accused. Or it could have made such non-consolidation applications under one or other of those two rules in combination in each case with rule 50(A) Third Limb, but now **subject of course to further prosecution obligations or further defence rights and entitlements either under subrule 50(B), as specified, or even under the primordial Rule 47 and selective combinations of its systemic progeny of processes in terms of Rules 52, 61, 62, 66, 72 and/or 73, for instance, among others, as applicable**. But, obviously, the prosecution did not wish either to forego the additions and new elements in respect of the First Accused or to be subjected to the prosecution obligations and/or defence entitlements as highlighted herein in securing them.

B. Abuses of Process

19. Dogged and calculated prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, which were readily available in the respective circumstances, together with its ulterior reasoning and impulsion thereto, plus the consistent (even if unintended) blessing of equally determined judicial endorsements thereof, and a certain congenital constitutive anomaly, have tended to sustain the current consolidated indictment in ways tantamount to a gross and sustained abuse of process that has, in its own turn, and from the very constituting of the Special Court and the earliest beginnings of the entire prosecution process right up until the present proceedings, repeatedly violated and egregiously prejudiced the due process rights (substantive and procedural alike) of the accused persons, and thereby subverted the interests of justice and the integrity of the international criminal justice process itself.

(i). Rights of the Accused.

20. The rights of accused persons, substantive and procedural alike, are enshrined in the applicable laws for the Special Court, as listed and categorised in Rule 72 bis, including fundamental rights provisions of such applicable treaties and conventions as the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1966) (ICCPR), and the African Charter on Human and Peoples' Rights (1981) (ACHPR), and also general principles of law derived from, say, Chapter III of the

Constitution of Sierra Leone, Act No. 6 of 1991(C 1991 SL), containing provisions on "the recognition and protection of fundamental human rights and freedoms of the individual".

(1). Substantive Rights

21. The substantive rights of accused persons are typically characterised as fundamental human rights and freedoms in the applicable international and national human rights instruments, which must be especially recognised, observed, exercised and protected, "with due regard to the rights of others" and to specified trumping public and collective interests (Articles 7(1)(a) and 27(2) ACHPR; 29(2) UDHR; sections 15 and 23 of C 1991 SL). The only limitations and derogations permitted from these rights are as expressly specified therein by law, if at all.

22. One of the most crucial rights of the accused is **the presumption of innocence** enshrined in Article 17(3) of the SCSL Statute, and obviously deriving force and inspiration from stipulations in that regard in Articles 11(1) UDHR, 7(1)(b) ACHPR and 14(2) ICCPR, and section 23(4) of C 1991 SL. The stipulation that the Special Court for Sierra Leone was established "**to prosecute persons who bear the greatest responsibility for**" the commission of various crimes under international and/or domestic national law, as provided in the Agreement with the United Nations and in the SCSL Statute itself[2], seems to have serious implications for the presumption of innocence for the accused persons.

23. The substantive right to **protection against double jeopardy** is distinctively stipulated in Article 9 of the SCSL Statute and in more general terms in both Article 14(7) ICCPR and section 23(9) of C 1991 SL, for example.

24. The rights enshrined in **Article 17(4)(a) and (b)** of the SCSL Statute are also replicated in the same terms in both Article 14(3)(a) and (b) ICCPR and section 23(5)(a) and (b) of C 1991 SL. The need for the prompt and detailed information as to the nature and cause of the charge(s) against an accused person is obviously for his/her better and early understanding of the said charge(s) so as to prepare adequately for his/her defence, with or without the professional assistance of counsel. The proper and effective observance of these fundamental rights by the relevant authorities and the formal means and measures whereby such observance may be effected and ensured are specifically provided for in SCSL Rules 52 and 61, for example.

25 The encompassing complex of requirements for "**a fair and public hearing by a competent, independent and impartial tribunal established by law" and for the accused person "to be tried without undue delay"**(Articles 14(1) and 14(3)(c) ICCPR respectively), as also stipulated in Article 10 UDHR, **Articles 13(1) and 7(2) and 17(4)(c) of the SCSL Statute**, and section 23(1) and (3) of C 1991 SL, comprise perhaps the most crucial set of substantive rights for accused persons. They have implications of duty and obligation on the part of all the authorities involved in the criminal justice adjudication process, including both the prosecution and the adjudicating court itself. And there are SCSL Rules which impact directly upon the effective observance, delivery and exercise of these related rights in practice.

26 The general force and effect of the various human rights norms and standards, national and international alike, is **that the violation of the fundamental human right of an individual is in itself necessarily egregious, and also perforce prejudicial to the right's owner in question**(See, for example, sections 15, 28, 127 and 171(15) of C 1991 S.L.)

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[2] See preambular para.2 and Article 1(1) of the Agreement and Articles 1(1) and 15(1) of the SCSL Statute.

2). Procedural "Rights".

27 Rule 26 bis and Rule 5 of the SCSL Rules, in effect, carry over into the regime of procedural rules the force and import of the foregoing substantive rights and of the effect of their violations. Rule 26 bis expressly incorporates and integrates into the procedural rules both the fairness and expeditiousness requirements for trials, by specific reference thereto, and the remaining range of substantive rights for accused persons, by generic reference thereto.

28. It is submitted that, considering this integration by Rule 26 bis, and in view of the principle of holistic textual construction, then **if the "material prejudice" issuing from a non-compliance with a Rule amounts in fact to a violation of a fundamental human right or of a substantive right of the accused as espoused above, or if the said Rule is itself infused with any such right, as Rule 26 bis itself is, the effect of that violation or non-compliance would or ought to be an annulment of the means or measure whereby it was effectuated or manifested. Nor, it is further submitted, would that annulment have to depend upon the stage at which the objection was raised, in so far as a fundamental human right or a substantive right of the accused person was violated in the process. And finally, that the violation of such a fundamental or substantive right would in itself be deemed to be necessarily egregious and to thereby constitute the "material prejudice" to the right's owner in question.** It has, indeed, been said that it would appear from certain international criminal tribunal decisions "that in certain circumstances, human rights considerations could override the clear language and meaning of the Tribunal's Rules"[3]

29. Furthermore, an accused person has a vested interest in and entitlement to, not only the prompt and proper performance by all concerned (including the prosecution and the court itself) of all their respective duties and obligations under the applicable laws, but also their keen and ready observance of all his/her own substantive rights as an accused person as stipulated by primary legislation and, in particular, their due and direct compliance with all relevant rules of procedure and evidence bearing upon his/her prosecution and defence, as and when they each fall due for application and/or enforcement in all three respects. The accused person's interests in and entitlements to the phenomena and processes at these three levels of criminal adjudication are rightly called his/her procedural "rights", deprivation or violation of which can cause varying degrees of prejudice to him/her in the quest for justice.

30 Under **the procedure in Rule 47**, for instance, the indictment is reviewed in nature, form and content alike for approval or dismissal, in whole or in part, by a Designated Judge. Under **its Limbs (C) and (E)**, the accused person has the opportunity of the charge(s) against him/her being possibly altogether or partially dismissed; or at least so definitively verified that he/she can begin early to prepare for his/her proper defence on the shoal of a sure foundation. Non-compliance with, or abuse or misuse of, a relevant rule which deprives him/her of these interests and/or entitlements could redound into a violation of any of the substantive rights under Article 17 SCSL Statute, as specified above.

31. Or take **the amendment processes under Rule 50(A)**, confining it for present purposes to its third limb only, with its appropriate leave under Rule 73. Amendment under **Rule 50(A) Third Limb** obtains only "at or after" an initial appearance under Rule 61. Rule 50(B) then stipulates that if after an initial appearance an indictment is amended so as to include "new charges", then the accused person in question automatically becomes mandatorily entitled to application of the measures and/or processes under Rules 61, 66(A)(i) and 72 in respect of the new charge(s). Under Rule 72(B), for example, the Accused could raise objections as to jurisdiction, formal defects, or abuse of process, in relation to the new charge(s); he/she

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[3] Jones & Powles, op. cit., p. 579; see also p. 564. The apparently contrary view on p. 474 thereof to the effect that "Rule 5 Does Not Permit the Annulment of the Prosecution Against an Accused" concerns a decision that did not seem to involve the violation of a fundamental right or the substantive right of an accused person.

could also apply thereunder for severance of the new charge(s) or indeed for separate trials all over again. Depriving him/her of any of them, not to talk of more or all of them in a fell swoop, would constitute a severe prejudice to him/her.

32. As for the exercise of **service of an indictment under Rule 52**, it is intimately tied up with the observance of such fundamental human rights or substantive rights of an accused person as are stipulated in Article 17(4) (a) and (b) and (c) and the all-important subsuming right to a fair trial under Article 17(2), all of the SCSL Statute, with their respective counterparts in the international and domestic national human rights instruments as surveyed above. It is obvious how refusal or failure of service of an indictment can seriously detract from any one, or some, or all, of these fundamental substantive rights, to the automatic and inescapable detriment or prejudice of the accused person thereby affected. And Rule 52 itself is fully mandatory.

33. And then, of course, the related **Rules 61 and 62. The need for arraignment on an indictment or charge** is both obvious and irrefutable. The indictment or charge is required to be read to the accused "in a language he speaks and understands" so as to ensure that he understands it (Rule 61(ii), all in due observance and service of the substantive rights of the accused person under SCSL Article 17(2) and 17(4)(a) to (c) inclusive. The compulsory entering of a plea of guilty or not guilty, on each count or charge in the indictment, thereby ensures the Accused's understanding of the indictment and his/her formal subjection of himself to the jurisdiction of the court and the triggering off of the actual trial process.

34. Even **the possibility of a guilty plea** is quite momentous**(Rule 61(v), Rule 62(A))**. Again the relevance of this exercise both as being in the observance or service of the substantive rights of the accused and as a matter of his/her vested interest and entitlement, are quite obvious. And there is always a distinct and real possibility that the accused person may wish to plead guilty to any new charge(s) in the amended/consolidated indictment and/or even to request perhaps "**to change his plea to guilty**" on those counts on which he had previously pleaded not guilty. Avoidance, evasion, or deprivation of the accused of the options in **Rules 61(v) and 62** by the prosecution or the court would thus be a serious potential prejudice to an accused and even the public interest in the circumstances.

35 Let **Rule 51** suffice here as a final example of a real repository of procedural "rights" for an accused person. This rule concerns **the need to withdraw an indictment.** Its application in a situation where a new indictment emerges after an extensive amendment or a consolidation, which leaves the previous indictment(s) on the books, can put paid to any threat or possibility of a present or future exposure to the negative operation of the rule against double jeopardy.

(ii). Rights Violations and Abuses of Process.

36. Various means and measures since the constituting of the Special Court, as applicable, and the genesis and continued operation of the current consolidated indictment, as surveyed in paragraphs 10 through 35 above hereof, have involved violations of the substantive and other rights of the accused persons in this trial, thereby causing prejudice to them and also undermining the interests of justice and the integrity and dignity of the judicial system itself.

(1) The Abuse of Process Doctrine

37. The phenomenon of ***the abuse of process and the inherent power and duty of a criminal court to stay or terminate a pending or an ongoing prosecution so as to forestall, avoid or prevent the abuse or degradation of its own process, from any source whatsoever***, are well established in the law[4]. The factors and circumstances that may give rise to operation of the

[4] For a selection of relevant authorities, see: Connelly v. DPP (1964)2 All ER 401 HL, p.442A & H; R. v. Crown Court at Derby, ex p. Brooks (1984) 80 Cr. App. 164 DC/HC; Bell v. DPP of Jamaica (1985)2 All ER 585 PC; S. v. Ebrahim (1991) (2) SA 553 App. Div;

abuse of process doctrine in criminal law are quite varied and wide in scope, including delay and ***if "the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality***"(per Sir Roger Omrod, in ex p. Brooks (1984) at pp. 168-169); or in the words of Lord Lowry in Bennett at p.161f: ***if "it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case***"; or in those of Lord Griffiths in the same Bennett case "***a responsibility for the maintenance of the rule of law***" and a "***(refusal) to countenance behaviour that threatens either basic human rights or the rule of law***"(at p.150 e-f) (All foregoing italics & emphases added).

38. In the case of international criminal tribunals, and that should go for the Special Court for Sierra Leone as well, relevant jurisprudence recognises the nature and scope of the doctrine of abuse of process and its applicability at both Trial and Appeals Chambers levels, together with attendant supervisory powers to apply and enforce it directly. (See Barayagwiza, paras. 74, 75, 76).

(2). Rights Violations.

39. From the foregoing analysis and submissions, it is clear that the constituting of the Special Court itself, at least in one respect, and the subsequent instituting and conducting of the entire pre-trial and trial proceedings upon the current consolidated indictment against the three accused persons, have only been made possible by acts which egregiously violate the substantive fundamental rights of the accused persons and whereby the prosecution has manipulated or misused the process of the court so as to deprive the accused persons of crucial protections, interests and entitlements provided by the law and in that way take unfair advantage of the rules and of the defence, thereby outraging any true sense of justice and propriety in continuing to subject the said accused persons to trial upon the said consolidated indictment.

40. As was mooted in paragraph 22 above hereof, for example, even the enactment of the avowed purpose of establishing the Special Court as being "**to prosecute persons who bear the greatest responsibility for**" the commission of the relevant crimes in the Tribunal's jurisdiction is a congenital constitutive anomaly which infringes perhaps the most basic of all fundamental rights for accused persons, **the presumption of innocence**. Now, the phrase, "**persons who bear the greatest responsibility for**", is not an element or part of an element or the definition of any of the offences or crimes under the SCSL Statute; and so it is not required to be proved by the prosecution beyond reasonable doubt or at all at the trial. It is at best an administrative identification of the persons or category of persons who are targeted for prosecution but are usually to be determined only by undisplayed prosecutorial discretion. But by legislatively characterising such categories in advance by epithets not constituting defining elements of an offence, any person who gets arrested for prosecution for any of the specified offences is thereby automatically characterised as "**bearing the greatest responsibility for**" the commission of some crime which has yet to be proven by the prosecution. Under a legal regime which criminalises command responsibility directly (Article 6(3) SCSL Statute), enactment of such a phrase in the primary legislative instruments, as is done here, to characterise a category of suspects before exercise of the prosecutorial discretion, is a most egregious violation of **the presumption of innocence** as a substantive fundamental right for accused persons: and right from the arrest of such a person, his/her trial will be tainted through and through to the end, unless it is terminated on grounds such as abuse of the process of the court.

41. **The protection** of the accused persons **against double jeopardy** is also egregiously violated in the current trial proceedings, this time by the adamant refusal of the prosecution

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Bennett v. Horseferry Rd. MC (1993) 3 All ER 138 HL;
Barayagwiza v. P.: AC "Decision" dated 3rd November 1999 (ICTR Appeals Chamber).

to formally withdraw the previous separate individual indictments after the adoption of the consolidated indictment against all three accused persons jointly (see para. 23 above hereof). Such withdrawal ought to have been effected immediately after the consolidated indictment was filed on 5th February 2004, and the joinder motion should even ideally have included a request to that effect.

42. ***These egregious violations have gravely prejudiced the accused persons, and in particular the First Accused, in the conduct of their cases to such an extent that any sense of justice and propriety in continuing the trial proceedings is severely outraged and will only redound to further misuse and degradation of the process of the court and prove detrimental to the dignity and integrity of the court. Indeed, they constitute a gross deprivation and denial of the principle of fundamental fairness, of fundamental human rights and of the rule of law itself.***

IV. RELIEFS BEING SOUGHT

43. In view of all the foregoing analysis and submissions, remedies for the violations and abuses of process highlighted above may be granted and implemented here as in the closely similar circumstances of the ICTR Barayagwiza decision of 3rd November 1999(see paras. 106 -112 thereof).

44. Accordingly, the First Accused hereby requests the Trial Chamber to grant him the following reliefs:

(1). INTERIM STAY of all CDF trial proceedings, with immediate effect as from the beginning of the fourth session thereof, pending final determination of this application.

(2). A DECLARATION to the effect that the current consolidated indictment is and has been since its inception invalid, null and void as a result of its illegal modes of genesis or coming into being.

(3). A DECLARATION to the effect that the current consolidated indictment and all trial proceedings thereon ought to be permanently stayed or terminated forthwith and immediately, on the ground of egregious abuses of the process of the Court in view of sustained and severe violations of the fundamental substantive rights of the accused.

(4). AN ORDER DISMISSING the current consolidated indictment forthwith and immediately, with prejudice to the Prosecutor.

(5). AN ORDER DIRECTING the immediate and unconditional release of the Applicant herein from detention and the custody of the Special Court.

(6). AN ORDER DIRECTING that the Applicant be compensated satisfactorily and in full for his prolonged detention and subjection to trial proceedings so far on the current consolidated indictment.

(7). OTHER OR FURTHER RELIEF OR ORDER as the Trial Chamber may consider fit, proper and just in all the circumstances.

DONE IN FREETOWN this 3rd day of February 2005.

Dr. Bu-Buakei Jabbi
Court Appointed Counsel

Sam Hinga Norman
FIRST ACCUSED

ANNEX

1. Original Separate Individual Indictments
   a. P. v. Norman, Case No. SCSL – 2003 – 08 – I, "Indictment", 7 March 3003.
   b. P. v. Fofana, Case No. SCSL – 2003 – 11 – I, "Indictment 26 June 2003
   c P. v. Kondewa, Case No. SCSL – 2003 – 12 – I, "Indictment 26 June 2003

2. Joinder Motions

   P. v. Norman Case No. SCSL – 2003 – 08 – PT; P. v. Fofana, SCSL – 2003 – 11 – PT;
   P. v. Kondewa, Case No. SCSL – 2003 – 12 – PT "Prosecution Motions for Joinder", 9 October 2003.

3. Joinder Decision
   P. v. Norman, Fofana, Kondewa,: "Decision and Order on Prosecution Motions for Joinder", 27th January 2004 (unanimous).

4. Consolidated Indictment.
   P. v. Norman, Fofana, Kondewa, Case No. SCSL – 2004 – 14 – T: "Indictment", 5 February 2004.

5. Some Authorities on Annexing Draft Indictment to Joinder/Amendment Motions.
   a). Kovacevic: "Decision on Prosecutor's Request to file an Amended Indictment", 5th March 1998, paras 2 & 4 (Amendment).

   b). Kovacevic: "Decision Stating Reasons for appeals Chamber Order of 29 May 1998" 2nd July 1998, para. 6 (Amendment).

   c) Musema: (ICTR, TC 1) "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 18 November 1998, preambular para. 6 (Amendment).

   d). Krnojelac: "Decision on Prosecutor's Response to Decision of 24 February 1999", 20th May 1999, para. 2 (Amendment).

   e). Niyitegeka (ICTR): "Decision on Prosecution Request to File a consolidated Indictment ....., 13th October 2000, preambular para. 4 (Consolidation).

   g). Mrksic et al: "Decision on form of consolidated amended Indictment and on Prosecution application to Amend", 23rd January 2004, para. 1 (Consolidation & Amendment).

   h). Limaj et al: "Decision on Prosecution's Motion to Amend the amended Indictment", 12th February 2004, para. 1 (Amendment).

   i). Ademi et al: "Decision on Motion for Joinder of Accused", 30th July 2004, final Order (Consolidation).

6. Motions for Service and arraignment and Decisions Thereon.
   P. v. Norman, Fofana, Kondewa. Case No. SCSL – 2004 – 14 – T.

a.). (i). (First Accused's) Motion for Service and Arraignment on second Indictment", 21 September 2004.

(ii). TC Decions Thereon.
(1). "Decision on first Accused's Motion ..... "29 November 2004 (Majority Decision)
(2). "Separate concurring Opinion ....," 29 November 2004.
(3). "Dissenting Opinion .... "29 November 2004.

b). (i). "Moinina Fofana Motion for Service of consolidated Indictment and a Further Appearance", 21 October 2004.

(ii).TC Decisions Thereon.
(1). "Decision on the Second Accused's Motion...." 6 December 2004.

(2). "Separate Concurring Opinion .....", 6th December 2004.

c) (i). "Allieu Kondewa Motion for Service of consolidated Indictment and a Further Appearance", 4 November 2004.

(ii). TC Decisions Thereon
(1). "Decision on Third Accused Motion....", 8 December 2004.
(2). "Separate concurring Opinion ....", 8 December 2004.

7. Prosecution applications in respect of 29 November 2004 Decision i.e. Item 6(a) (ii) above.

a) (i). "Request for leave to amend the Indictment Against Norman", 8 December 2004.

(ii). " First Accused Response to Prosecution Request for leave to Amend 17 December 2004.
(iii). "Reply to Defence Response to Prosecution's Request for leave to Amend the Indictment Against Norman", 14 January 2005.

b). (i). "Prosecution Notice of Appeal Against the Trial Chamber's Decision of 29 November 2004 and Prosecution submissions on appeal", 12 January 2005.

(ii). "Defence Response to Prosecution Notice of Appeal .....", 26 January 2005

(iii). "Prosecution Reply to the Defence Response .....", 31 January 2005.

8. Defence Applications in Respect of 29 November 2004 Decision i.e. 6 (a)(ii) above.

a). (i). Interlocutory appeal by first accused Against the Trial chamber's Decision on the first Accused's Motion for Service and Arraignment on the consolidated Indictment, 29th November 2004" 14 January 2005.

(ii). "Prosecution Response to the Interlocutory Appeal by first Accused ...., 24th January 2005.

(iii). "Defence Reply to Prosecution Response to Interlocutory appeal by First Accused .....", 28th January 2005

9. Some Authorities on the Abuse of Process doctrine.

a). Connelly v. DPP (1964) 2 all ER 401 HL (UK)
b). R. v. Crown Court at Derby, ex p. Brooks (1984) 80 Cr. App Rep. 164 DC/HC
c). Bell v. DPP of Jamaica (1985) 2 All ER 585 PC
d). Bennet v. Horseferry Rd. MC (1993) 3 All ER 138 HL (UK)
e). Barayagwiza v. P. AC "Decision", 3 November 1999 (ICTR Appeals Chamber).

[redacted]
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IN THE TRIAL CHAMBER

Before: Judge Richard George May, Presiding

Judge Lal Chand Vohrah

Judge Florence Ndepele Mwachande Mumba

ANNEX 5(a)

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 5 March 1998

PROSECUTOR

v.

MILAN KOVACEVIC

DECISION ON PROSECUTOR'S REQUEST TO FILE AN AMENDED INDICTMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Michael Keegan
Ms. Hildegard Uertz-Retzlaff
Mr. Morten Bergsmo

Counsel for the Accused:

Mr. Dusan Vucicevic
Mr. Anthony D'Amato

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ("the International Tribunal") is a Request for Leave to File an Amended Indictment ("the Request for Leave to Amend"), filed by the Office of the Prosecutor ("the Prosecution") on 28 January 1998, pursuant to Rules 50 and 73 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules"). On 5 February 1998 the Defence filed a Motion for extension of time, which request was granted by the Trial Chamber on 9 February 1998. The Defence filed its Reply to Prosecutor's Request to File an Amended Indictment on 20 February 1998, followed by a corrigendum filed on 23 February 1998 (together "the Reply"). On 26 February 1998 the Prosecution sought leave to respond to the Defence Reply, submitting its proposed response with that application ("the Response").

The Trial Chamber heard oral argument on 27 February 1998 at which time the Trial Chamber accepted the submission of the Response and issued its oral decision, refusing the Request for Leave to Amend, and reserving the written decision to a later date.

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Following the oral decision of the Trial Chamber, the Defence withdrew its Motion to Strike Portions of the Indictment, filed on 11 September 1997, which had been held over pending the determination of the Request for Leave to Amend.

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

HEREBY ISSUES ITS WRITTEN DECISION.

II. ANALYSIS

A. Background

2. A draft Amended Indictment is attached to the Request for Leave to Amend. The existing Indictment ("Indictment") against the accused Milan Kovacevic was confirmed by Judge Odio Benito on 13 March 1997. The accused was arrested and transferred to the custody of the International Tribunal on 10 July 1997 on the basis of that Indictment. At his Initial Appearance held on 30 July 1997, the accused pleaded "not guilty" to a single charge of complicity in genocide, a breach of Article 4 of the Statute of the International Tribunal.

3. The Prosecution first indicated its intention to amend the Indictment at the confirmation proceedings held on 13 March 1997. The Defence was notified of this intention on 11 July 1997, at the first meeting between the Prosecution and the Defence after the arrest of the accused. This prompted the Defence to file a Motion to Clarify Standards Implicit in Rule 50 on 10 September 1997, to which the Prosecution responded on 24 September 1997. In its Decision on this Motion, the Trial Chamber held that the issues involved were not for the Trial Chamber but for the plenary to consider. Rule 50 was subsequently amended in plenary, effective 12 November 1997.

4. Thus the Prosecution had already notified the Defence and the Trial Chamber of its intention to amend the Indictment. However, the scope of the amendment was only revealed when the Request for Leave to Amend and the draft Amended Indictment were filed on 28 January 1998. The draft Amended Indictment seeks to add 14 counts to the single count of complicity in genocide. These counts cover Articles 2, 3, and 4 of the Statute, and are based on substantially expanded factual allegations. The Indictment contains 8 pages, whereas the draft Amended Indictment contains 18 pages.

B. Submissions

5. The Request for Leave to Amend does not provide any reasons for the proposed amendment. The Prosecution's reasons are set out in the Response, in which the Prosecution submits:

> (a) the proposed amendment is inappropriate in the light of the evidence presented, which clearly establishes a prima facie case for each proposed change;
>
> (b) the Request for Leave to Amend is brought in accordance with Rule 50 and the practice of national jurisdictions;
>
> (c) the standard and manner of review and the obligation of the confirming Judge(s) remain the same under the revised Rule 50 as under Article 19 of the Statute and Rule 47;
>
> (d) the accused has no right to receive the supporting materials, or to challenge the substance of the amendment at this stage of the proceedings;

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(e) from the outset of the proceedings, the Prosecution has given ample notice of its intention to amend;

(f) the "new charges" are based on the same basic events and general facts;

(g) Article 9 (2) of the International Covenant on Civil and Political Rights ("the Covenant") of 1966 was complied with at the time of the arrest of the accused, and therefore is no longer applicable;

(h) the Trial Chamber may only refuse leave if the accused would be substantially prejudiced in exercising his right to a fair trial; and this would not occur if the Defence were allowed extra time to prepare.

At the hearing on 27 February 1998, the Prosecution addressed the issue of delay, asserting:

(a) there has been no undue delay;

(b) any delay has been justified in the particular circumstances of the case, e.g., due to the change in the composition of the Trial Chamber, and in order to await the decision on the accused's application for provisional release.

6. The Defence submits that the Request for Leave to Amend should be denied on the following grounds:

(a) the Prosecution should not be entitled to amend the Indictment in this fashion seven months after the arrest of the accused;

(b) to do so would be contrary to the right of the accused set out in Article 9 (2) of the Covenant to be informed promptly of any charges against him at the time of arrest;

(c) the Trial Chamber should not condone the arbitrary and opportunistic behaviour displayed by the Prosecution in withholding the amendment;

(d) the Trial Chamber should set an example in upholding the principles of international human rights by defending the rights of the accused;

(e) the supporting materials do not give rise to a prima facie case, as certain elements of the Prosecution case, such as intent on the part of the accused to participate in a plan to commit genocide, and the position of the accused as a civilian in the chain of command of the military and police forces, are not adequately demonstrated;

(f) the Trial Chamber lacks jurisdiction under Article 3 of the Statute over certain acts committed in the context of an internal armed conflict.

C. Applicable Law

7. Rule 50 (A) was adopted in its current form on 12 November 1997 and reads as follows:

The Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. At or after such initial appearance

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> amendment of an indictment may only be made by motion before that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

Prior to this time, the power to grant leave to amend an indictment before the commencement of trial lay with the confirming Judge, rather than by way of motion to the Trial Chamber seised of the matter. This is therefore the first time a Trial Chamber has had to consider the application of Rule 50 in its amended form. Prior practice of the International Tribunal as to the amendment of indictments is thus of little assistance to the Trial Chamber in the current matter.

8. The Prosecution accepts that the power to amend is not unlimited, and that the accused must be guaranteed a fair trial. However, this is not the only relevant right of the accused. Article 20, paragraph 1, of the Statute guarantees the right of the accused to a fair and expeditious trial. This right is further reflected in Article 21, paragraph 4 (c), which protects the right of the accused to be tried without undue delay. These Articles reflect the general principles found in international human rights law. The Trial Chamber also notes Articles 20, paragraph 2, and 21, paragraph 4 (a), of the Statute which provide for the accused to be informed promptly of the charges against him.

9. Both parties have referred to Article 9 (2) of the Covenant which provides:

> Article 9 (2): Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

10. National legal systems generally permit amendments both before and during trial. Civil law systems and the common law systems treat the process differently. In many civil law systems, indictments are subject to judicial scrutiny by the investigating judge before the trial. Due to the inquisitorial nature of those systems, amendments are not as contentious as in the common law system, but if new allegations are based on different facts, it is common for the prosecutor to bring a separate indictment on those allegations.

11. In some common law jurisdictions amendments have been allowed even during late stages of trial, provided that the amendment will not cause injustice to the accused. For example, the Court of Appeal in England said in *R. v. Johal and Ram*:

> [T]he longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and in every case in which amendment is sought, it is essential to consider with great care whether the accused person will be prejudiced thereby.

This principle, which is reflected in a number of other common law jurisdictions, is not limited to the notion that the accused must have extra time to prepare his case to have a fair trial. It also includes the notion that the accused should not be misled as to the charges against him. The Scottish system disallows certain types of amendments altogether. The Criminal Procedure (Scotland) Act of 1995 provides:

> s. 96 (2): Nothing in this section shall authorise an amendment which changes the character of the offence charged . . . .

III. REASONS

12. The Trial Chamber's reasons for refusing this Request for Leave to Amend are as follows:

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(a) The proposed amendment (consisting of 14 added counts, and factual allegations which would increase the size of the Indictment from 8 to 18 pages) is so substantial as to amount to a substitution of a new indictment; an amendment of this proportion should have been made much more promptly (and not nearly a year after confirmation; and seven months after the arrest of the accused).

(b) The amendment sought is not the result of the subsequent acquisition of materials unavailable at the time of confirmation of the Indictment, nor are all the added counts covered by the factual allegations in the original Indictment. The reasons given by the Prosecution do not justify the delay in bringing this request. The fact remains that the Prosecution knew the whole case against the accused long before it was made known to the accused. The Prosecution should have made every effort to bring the whole case against the accused before the confirming Judge, so as to avoid any impression that the case against the accused was constructed subsequent to his arrest, and to adhere to the principle of equality of arms.

(c) To allow what amounts to the substitution of a new indictment at this late stage in the proceedings would infringe the right of the accused to be informed promptly of the charges against him, thus placing him at a disadvantage in the preparation of his defence. The only way to redress the unfairness suffered by the accused would be to allow the Defence substantial additional time to prepare his defence. The date for trial is set for 11 May 1998. The Defence has indicated that it would require another seven months for preparation, a period which does not seem unreasonable. The trial date would therefore be postponed at least until the autumn of this year, thus depriving the accused of his right to an expeditious trial.

(d) The accused continues to be held in custody. His application for provisional release was rejected. It is in the interests of justice that his trial should begin.

(e) The Trial Chamber's rejection of the Request for Leave to Amend renders further discussion on the substance of the amendment and other issues raised by the Prosecution inappropriate. In conclusion, the Trial Chamber deplores the delay in filing this request and trusts that no Trial Chamber in the future will be faced so late with an application of this kind.

IV. DISPOSITION

For the foregoing reasons

PURSUANT TO RULES 50 AND 73

THE TRIAL CHAMBER REFUSES the Prosecutor's Request for Leave to File an Amended Indictment of 28 January 1998.

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

[redacted]
11736

Richard
May

Presiding
Judge

Dated this fifth day of March 1998

At The Hague

The Netherlands

[Seal
of
the
Tribunal]

[redacted]
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UNITED

NATIONS

ANNEX 5(b)

Case No: IT-97-24-AR73

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

Date: 2 July 1998

Original: English

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald (Presiding)

Judge Mohamed Shahabuddeen

Judge Wang Tieya

Judge Rafael Nieto-Navia

Judge Almiro Simões Rodrigues

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 July 1998

PROSECUTOR

v.

MILAN KOVACEVIC

DECISION STATING REASONS FOR APPEALS CHAMBER'S ORDER OF

[redacted]
11738

29 MAY 1998

Office of the Prosecutor:

Ms. Brenda Hollis

Mr. Michael Keegan

Counsel for the Accused:

Mr. Dusan Vucicevic

Mr. Anthony D'Amato

I. INTRODUCTION

A. Background

1. The Prosecutor sought leave before the Appeals 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") to appeal against a decision of Trial Chamber II refusing her leave to amend an indictment by the addition of fourteen counts to an original single count. By Order dated 29 May 1998, the appeal was allowed. The Order indicated that the reasons for allowing the appeal would be put in writing in due course. This Decision sets forth those reasons.

2. In the original Indictment ("Indictment") against the accused Milan Kovacevic, confirmed by Judge Odio-Benito on 13 March 1997, Mr. Kovacevic was charged with a single violation of Article 4, sub-paragraph (3)(e), of the Statute of the International Tribunal ("Statute"), complicity in genocide. At the confirmation hearing on the same date, the Deputy Prosecutor explained that, while the Indictment contained only one count, the Office of the Prosecutor ("prosecution") intended to amend the Indictment to include other charges in the event of an arrest. The accused was arrested and transferred to the custody of the International Tribunal on 10 July 1997. At the Initial Appearance held on 30 July 1997, the accused pleaded not guilty to the charge of complicity in genocide.

3. The defence was first notified of the prosecution's intention to amend the Indictment on 11 July 1997, during the first meeting between the defence and prosecution. The defence then filed a Motion to Clarify Standards Implicit in Rule 50 Regarding Amendment on Indictment on 10 September 1997, to which the prosecution responded on 24 September 1997. In its Decision on this Motion, the Trial Chamber, on 1 October 1997, held that the issues involved were to be considered in Plenary. Rule 50 of the Rules of Procedure and Evidence ("Rules") was subsequently amended in Plenary, and became effective on 12 November 1997.

4. The matter of amendment of the Indictment was further addressed at a motions hearing before the Trial Chamber on 10 October 1997, where the Presiding Judge noted that the Indictment was to be amended "in due course, whatever that may mean". Pointing out that the composition of the Trial Chamber was to be altered, he observed that this was a matter that would be dealt with by the new Trial Chamber to be constituted in November. On this occasion the prosecution indicated that there

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was a possibility that the envisaged amendment would include "a more substantive charge" which would need to be supported by additional materials.

5. During a status conference before the Trial Chamber in its new composition, on 24 November 1997, the prosecution confirmed its intention to seek an amendment to the Indictment and declared that it would be in a position to do so on 19 December 1997. However, expressing concern that the medical condition of the accused might be such that going through the process of seeking leave to amend the Indictment would prove to be irrelevant, the prosecution expressed its preference for this matter be considered only after a decision had been reached on a pending application for provisional release filed by the defence. The prosecution further declared that, in its amendment, it would be seeking to include not only the genocide count, but also charges of grave breaches of the Geneva Conventions. Neither the Bench nor the defence responded to this latter statement. The Trial Chamber on this occasion decided not to timetable anything beyond the application for provisional release, and declared that depending on the outcome of that decision it would then go on to timetable the prosecution motion to amend the Indictment, if filed, in the new year. On 16 January 1998, the Trial Chamber rejected the defence's application for provisional release, and ordered the prosecution to file its motion to amend the Indictment by 28 January 1998.

6. The full scope of the amendment to the Indictment became apparent on 28 January 1998, when the prosecution filed its Request for Leave to file an Amended Indictment ("Request"). The draft Amended Indictment seeks to add fourteen additional counts to the single count of complicity in genocide. These new counts would cover Articles 2, 3, and 5 of the Statute and are based on expanded factual allegations. While the original Indictment is 8 pages in length, the proposed Amended Indictment is 18 pages.

7. On 5 March 1998, the Trial Chamber issued the Decision on Prosecution's Request to File an Amended Indictment ("Decision"), pursuant to Rules 50 and 73(A) of the Rules, refusing the prosecution's Request. The Trial Chamber found the amendments to be so substantial as to amount to a new indictment. In its view, to accept the Amended Indictment would be to substitute a new indictment for the confirmed Indictment at the stage of the proceedings when the trial was set to begin on 11 May 1998. The Trial Chamber found that the prosecution produced insufficient reasons that do not justify its delay in bringing the Request nearly one year after confirmation and seven months after the arrest of the accused. The Trial Chamber decided to deny the Request, in order to protect the rights of the accused to be informed promptly of the charges against him, and to be accorded a fair and expeditious trial, as well as in the interests of justice.

8. Noting that the defence had no objection to the prosecution's request for interlocutory review of the Trial Chamber's Decision, on 22 April 1998, a Bench of the Appeals Chamber, in the Decision on Application for Leave to Appeal by the Prosecution ("Decision on Application") granted leave to appeal. The Appeals Chamber decided to hear the appeal "expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any written brief . . . and without oral hearing".

9. On 1 May 1998, the prosecution submitted a Brief in Support of Prosecutor's Application for Leave to Appeal From the Trial Chamber's Denial of the Prosecutor's Request for Leave to File an Amended Indictment. A Defence Reply to Prosecutor's Brief in Support of Leave to Appeal was filed on 5 May 1998.

B. Submissions of the Parties

Prosecution

10. The prosecution submits that the Decision is contrary to the standards set down by international human rights law with respect to reasonable delay. It contends that the pre-trial detention in the

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present case does not violate international standards under the International Covenant on Civil and Political Rights ("ICCPR") or regional standards under the European Convention on Human Rights ("ECHR"). 11740

11. In the view of the prosecution, Article 21, sub-paragraph (4)(c) of the Statute should be interpreted in the light of Article 14(3)(c) of the ICCPR because the former was based almost verbatim on the latter. The prosecution submits that a commentary to the ICCPR states that "undue delay" or "reasonable time" under Article 14(3)(c) "depends on the circumstances and complexity of the case".

12. The prosecution submits that the Trial Chamber erred in law by holding that the right of the accused to be informed promptly of the charges against him would be infringed by allowing leave to amend the Indictment. It asserts that the Trial Chamber misapplied Article 9 of the ICCPR in coming to this conclusion.

13. The prosecution submits that the decisions of the European Commission and of the European Court of Human Rights interpreting Articles 5(3) and 6(1) of the ECHR establish that the judiciary must determine the meaning and requirements of the phrase "within a reasonable time" according to the specific circumstances of the case at hand. With respect to Article 5(3), the prosecution finds in the jurisprudence the following essential factors that the court must consider: "the complexity and special characteristics of the investigation; the conduct of the accused; the manner in which the investigation was conducted; the actual length of detention; the length of detention on remand in relation to the nature of the offence; and the penalty prescribed and to be expected in the case of conviction". With respect to the interpretation of "within a reasonable time" in Article 6(1), the prosecution finds in the settled law the following criteria: the "complexity of the case, the manner in which the investigation was conducted, the conduct of the accused relating to his role in delaying the proceedings and his request for release, the conduct of judicial authorities, and the length of proceedings".

14. The prosecution submits that the Trial Chamber arrived at the Decision on the basis of expediency to maintain a starting date for trial of 11 May 1998, rather than by looking at the merits of the Prosecution's Request to File an Amended Indictment. The prosecution argues that Article 20 of the Statute guarantees both parties a fair and expeditious trial, and that the Trial Chamber did not consider the harm to the prosecution's case caused by the Decision. The prosecution claims that the Decision forces it "to proceed to trial on a single charge of complicity in genocide which does not accurately reflect the totality of the alleged conduct of the accused", and "without any options to account for the contingencies of proof at trial, despite the fact that the evidence submitted with the Amended Indictment establish[es] [what it considers to be] a *prima facie* case against the accused" for violations other than complicity in genocide.

15. The prosecution contends that the Trial Chamber erred by not affording it an opportunity to present additional material in support of the delay in submitting the request for leave to amend. The prosecution further claims that the Trial Chamber erred in failing to determine whether any of the proposed charges in the Amended Indictment could have been confirmed without resulting in undue delay of the scheduled trial date.

Defence

16. The defence submits that the prosecution should not be permitted to amend the Indictment by adding 14 new counts ten and a half months after confirmation of the Indictment. It is the position of the defence that the "Prosecution deliberately chose to withhold the addition of these counts until 28 January 1998". The defence claims that Article 9(2) of the ICCPR is applicable in this case and entitles Mr. Kovacevic to full disclosure of the reasons for his arrest and prompt disclosure of the charges against him. The defence argues that the accused was denied his right to be fully and

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promptly informed of the case against him because the prosecution did not reveal the 14 additional charges against the accused until six and a half months after his arrest. The defence contends that the prosecution behaved in an opportunistic fashion that is in clear violation of international human rights principles under the ICCPR.

17. The defence submits that the delay is *ipso facto* undue and unreasonable because the Trial Chamber found that the prosecution had no legitimate reason for the delay in amending the Indictment. It is the position of the defence that the delay by the prosecution in amending the Indictment is due to the prosecution's strategic manoeuvring. The defence alleges that not only did the prosecution purposely delay disclosing the new charges to the accused, but that it withheld these charges from the accused in an effort to obtain his co-operation against other persons. In its submissions to the Trial Chamber, the defence asserted that it would require seven months to prepare its case if the new charges were to be added. The Trial Chamber accepted this assertion. The defence submits that the resulting delay of trial would violate the accused's right to be tried without undue delay.

18. The defence asserts that the prosecution's supporting materials do not give rise to a *prima facie* case, given that certain elements of the prosecution's case have not been proved, including the intent on the part of the accused to participate in a plan to commit genocide, and the position of the accused as a civilian in the chain of command of the military and police forces.

C. Applicable Provisions

19. It is appropriate to set out in relevant parts the applicable provisions of the Statute and the Rules of the International Tribunal, as well as certain provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Statute

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chamber 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.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set a date for trial.

[...]

Article 21

[redacted]
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Rights of the accused

[...]

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

[...]

4. In the determination of an 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;

(c) to be tried without undue delay;

[...]

Rules

Rule 50

Amendment of Indictment

(A) The Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. At or after such initial appearance amendment of an indictment may only be made by motion before that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of sixty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rule 59 *bis*

Transmission of Arrest Warrants

[...]

(B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal.

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Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language.

[...]

Rule 62

Initial Appearance of Accused

Upon the transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

(i) satisfy itself that the right of the accused to counsel is respected;

(ii) read or have the indictment read to the accused in a language the accused speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on the accused's behalf;

[...]

ICCPR

Article 9

1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

[...]

Article 14

[...]

3. In the determination of any criminal charge against him, everyone 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

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and to communicate with counsel of his own choosing;

(c) To be tried without undue delay.

[...]

ECHR

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]

[...]

3. Everyone charged with a criminal offence has the following minimum rights:

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

[...]

II. DISCUSSION

20. In sum, the motion for leave to amend was refused on the general ground that to allow the amendments would prejudice the right of the accused to a fair and expeditious trial, and, more particularly, because of the following reasons:

21. First, the new counts involved an unacceptable increase in the size of the original Indictment. Secondly, they led to undue delay. Thirdly, the accused was not informed promptly of the additional charges. Before this Chamber, the defence raised the point whether the addition of the new counts was barred by the speciality principle of extradition law.

These four points are dealt with below.

i). Whether the size of the proposed amendments was objectionable

22. As to the first ground on which leave to amend was refused, the Trial Chamber found that the new "counts cover Articles 2, 3, and 4 of the Statute, and are based on substantially expanded factual allegations", and that "[t]he proposed amendment ... is so substantial as to amount to a substitution of a new indictment". It noted that the amendments would add fourteen counts to one original, and would increase the length of the Indictment from 8 pages to 18.

23. This Chamber sees no sufficient reason to reject the substance of the explanation of the

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Prosecutor that the "expansion of the indictment from 8 to 18 pages, referred to by the Trial Chamber, is merely due to the organisational layout of the document, which repeats many of the same facts in the prefatory paragraphs for each group of counts". But for that editorial approach, a shorter document would have been produced.

24. No doubt, size can be taken into account in considering whether any injustice would be caused to the accused; but, provided other relevant requirements are met, a court would be slow to deny the prosecution a right to amend on that ground only. The Trial Chamber did not consider whether any possible injustice arising from size could be remedied by disallowing only some of the amendments, in which case, the prosecution could have been asked to indicate its preferences: it rejected the whole.

25. In the circumstances of the case, this Chamber is not satisfied that the size of the amendments was objectionable.

ii). Whether the amendments would cause undue delay

26. The second ground of refusal was undue delay. Some domestic systems impose stricter limits than those enjoined by internationally recognised standards. It is the latter which apply to proceedings before the International Tribunal. Does any basis appear for saying that these latter standards would be violated by granting the requested amendments?

27. The accused spent six and a half months in detention before the prosecution filed its motion for leave to amend the Indictment. The trial was due to take place three and half months later. If the motion was granted, the defence would need seven months to prepare in respect of the new changes. How long the trial will take is not something to be considered at this stage.

28. The question faced by the Appeals Chamber is whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in the light of the right of the accused to a fair and expeditious trial, as enshrined under Article 20, paragraph 1, and Article 21, sub-paragraph 4(c), of the Statute. These statutory provisions mirror the protections offered under Article 14(3) of the International Covenant on Civil and Political Rights. The jurisprudence of the United Nations Human Rights Committee shows that the question of what constitutes an undue delay turns on the circumstances of the particular case.

29. In the case at hand, although the details were not given and the exact size of the amendments was not conveyed, from the beginning of the proceedings the prosecution did indicate its intention to amend the Indictment, by adding new counts. In subsequent motion hearings, the prosecution raised the issue of setting a suitable date for the Trial Chamber to hear the prosecution's motion for leave to amend. The prosecution submitted that it would be better to wait until after the Trial Chamber had disposed of the provisional release motion brought by the defence. The defence made no objection to this submission. The Trial Chamber agreed with the prosecution's submission and scheduled the motions accordingly.

30. The right of an accused to be informed promptly of the nature and cause of the charges against him, enshrined in similar terms in Article 6(3)(a) of the ECHR, Article 14(3)(a) of the ICCPR and Article 21, sub-paragraph 4(a) of the Statute of the International Tribunal, constitutes one element of the general requirement of fairness that is a fundamental aspect of a right to a fair trial. The following common general principles which may be derived from the practice of the European Court of Human Rights in relation to Article 6 of the ECHR provides some guidance as to how to interpret the requirements set out in Article 21, sub-paragraphs 4 (a) and (c) of the Tribunal's Statute: firstly, that the accused's right to be informed promptly of the charges against him has to be assessed in the light of the general requirement of fairness to the accused; secondly, that the information provided to the accused must enable him to prepare an effective defence; thirdly, that the accused must be tried

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without undue delay; and fourthly, that the requirement must be interpreted according to the special features of each case. This is consistent with the provisions of the Statute, which in Article 21, sub-paragraph 2 provides that all accused are entitled to a fair and public hearing, and thereafter in sub-paragraph 4 sets out the right of the accused to be informed promptly of the charge against him, and to be tried without undue delay, as part of the specific minimum guarantees necessary to ensure that this general requirement of fairness is met.

31. As it relates to the present Appeal, the timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings. Based upon the estimates of the defence, which were accepted by the Trial Chamber, it would take an additional seven months for the defence to prepare to defend against the charges in the Amended Indictment. Considering the complexity of the case, the omission of the defence to object to the prosecution's motion to schedule consideration of the request for leave to amend the Indictment until after the motion for provisional release had been decided, and the Trial Chamber's decision accepting the prosecution's proposal, the extension of the proceedings, even by a period of seven months, would not constitute undue delay and would afford the accused a fair trial.

32. There is one other aspect of this branch. Delay which is substantial would be undue if it occurred because of any improper tactical advantage sought by the prosecution. Was such advantage sought?

33. In replying to the prosecution's application for leave to appeal, the accused asserted that the prosecution had been deferring its request for the amendment in order to compel the accused to grant an interview to the prosecution, to obtain his co-operation against other persons, and to change his plea. The prosecution did not reply to that complaint. But the complaint had not been made before the Trial Chamber even though, before that Chamber, prosecuting counsel had volunteered, as one of the reasons for not earlier applying for leave to amend, that the prosecution "had a question of whether the accused was going to submit to an interrogation, which he ultimately chose not to do, which is his right, but that would also affect the question of when to bring forth an amendment". In its Decision, the Trial Chamber did not mention any complaint by the accused that the prosecution was seeking a tactical advantage, and did not found its holding on that point. In the circumstances, this Chamber would not give effect to the allegation of the defence that an improper advantage was being sought by the prosecution.

iii). Whether there was a failure to disclose the new charges promptly

34. As to the third ground of refusal, the defence argues that, where the prosecution brings an indictment for only some of the charges which it was then in a position to bring, the other charges are charges which it is required promptly then to disclose to the defence by reason of Article 9(2) of the International Covenant on Civil and Political Rights, and that, not having done so, it is prohibited from later seeking an amendment of the Indictment for the purpose of including them. In contrast, the prosecution regards Article 9 of the ICCPR as having "absolutely no application to the issues at hand". In its view neither the Statute and Rules of the International Tribunal, nor Articles 9 and 14 of the ICCPR, require that an indicted person be promptly informed of charges for which he has not been indicted. Pointing out that the accused upon his arrest was immediately notified of the basis for the arrest and served with a copy of the confirmed Indictment, the prosecution asserts that the completion of that process satisfied the requirements of Article 9(2) and ended its application.

35. The authorities relied upon by the defence in support of its position that allowing the prosecution leave to amend the Indictment would contravene Article 9(2) are not applicable, for in each a violation was found because of the failure to charge a person with any crime at the time of their arrest. In *Moriana Hernándes Valentini de Bazzano* (Communication No. 5/1977), Martha Valentini de Massera was arrested on 28 January 1976, but was charged only in September 1976, after spending nearly eight months in prison. In *Leopoldo Buffo Carballal* (Communication No. 33/1978), the complainant was arrested in Argentina on 4 January 1976, and was handed over to members of

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the Uruguayan Navy who later transferred him to Montevideo. He was not informed of any charges brought against him and remained detained until 26 January 1977. In *Alba Pietraroia* (Communication No. 44/1979), the Committee found that Rossario Pietraroia Zapala was arrested without an arrest warrant in early 1976 and held incommunicado for four to six months. He was not charged until his trial began on 10 August 1976. In *Monja Jaona* (Communication No. 132/1982), the Committee found that Monja Jaona was put under house arrest on 15 December 1982, without any explanation being given, and subsequently detained until 15 August 1983. In *Glenford Campbell v. Jamaica* (Communication No. 248/1987) a violation of Article 9(2) was found because of the failure to formally charge Mr. Campbell with any crime until over one month after he was arrested. None of these cases relied upon by the defence involved an arrest based on an indictment which was subsequently sought to be amended to add new charges.

36. Whatever the true meaning of "any" in Article 9(2) of the ICCPR, a point addressed by defence counsel, the Chamber does not accept that the requirement to inform an arrested person of any charges against him was breached in this case. Article 20, sub-paragraph 2 of the Statute of the International Tribunal is analogous to Article 9(2) of the ICCPR, requiring, however, that the person be "immediately informed of the charges against him". The Report of the Secretary-General submitting the draft Statute to the Security Council, referring to that Article, states that "[a] person against whom an indictment has been confirmed would ... be informed of the contents of the indictment and taken into custody". That is consistent with the view that what was visualised was that an arrested person would be promptly told of the charges contained in the indictment on the basis of which he was arrested. That was done in this case.

iv). Whether the requested amendments would breach a principle of speciality

37. The fourth and final point concerns the argument of the defence that there exists in customary international law a speciality principle which prohibits the prosecution of the accused on charges other than that on which he was arrested in Bosnia and Herzegovina and brought to The Netherlands. In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal. That institution prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition. Obviously, any such additional prosecution could violate the normal sovereignty of the requested state. The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal.

III. CONCLUSION

For the reasons given, the Appeals Chamber considered that, in the circumstances of this case, the prosecution was entitled to leave to amend the Indictment by the addition of the new charges. The Appeals Chamber has not hereby determined whether a *prima facie* case has been established in relation to the charges added in the Amended Indictment, as required for its confirmation.

[redacted]

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

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Gabrielle Kirk McDonald

President

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Dated this second day of July 1998

At The Hague,

The Netherlands.

[Seal of the Tribunal]

[redacted]

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Antonio Cassese
Judge Florence Ndepele Mwachande Mumba

ANNEX 35 (a)

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
20 May 1999

PROSECUTOR

v

MILORAD KRNOJELAC

DECISION ON PROSECUTOR'S RESPONSE TO DECISION OF 24 FEBRUARY 1999

The Office of the Prosecutor:

Ms Brenda J Hollis
Mr Franck Terrier
Ms Peggy Kuo
Ms Hildegard Uertz-Retzlaff

Counsel for the Accused:

Mr Mihajlo Bakrac
Mr Miroslav Vasic

I Introduction

1. On 24 February 1999, the Trial Chamber gave a decision on a Preliminary Motion by the accused (Milorad Krnojelac) alleging defects in the form of the indictment, filed pursuant to Rule 72 of the Rules of Procedure and Evidence. That Motion was partially successful, in that the prosecution was directed to amend the indictment in certain respects and to file an amended indictment on or before 26 March. On the subsequent application of the prosecution, based upon what was said to be the need to review voluminous documents in order to plead the charges correctly and the illness of one of its counsel,[1] and without objection from the accused, this date was extended to 23 April 1999.[2]

2. On 23 April, the prosecution filed a document entitled "Prosecutor's Response to Decision on the Defence Preliminary Motion on the Form of the Indictment", to which was attached a document

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entitled "Amended Indictment" and certain other documents to which reference need not be made at this stage. The amended indictment itself was not filed separately.

3. The so-called "Response" seeks to explain the amendments which were made and how they are said to comply with the decision of the Trial Chamber given on 24 February. The document –

(i) raises for the determination of the Trial Chamber an issue as to whether Rule 50 of the Rules of Procedure and Evidence is applicable and what further procedures, if any, must be followed for the amended indictment "to become valid";[3]

(ii) draws attention to a factual error in the original indictment which has been revealed by further investigation; and

(iii) submits that the amended indictment is "in compliance" with the Trial Chamber's Decision.[4]

II Amending the indictment

4. Rule 50 is concerned with two situations – how an amendment may be made to the indictment, and what happens thereafter. It provides:

(A) The Prosecutor may amend an indictment:

(i) without leave, at any time before its confirmation;

(ii) thereafter, and until the commencement of the presentation of evidence in terms of Rule 85, with leave of the Judge who confirmed the indictment, or a Judge assigned by the President; or

(iii) after the commencement of the presentation of evidence, with leave of the Trial Chamber hearing the case, after having heard the parties.

If leave to amend is granted, the amended indictment shall be reviewed by the Judge or Trial Chamber granting leave. Rule 47 (G) and Rule 53*bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rules 47(G) and 53*bis* relate to the certification, translation and service of the indictment once it has been confirmed.

5. The context in which Rule 50 is being considered here is that, pursuant to Rule 72, the accused has successfully demonstrated a defect in the form of the indictment and the Trial Chamber has directed the prosecution to amend it. In that context, it is convenient to consider first the situation in relation to the making of the amendment. As the original indictment in this case was confirmed by Judge

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Vohrah on 17 June 1997, and as no evidence has yet been presented in the terms of Rule 85, and upon the assumption that Rule 50(A) does apply in the present context, para (ii) would be the relevant provision.

6. The prosecution submits that leave to amend the indictment need only be obtained from the confirming judge (or another judge assigned by the President) where the amendment is sought by the prosecution, and that Rule 50(A) does not apply where the amendment is made either with the leave or at the direction of a Trial Chamber pursuant to Rule 72.

7. The practice within the Tribunal has not been consistent as to the precise nature of the relief granted when upholding a complaint by an accused in relation to the form of the indictment pursuant to what is now Rule 72. For example, in *Prosecutor v Tadic*,[5] the Trial Chamber granted leave to the prosecution to amend the indictment within a limited period. In *Prosecutor v Djukic*,[6] the Trial Chamber invited the prosecution to amend the indictment so as to conform with the Statute and the Rules. In *Prosecutor v Blaskic*,[7] the Trial Chamber invited the prosecution to supplement the indictment by supplying particulars of the places where certain events were alleged to have occurred and, "as appropriate", it ordered such amendments to be made within a limited period, but it also directly ordered the prosecution to amend the indictment in three ways – by providing sufficient factual indications in support of the types of responsibility invoked, by adding further precision to various allegations made only in general terms and by giving further particulars of other allegations. Subsequently, in the same case,[8] the Trial Chamber noted that the prosecution had failed by its amendments to provide any further details in support of the types of responsibility involved, and the Trial Chamber stated that it would not fail "to draw all the legal consequences at trial" of the prosecution's failure to give sufficient notice to the accused of the case he was to meet. In the present case, the prosecution was directed to amend the indictment in certain respects and to file an amended indictment within a limited period.[9] Another form of relief in an appropriate case may be to strike out any offending part of an indictment and then to grant leave to the prosecution to amend.

8. There is no difference in substance between granting leave to the prosecution to amend the indictment and ordering or directing the prosecution to amend it. In either such case, any application made to the confirming judge pursuant to Rule 50(A) for leave to make the particular amendments which have already been permitted or directed by a Trial Chamber would serve no useful purpose, and the Trial Chamber is satisfied that such a procedure is not contemplated by the wording of the rule. The submission of the prosecution in relation to Rule 50(A) is therefore correct. It is unnecessary in this case to determine whether the same would be the consequence of a mere invitation by a Trial Chamber to the prosecution to amend, although common sense would seem to dictate that it should be the same.

9. What happens next depends upon whether the amendments do or do not go beyond what was permitted or directed by the Trial Chamber.

10. If the amendments made by the prosecution *do* go beyond what was permitted or directed by the Trial Chamber and add new charges, Rule 50(A) does apply, and leave to make those amendments is required. Such leave must be sought from the confirming judge or another judge assigned by the President. The reason why the Trial Chamber which heard the Motion by the accused pursuant to Rule 72 cannot also grant leave to add new charges at this stage lies in the structure of the Rules of Procedure and Evidence. The Rules adopt a division of functions which exists in both common law and civil law systems – between, on the one hand, the functions of the grand jury (or committing magistrate) in the common law system or the *juge d'instruction* in some civil law systems and, on the other hand, the functions of the trial judges.

11. Every indictment submitted by the prosecution must be reviewed by a judge for confirmation in accordance with Rule 47 prior to the service of the indictment. That judge is required by Rule 47(E)

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to examine each count of the indictment in order to determine whether a case exists against the person or persons against whom the count is laid. The judge must be satisfied that the count contains a *prima facie* case against the accused,[10] in the sense that it pleads a credible case which would (if not contradicted by the accused) be a sufficient basis to convict him on the charge.[11] This review is performed *ex parte* and, once performed, the confirming judge becomes ineligible to sit as a member of the Trial Chamber for the trial of that accused.[12] The intention of this division of functions is to avoid any contamination spreading from the *ex parte* nature of the confirming procedure to the Trial Chamber.

12. Once evidence has been presented before the Trial Chamber, it is not practicable for the confirming judge to continue to be the authority from whom leave to amend in order to add new charges must be sought. Many amendments at that stage are in any event made simply to ensure that the indictment properly reflects the evidence which has already been given. But, even when that is not the case and the amendment involves new evidence, no confirming judge can be in as good a position at that stage as the Trial Chamber is to deal with amendments to the indictment. That is why para (iii) has been added to Rule 50(A). The need to confirm the indictment remains where an application for leave to amend is granted,[13] although the review which must be undertaken by the Trial Chamber for that purpose is performed *inter partes*, in open court in the presence of the accused, and the amended indictment may be confirmed only after hearing both parties.[14] The possibility of contamination spreading from the *ex parte* nature of the confirming procedure is therefore effectively eliminated.

13. If the amendments made by the prosecution do *not* go beyond what was permitted or directed by the Trial Chamber in relation to defects found in the form of the indictment, and so do not add new charges, leave to amend need not be sought from the confirming judge or other judge assigned by the President pursuant to Rule 50(A), as earlier stated. Is there nevertheless still a requirement that the amended indictment be reviewed? Such a review could not practicably be performed by the Trial Chamber which granted leave to amend, because all three judges would thereafter automatically become ineligible to sit as members of the Trial Chamber for the trial of the accused.[15] And, as no new charges have been added, a review would serve no useful purpose. The Trial Chamber is satisfied that such a procedure is not contemplated by the wording of the rule in this situation.

14. If at any stage the amendments to the indictment do include new charges, Rule 50(B) requires the accused to enter a plea on the new charges.

III The present case

15. An issue would appear to arise in the present case as to whether some of the amendments now made by the prosecution *do* go beyond what was directed by the Trial Chamber's decision and thus require such leave and confirmation pursuant to Rule 50(A) and the entry of a new plea pursuant to Rule 50(B). Before referring to the nature of those amendments, however, it is necessary to say something concerning the procedure which has been followed by the prosecution in this case.

16. First, it is inappropriate for any party to file a so-called "Response" to a decision of the Tribunal unless one is expressly sought by that decision. If a party wishes to obtain advice as to any procedure to be followed as a consequence of that decision, then that party should file a Motion seeking a determination of the issue which arises, allowing the other party or parties to file a response to that Motion.

17. Secondly, the submission in the so-called "Response" in the present case that the proposed amended indictment is "in compliance" with the decision of the Trial Chamber appears to assume

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that, without more, it now becomes the function of the Trial Chamber to determine whether that document does or does not comply with that decision. In effect, it assumes that the prosecution may now obtain the Trial Chamber's approval of the form of the new pleading. That assumption is quite wrong.

18. The Trial Chamber is, of course, entitled to raises the issue *proprio motu*. But, unless it does so, it is never the function of a Trial Chamber to approve of the form of an indictment unless and until there is some complaint by the accused that the form of that indictment (original or amended) is defective. If an indictment has been amended only as permitted or directed by the Trial Chamber following a preliminary Motion pursuant to Rule 72, then it should be filed and served. If the accused believes that there remain defects, or that there are new defects, he must file a new Motion in which he makes his complaint.[16] Then and only then does it become the function of the Trial Chamber to determine whether or not the form of the amended indictment is defective.

19. The Trial Chamber has *not* given any consideration as to whether the amendments now made in the proposed amended indictment comply with the directions which it gave. However, when reading the explanatory material in the so-called "Response" of the prosecution, the Trial Chamber has obtained the impression that the prosecution may have taken the opportunity to add new charges for which leave is required pursuant to Rule 50(A). It is true, as the prosecution says, that no new counts have been added to the indictment. But that is only because of the pleading style adopted by the prosecution in this case; each count has been pleaded only in the terms of the Statute, and thus in terms of absolute generality, leaving it to the material facts pleaded in respect of that count to reveal the specific details which are required (such as the identity of the victim, the place and the approximate date of the alleged offence and the means by which the offence was committed)[17] and which should, strictly, have been pleaded in the count itself.

20. In some cases in the proposed amended indictment, it is at least arguable that there has been an insertion of entirely new factual situations in support of existing counts, either in substitution for or in addition to the factual situations which had been pleaded in the original indictment.[18] Even though the count remains pleaded in the same terms of the Statute, these substitutions may nevertheless amount effectively to new charges. It may well be that, such has been the nature of the changes made, leave to amend will be required. If that be so, the amended indictment will have to be reviewed and the accused will have to enter a new plea on those charges. At this stage, the Trial Chamber merely raises these issues for the consideration of the parties. It does not express any concluded view as to those issues, preferring to determine them if and when they are raised and after considering the submissions of both parties.

21. What is to be done in the present case, therefore, is as follows:

(1) The prosecution must determine what stand it takes in relation to the proposed amended indictment. If it takes the stand that it has *not* pleaded new charges in the way described, it must file the amended indictment within seven days of the date of this decision.

(2) If the accused challenges the prosecution's stand that the proposed amended indictment has *not* pleaded such new charges, he must, within thirty days of the filing of the amended indictment, file a Motion to strike out those passages from that amended indictment which he asserts *do* plead new charges as having been added without leave.

(3) If the prosecution accepts that it *has* pleaded new charges in the way described, it must apply to the confirming judge (Judge Vohrah), or to another judge assigned by the President, for leave to amend pursuant to Rule 50, and the remaining procedures provided by that rule will follow. It must also apply to this Trial Chamber within seven days of the date of this decision for a variation of the time limit for filing the amended

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indictment already imposed by its order of 25 March 1999 to enable that application to be made and a review carried out.

(4) If the accused asserts that there remain defects, or that there are new defects in any amended indictment filed, he must, within thirty days of the filing that amended indictment, file a Motion to complain of those defects.

IV Disposition

22. For the foregoing reasons, TRIAL CHAMBER II DECIDES that –

1. Leave is granted to the prosecution, within seven days of the date of this decision, to file the proposed amended indictment or to apply for a variation of the time limit imposed by the order made on 25 March to enable an application for leave to amend to be made and a review carried out pursuant to Rule 50.

2. Leave is granted to the accused, within thirty days of the filing of an amended indictment, to file a preliminary Motion pursuant to Rule 72 in relation to that amended indictment if he be so advised.

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

Dated this 20th day of May 1999
At The Hague
The Netherlands

_____

David Hunt
Presiding Judge

[Seal of the Tribunal]

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1. Prosecutor's Motion for Extension of Time to File Amended Indictment, 18 Mar 1999, at paras 2-3.
2. Order on the Prosecutor's Motion for an Extension of Time to File an Amended Indictment, 25 Mar 1999, at p 2.
3. Prosecutor's Response to Decision on the Defence Preliminary Motion on the Form of the Indictment, 23 April 1999, at para 31.
4. *Ibid*, at para 37.
5. Case IT-94-I-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov 1995, at p 7.
6. Case IT-96-20-T, Decision on Preliminary Motions of the Accused, 26 Apr 1996, at p 11.
7. Case IT-95-14-PT, Decision on the Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 Apr 1997, at para 39.
8. *Prosecutor v Blaskic*, Case IT-95-14-PT, Decision on the Defence Request for Enforcement of an Order of the Trial Chamber, at p 5.
9. *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, at p 22 ("VIII Disposition").
10. Statute, Article 19.1; Rule 47(E).
11. *Prosecutor v Kordic*, Case IT-95-14-1, Decision on the Review of the Indictment, 10 Nov 1995, at p 3. It should be noted that the confirming judge does not determine the validity of the *form* of the indictment.
12. Rule 15(C).
13. Rule 50(A).

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14. Rule 50(A) (iii).
15. Rule 15(C).
16. Rule 50(C) gives to the accused a further period of thirty days in which to file a preliminary Motion pursuant to Rule 72 challenging the form in which any *new* charges have been pleaded. If the accused claims that there remain defects, or there are new defects, in respect to any *existing* charges, his Motion would, strictly, have to include an application pursuant to Rule 127 for a variation of the time limit imposed by Rule 72 to make that complaint. Such a variation would necessarily have to be granted as a matter of fairness if there is any validity in the complaint itself.
17. *Prosecutor v Krnojelac*, Case IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, at para 12.
18. See, for example, paras 5.6, 5.10-13, 5.20 and 5.21, and possibly also paras 5.14 (by the addition of Schedule A), 5.26 (by the addition of Schedule B), 5.37 (by the addition of Schedule D) and 5.41 (by the addition of Schedule E). Schedule C was in the original indictment.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

OR: ENG

TRIAL CHAMBER II

Before:
Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

ANNEX #5(e)

Registry: Agwu U. Okali

Decision of: 21 June 2000

THE PROSECUTOR
v.
Eliezer NIYITEGEKA

Case No. ICTR-96-14-T

DECISION ON THE PRELIMINARY MOTION OF THE DEFENCE (OBJECTIONS BASED ON LACK OF JURISDICTION AND DEFECTS IN THE FORM OF THE INDICTMENT) and ON THE URGENT DEFENSE MOTION SEEKING STAY OF PROCEEDINGS

The Office of the Prosecutor:
Ken Flemming
Don Webster
Ifeoma Ojemeni

Counsel for the Accused:
Sylvia Geraghty

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

SITTING as Trial Chamber II composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Pavel Dolenc as assigned by the President to temporarily replace Judge Mehmet Güney;

BEING SEIZED of a motion filed on 11 April 2000 by the Defence, entitled; Urgent Preliminary Motion: Objections Based on Lack of Jurisdiction and Defects in the Form of Indictment, (the "Preliminary Motion");

BEING SEIZED of a motion by the Defence, filed on 20 April 2000, entitled; Urgent Defence Motion: Seeking Stay of Proceedings Pending Final Decision/Judgement on Urgent Preliminary

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Defence Motion, filed on 11 April, ("The Motion Seeking Stay of Proceedings")

CONSIDERING the three responses from the Prosecutor for the above two motions filed respectively 15 May 2000, 17 May 2000, and the Supplementary Prosecutor's Response to: (i) Urgent Preliminary Defence Motion: Objections Based on Lack of Jurisdiction and Defects in the Form of the Indictment; (ii) Urgent Defence Motion Seeking Stay of Proceedings, and (iii) Defence Motion Objecting to the Prosecutor's Request for Leave to File an Amended Indictment, on the Grounds of, inter alia, Abuse of process, Inadmissibility and Lack of Jurisdiction. filed on 30 May 2000, "The Supplementary Prosecutor's Response;"

TAKING NOTE of the Decision rendered by this Trial Chamber on 7 February 2000 on the Defence's Application of Extreme Urgence for Disclosure of Evidence filed by the Accused on 9 November 1999, where the Trial Chamber specifies the different time frames for disclosure of supporting material based on Rule 66;

NOTING that on 3 March 2000, the Accused filed the 'Very Urgent Defence Motion for Order of Compliance by the Prosecutor with Order of the Tribunal Dated 7 February 2000,' the Hearing of which was on 30 March 2000.

NOTING that Prosecutor has complied with the disclosure required under Rule 66;

CONSIDERING the provisions of the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 66 and 72;

HAVING HEARD the parties on the motions on 1 June 2000;

WHEREAS on 1 June 2000 the Trial Chamber rendered an oral decision on this case on the Preliminary Motion and the Motion Seeking Stay of Proceedings, and the parties were notified that the written decision would be filed at a later stage.

THE SUBMISSIONS OF THE PARTIES

The Defense on the Preliminary Motion

1. The Defense raises several issues to substantiate allegations that the Trial Chamber lacks jurisdiction. In the light of the serious violations of the rights of the Accused, given the conduct and *mala fides* of the Prosecutor, the Accused has suffered serious prejudice to the extent that no fair trial can take place and therefore, to try him would be so unfair as to amount to an abuse of process. The Defense Counsel in support of this motion made, *inter alia* the following submissions:

Abuse of process

2. In support of its Preliminary Motion the Defence uses Affidavits filed in April 2000 as Annexes 5 and 6 to the Defense Motion. The Preliminary Motion alleges, *inter alia:*

3. That pursuant to Rule 47(H)(ii), the Indictment against the Accused was confirmed on 15 July 1996 and an Order pursuant to Rule 40*bis* addressed to the Government of Kenya to search for, arrest and transfer the Accused to the Tribunal was also signed on 16 December 1998.

4. On 9 February 1999, the Accused was arrested in Nairobi, Kenya.

5. The Prosecutor conducted interrogation of the Accused, without recordings being made and in the absence of a lawyer, in breach of the provisions of Article 19(1) and (2) and Article 20(3) and (4)(g) of the Statute, and Rules 42(A) (i) and (iii): 42(B) and 43 (i), (ii), (iii), (iv) and (v), *mutatis mutandis*,

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Rule 44 bis (D), 45 (under Rule 45 bis), with no provision having been made for any such interrogation under Rules 55 or 57.

6. The Prosecutor, during the course of interrogation, attempted to compel the Accused to admit guilt to all the charges alleged against him in the Indictment. The Prosecutor, in order to encourage a guilty plea, made mention of certain promises and inducements, including:

(a) that some of the charges proffered against the Accused would be removed.

(b) that if the Accused accepted the demands, the Prosecutor would arrange for the family of the Accused to be transferred, without delay, receiving financial assistance for at least six months, whilst awaiting intervention of UNHCR.

(c) that if the Accused refused to co-operate, the Prosecutor could proceed to amend the Indictment and include, *inter alia*, the additional charge of rape even though she knew that the Accused had not raped anyone and that there was no credible evidence to prove such a charge.

7. The Defence emphasizes that in order to deter a potential abuse, there must be strict adherence to the Rules considering the vulnerability of the Accused.

8. On 18 February 1999, the duty counsel of the Accused informed the Prosecutor that the Accused was innocent of the charges being brought against him and that he could not plead guilty to false charges and was ready to prove his innocence.

9. The Defence reminds the Tribunal that to date the Prosecutor has neither sworn an affidavit, nor has she filed one to rebut all of the matters, which the Accused has deposed to. The evidence as given by the Accused stands unchallenged and should be taken as true, in the absence of any rebutting evidence.

10. The Accused awaited disclosure under Rules 66(A) and 68 comprising of the exculpatory evidence, supplementary materials and the full witness statements, redacted or otherwise, especially the extracts of witness statements, which are to be provided within thirty days of the initial appearance of the Accused. The Defence has written to the Prosecutor several times seeking a definitive answer on this point.

11. On 13 March 2000, seven weeks later, disclosure was made of supporting material comprising of witness statements. At the end of April 2000 the Prosecutor disclosed some exculpatory evidence, which it had denied possessing, up to then.

12. The Defence submits that, this Preliminary Motion has been filed within thirty days of receipt from the Prosecutor of what is, in reality, the supporting material envisaged by the Defence pursuant to Rule 66A(i).

13. The Defence submits that the Prosecutor's case, which charges the Accused of committing crimes under Article 2, 3 and 4 of the Statute is not grounded in evidence, because:

14. The Prosecutor relies on the statements of a witness who has already been discredited in two separate trials: *Prosecutor v Alfred Musema*, ICTR – 1996-13-T, as Witness "Z" (Judgement of 27 January 2000) and in the case of *Prosecutor v Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, as Witness "NN" (Judgement of 21 May 1999). The Defence submits that to put forward the testimony of this witness, is incontrovertible proof of the overwhelming abuse of process and *mala fides* of the Prosecutor towards this Accused.

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15. Defence further submits that in putting forward sixteen witness testimonies, of whom not one witness makes allegations of having seen the Accused killing anyone manifests, *inter alia*, to an abuse of process. This is contrary to Rule 95, which states that, no evidence shall be admissible if its admission is antithetical to and would seriously damage the integrity of these proceedings.

16. The Defence further submits that the charge of conspiracy brought against the Accused in the existing Indictment is false and without foundation. The evidence to ground these allegations having emerged since Operation NAKI in July 1997.

17. The Prosecutor impedes the Trial Chamber in carrying out its obligation to the Accused in ensuring his right to a fair and expeditious trial as set out in Article 19(1) of the Statute. The Prosecutor's Motion and Brief for Leave to File an Amended Indictment is specifically referred to.

18. The Prosecutor's Application to Amend the existing Indictment against the Accused three years and nine months after he was indicted will delay his trial and constitutes an abuse of process.

19. The Defence grounds its arguments on the abuse of process against the Accused by making reference to, inter alia, the case of *Regina v Horseferry Road Magistrates Court ex parté Bennet*, IAC, 42.95 [1994), ILR, House of Lords, 380 (1993). The House of Lords stated, *inter alia*, that one would hope the number of reported cases in which a Court has to exercise jurisdiction to prevent abuse of process are comparatively rare, usually confined to cases in which the conduct of the Prosecution has been such as to prevent a fair trial of the Accused.

20. Further reference is made to *Jean-Bosco Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, page 42, Decision of 11 march 1999, where it was stated that, 'To proceed with a trial against the Accused would amount to a further act of injustice in forcing him to undergo a lengthy and costly trial, only to have him raise once again these issues currently before this chamber.'

21. The Accused requests the Trial Chamber that given all the circumstances outlined herein, to take this Motion under Rule 72 as it existed before its amendment in February 2000.

22. The Defence therefore prays that the Trial Chamber stay these proceedings with prejudice to the Prosecutor, order immediate unconditional release of the Accused, and compensate the Accused

The Defence on the Motion Seeking Stay of Proceedings

23. The Defense submits that because of lack of jurisdiction any further proceedings stay until the Trial Chamber has deliberated on this Preliminary Motion.

The Prosecutor on the Preliminary Motion

24. In response, the Prosecutor submits, as follows;

Abuse of Process

25. That the Defence does not appreciate the distinction between 'supporting material' pursuant to Rule 66(A)(i) and 'witness statements' pursuant to Rule 66(A)(ii).

26. That this Trial Chamber accepted in its Decision rendered on 7 February 2000 that all of the supporting material was sent at the latest on 11 June 1999, which the Accused still ignores completely and seeks to have another determination of the issue.

27. That the Accused had '60 days', following disclosure of all the material envisaged by Rule 66(A) (i) by the Prosecutor since June 11 1999 within which to bring a preliminary motion. The Accused is

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eight months out of time in bringing this so-called 'Urgent Motion' and the Defence has not requested an extension of the deadline for good cause.

28. That in response to the misapprehension shown by the Accused that the Prosecutor has exculpatory evidence, the Prosecutor responds again, as she has maintained before this Trial Chamber in a hearing of 7 December 1999, that she does not have any material she considers exculpatory.

29. That the Accused misstates Articles 2, 3, and 4 by not stating them fully. The Defence complains about the adequacy of evidence, which in essence, is an issue for trial and not for a preliminary motion. The Prosecutor refers to the case of *Prosecutor v Jérôme Bicamumpaka*, ICTR-99-50-I, Decision of Trial Chamber II given on 8 May 2000.

30. The Prosecutor submits that the Defence ignores the substantial learning on genocide and related crimes contained in the Decisions of this Tribunal. The case of *Prosecutor v Jean Paul Akayesu*, paragraph 112 to 129 and 492 – 562 and particularly at paragraphs 523 – 524, ICTR-96-4-T Judgement of 2 September 1998, is one such case, with respect to inferences to be drawn from multiplicity of facts.

31. The Prosecutor further submits that the Accused is charged with heinous crimes because there is evidence, which in accordance with the law, was and is sufficient to confirm the Indictment and to put the Accused on trial as was determined by the confirming Judge.

32. The Prosecutor, whereupon, made reference to the witness statements where in at least three of the witnesses referred to the Accused by name.

33. The Prosecutor therefore submits that the witness statements are not 'truncated' and are full statements in respect to the witness it is intends to call. The Defences' submissions in respect of these matters are false and mischievous.

34. As to the allegations by the Defence concerning the Prosecutor's Motion to Amend the indictment, the Prosecutor submits that filing a Motion to Amend an Indictment does not amount to an abuse of rights, which is a totally different issue and is not a matter of jurisdiction.

35. The Prosecutor submits that the Defence's Preliminary Motion may be addressed under Rule 72 (H), which deals with objections based on jurisdiction. This rule exclusively challenges an Indictment on the ground that it does not relate to, *inter alia*, specific persons, territories, period and violations as provided for in the Statute. This Motion does not, therefore relevantly relate to this Rule. This Preliminary Motion is instead, an attempt to review the Decision of the confirming Judge, of 15 July 1996.

36. As to the issue of Affidavit, the Prosecutor submits that she received the sealed Affidavit of the Defence Council on the 30 May 2000 after the Court had ordered that it be disclosed. For that same reason, the Prosecutor submits accounts for the delay in delivering the Affidavit in response to the Defence Counsel's Affidavit.

37. The Prosecutor further submits on the understanding of certain of the facts in the Affidavit of the Accused that it was the Accused who initiated conversations with the Prosecutor because he wanted to ensure the safety of his wife and children. Furthermore, the Accused wanted to know what sort of a deal he could get if he did co-operate with the Prosecutor.

38. The Prosecutor also submits that the Accused further wanted to know if the Prosecutor would remove certain parts of the Indictment. It was therefore the accused bargaining with the Prosecutor to have certain charge taken out so that he could co-operate.

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39. As to the issue of recording interrogations and conversations made with the Accused, the Prosecutor submits that it was the Accused himself, a journalist, who stipulated that he would not talk if there were to be any recording. The Accused had made reference to Jean Kambada whose co-operation was soon broadcast amongst the detainees and who was considered to be a 'cockroach' by the other detainees.

The Prosecutor's response on the Motion Seeking Stay of Proceedings

40. The Prosecutor relies on its Motion titled 'Supplementary Prosecutor's Response to, *inter alia*, Urgent Defence Motion Seeking Stay Of Proceedings' filed on 30 May 2000. The Prosecutor submits, inter alia, the following:

41. That this Urgent Motion Seeking Stay of Proceedings is premised on the Defence complaints concerning disclosure of witness statements that has motivated every Defense Motion that has been filed and argued before this court. The Defense has been in possession of the supporting materials since the time of his arrest. Copies of the full witness statements were delivered to him by the Registry on 11 June 1999. The first Defense preliminary motion is this preliminary motion before us, which is a full nine months out of time as prescribed under Rule 72.

42. The Prosecutor therefore requests that the Defense application for stay be denied and that this Trial Chamber sanction the Defense by withholding compensation for the Defense Motion Seeking Stay of Proceedings.

AFTER HAVING DELIBERATED

Extent of the Motion

43. Although the Defence filed its Preliminary Motion making objections based on lack of jurisdiction and defects in the form of the indictment, at the hearing of 1 June 2000, the Defence indicated that it will only dwell into the issue of Lack of Jurisdiction.

Timeliness of the Preliminary Motion

44. The Defence filed its Preliminary Motion on 11 April 2000 under Rule 72. The Trial Chamber notes that the Defence has not sought relief under Rule 72(F) for the extension of the time limit as prescribed in Rule 72(A). Instead, the Defence maintains that this Preliminary Motion is filed within thirty days of receipt from the Prosecutor of the supporting materials envisaged under Rule 66(A)(i). In the brief supporting this Motion, the Defense maintains that the Prosecutor continues to breach its obligations in failing to disclose 'supporting materials' and that the applicable 'supporting materials' for disclosure within thirty days were the full witness statements, redacted or otherwise.

45. Pursuant to Rule 72(A) as amended on 22 February 2000, all preliminary motions must be filed within thirty days following disclosure by the Prosecutor to the Defence of all materials envisaged by Rule 66(A)(i). Rule 72(F) further provides that failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights unless the Trial Chamber grants relief from the waiver upon showing good cause.

46. Thus the question of whether the Defence has filed the Preliminary Motion in a timely manner, depends on the date when copies of the supporting material that accompanied the indictment at its confirmation are disclosed to the Defence.

47. The Trial Chamber deems it necessary at this juncture, to point out the important distinction between the different specified time frames for the disclosure of various documents pursuant to Rule 66 by referring to its decision of 7 February 2000.

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48. In the 7 February 2000 Decision, the Trial Chamber distinguished between:

(a) *The Disclosure of Supporting Material pursuant to Rule 66(A)(i):*
The Prosecutor should have disclosed to the Defence, copies of the Supporting material, which accompanied the Indictment when confirmation was sought within 30 days of the initial appearance of the Accused and not 57 days later (i.e. 11 June 1999.)

(b) *The Disclosure of Witness Statements pursuant to Rule 66(A)(ii):*
Although the trial date is not set yet, the Prosecutor is required to make a concerted effort to continue and complete the Prosecutor's disclosure obligations at the earliest opportunity.

49. Rule 66(A)(i) states that the Prosecutor shall disclose to the Defence within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecutor from the accused. The Trial Chamber emphasises the importance of the link between the disclosure of supporting materials as envisaged by Rule 66(A)(i), and the specified time limit for the filing of a preliminary motion as prescribed in Rule 72(A).

50. This Chamber addressed the same issue in *Prosecutor v. Sylvain Nsabimana and Alphonsbe Nteziryayo*, ICTR-97-29-I, pg. 4, paras. 4-5, (10-9-1999) where in, the Tribunal held that the period for filing a preliminary motion begins to run once the Prosecutor has disclosed the supporting material pursuant to Rule 66(A)(i). In the same decision, the Trial Chamber noted that the Prosecution must disclose supporting material and prior statements of the accused within thirty days of the initial appearance.

51. Similarly, in *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-I, pg. 3, para. 4, (8-31-1999) in which the Trial Chamber ruled that Rule 72(A) specifies the time limit to file all preliminary motions following disclosure by the Prosecutor. The materials that are subject to disclosure, as envisaged in Rule 66(A)(i) of the Rules are copies of the supporting material that accompanied the indictment at its confirmation, as well as prior statements obtained by the Prosecutor from the Accused.

52. In the instant case, the Trial Chamber acknowledges that the issue of disclosure has been raised repeatedly by the Defence.

53. As indicated in the above decision dated 7 February 2000, the Accused made his initial appearance on 15 April 1999. It is undisputed that on or about 11 June 1999, the Defence received a second set of supporting materials identical to the one disclosed to the Accused on the day of his arrest on 9 February 1999 (see Decision On the Defence Motion For Disclosure of Evidence, pg. 1, para. 1; see also Defence Application of Extreme Urgence For Disclosure of Evidence, filed 9 November 1999). Hence, the Trial Chamber found that the Prosecutor has complied with the mandatory obligation stated in Rule 66(A)(i) as of 11 June 1999.

54. Thus, the date when the Prosecutor communicated the supporting materials to the Defence serves as the triggering factor for the running of the time limit to file the preliminary motion within thirty days of the disclosure date as specified in Rule 72(A). Therefore the Preliminary Motion which was filed on 11 April 2000 is submitted after the time limit expired.

55. The Defense requests that the Trial Chamber apply 'old' Rule 72, which is as it stood before its amendment in February 2000, but it fails to show any prejudice for the accused if the amended rule is applied. Furthermore, even if this Trial Chamber was to consider the Defence's request to apply the previous Rule 72 prior to its amendment, (which allowed sixty days following disclosure by the Prosecutor to the Defence to file any preliminary motions), the prescribed time limit for filing

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preliminary motions would have long been expired. 11763

56. Therefore because the Accused has not adhered to the provisions of Rule 72 and no relief was sought for a waiver of this time limit pursuant to Rule 72(F), the Trial Chamber rules that the Defence's preliminary motion is inadmissible.

57. Furthermore, in view of the aforementioned Decision and the subsequent hearing on 30 March 2000, when the Trial Chamber again noted that the Prosecutor has complied with the disclosure requirements, the issue of disclosures has previously been ruled on and decided upon.

58. Thus, in accordance with the principle of *res judicata*, the Trial Chamber holds that the issue of disclosure shall not be reopened or re-challenged by the parties. In addition, mindful of Rule 73(E), the Trial Chamber reminds, *in limine*, counsel for the Defence, the obligation not to make frivolous or unwarranted motions.

59. In any case, it is evident from the submissions by the Defence, the issue raised was not one of jurisdiction rather it was an attempt to review the decision of the confirming Judge, which is inadmissible under Rule 72.

60. The Defence also raised and linked the issue of jurisdiction to the question of abuse of process. As already explained, the Preliminary Motion is out of time under Rule 72. The Trial Chamber has considered the issue of abuse of process and it holds that it is unfounded.

61. The Trial Chamber accepts that the parties met noting the fact that there have been plea agreements leading to pleas of guilty in some proceedings before the Tribunal. It further notes, that the alleged events are said to have happened during the first days the Accused came into contact with representatives of the Prosecutor's office in February 1999. Yet the Accused raised them for the first time in April 2000, upon filing this Preliminary Motion to the Tribunal. In these circumstances, therefore, the Trial Chamber is led to believe that the allegations by the Accused are unfounded.

Stay of Proceedings

62. The Defence's second Motion asking for stay is thus moot and denied.

FOR THE FOREGOING REASONS,

THE TRIAL CHAMBER,

DISMISSES the Defence's Preliminary Motion, because it is out of time, and;

DISMISSES the Defence request for seeking stay of proceedings pending final decision on the Defence's Preliminary Motion filed on 9 April 2000 as inadmissible because it is moot.

Decision Rendered on 1 June 2000
Signed in Arusha on 21 June 2000

Laïty Kama,	William H. Sekule	Pavel Dolenc
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

ANNEX B 5(i)

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IT-04-78-PT ~~IT-04-76-I~~ ~~IT-01-46-PT~~ ~~1443~~
D3 - D1 ~~D1103-D1101~~ ~~D1443-D1441~~ ~~Rk~~
03 AUGUST 2004 ~~30 JULY 2004~~ ~~30 JULY 2004~~ ~~1103~~ ft

3 AT

UNITED NATIONS

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

Cases No. IT-04-76-I and IT-01-46-PT
Date: 30 July 2004
Original: English

IN TRIAL CHAMBER I

Before: **Judge Liu Daqun, Presiding**
Judge Amin El Mahdi
Judge Alphonsus Orie

Registrar: **Mr. Hans Holthuis**

Decision: **30 July 2004**

THE PROSECUTOR
v.
RAHIM ADEMI
(IT-01-46-PT)

THE PROSECUTOR
v.
MIRKO NORAC
(IT-04-76-I)

DECISION ON MOTION FOR JOINDER OF ACCUSED

The Office of the Prosecutor:

Mr. Mark Ierace

Counsel for the Accused:

Mr. Čedo Prodanović for Rahim Ademi
Mr. Željko Olujić for Mirko Norac

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IT-04-78-PT ~~IT-01-46-PT~~ ~~IT-04-76-I~~ ~~4442~~ ~~1102~~ 2

TRIAL CHAMBER I, ("the 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 ("the Tribunal");

BEING SEIZED of the "Prosecution Motion for Joinder of Accused" filed on 27 May 2004 ("the Motion"), in which the Prosecutor seeks to join the case against Mirko Norac (IT-04-76-I) with the case against Rahim Ademi (IT-01-46-PT), pursuant to Rule 48 of the Rules of Procedure and Evidence ("Rules");

NOTING that an indictment against Mirko NORAC was confirmed on 20 May 2004;

NOTING that a first indictment against Rahim Ademi was confirmed on 8 June 2001 and that the second amended indictment against Rahim Ademi was filed on 1 February 2002;

NOTING that the Prosecution argues that (i) the legal requirements of Rule 48 are met, (ii) a joint trial would be in the interests of justice, (iii) a joint trial would neither create a conflict of interest nor interfere with the rights of the accused;

NOTING the "Defence Response to Prosecution Motion for Joinder of Accused" filed by the Defence of Mirko Norac on 23 July 2004, whereby Mirko Norac indicates that he does not object to the Motion since a joinder would be consistent with Rules 48 and 82 of the Rules and the Prosecution connected this matter with the referral of the case before a Court of the Republic of Croatia;

NOTING that no response was filed by the Defence of Rahim Ademi;

CONSIDERING that both accused are charged with the same crimes, allegedly committed during the same time period and in the same geographical area; that the indictments demonstrate *prima facie* that the crimes charged against both accused were committed in the course of the same transaction;

CONSIDERING that the joinder of accused would avoid duplication of the presentation evidence, minimise hardship to witnesses, be in the interests of judicial economy and ensure consistency of verdicts;

CONSIDERING that a joinder would not create a conflict of interest nor otherwise prejudice the right of the accused to a fair and expeditious trial;

CONSIDERING that it is in the interests of justice that both accused be tried in a single trial;

CONSIDERING that this decision solely deals with the Motion for Joinder and is without prejudice to any further decision on other matters;

PURSUANT to Rules 48 of the Rules,

GRANTS the Motion;

REQUESTS the Registry to designate one unified case number to the joined case forthwith;

CONFIRMS that the Consolidated Indictment that is attached to the Motion, is the official indictment against both accused.

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

Done this Thirtieth day of July 2004,
At The Hague,
The Netherlands

Judge Liu Daqun, Presiding Judge

[Seal of the Tribunal]

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Case No. IT-95-13/1-PT

IN TRIAL CHAMBER II

[redacted]

Before:
Judge Carmel Agius, Presiding
Judge Jean Claude Antonetti
Judge Kevin Parker

ANNEX [redacted] 5(g)

Registrar:
Mr. Hans Holthuis

Decision of:
23 January 2004

PROSECUTOR

v.

MILE MRKSIC
MIROSLAV RADIC
VESELIN SLJIVANCANIN

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

The Office of the Prosecutor:

Mr. Jan Wubben
Mr. Mark J. McKeon

Counsel for the Accused Mile Mrksic:

Mr. Miroslav Vasic

Counsel for the Accused Miroslav Radic:

Mr. Borivoje Borovic
Ms. Mira Tapuskovic

Counsel for the Accused Veselin Sljivancanin:

Mr. Novak Lukic
Mr. Momcilo Bulatovic

I. APPLICATIONS AND BACKGROUND

1. The Office of the Prosecutor ("Prosecution") has applied for leave to amend the indictments against the Accused Mile Mrksic ("Mrksic"), the Accused Miroslav Radic ("Radic") and the Accused Veselin Sljivancanin ("Sljivancanin") (collectively : "Accused").[1] The Prosecution

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attaches to its application a newly amended and consolidated indictment it seeks to file ("Consolidated Amended Indictment").

2. The initial indictment against the Accused was confirmed by Judge Fouad Riad on 7 November 1995.[2] This indictment was amended to include one other co-accused, Slavko Dokmanovic, on 3 April 1996.[3] A further amended indictment against all four was filed on 2 December 1997.[4] Slavko Dokmanovic passed away on 29 June 1998, with the result that trial proceedings against him were terminated.[5] Mrksic surrendered to the Tribunal on 15 May 2002, and the Prosecution was given leave to file a further amended indictment against him alone.[6] The Prosecution, somewhat confusingly, termed this indictment the "Second Amended Indictment".[7] Mrksic subsequently alleged that it was defective: the Trial Chamber decided on these allegations on 19 June 2003,[8] and ordered the Prosecution to amend the Second Amended Indictment in the terms set in its decision.

3. In the meantime Radic had been arrested. Sljivancanin was arrested soon thereafter. At their initial appearances on 21 May 2003 and 10 July 2003 respectively, both entered pleas of not guilty to all charges in the 1997 Amended Indictment.[9] Radic filed a motion alleging defects in the form of the 1997 Amended Indictment which the Trial Chamber dismissed in anticipation of the current Prosecution Application to Amend the Indictments.[10] The Consolidated Amended Indictment concerns all three Accused. The differences between it, the Second Amended Indictment and the 1997 Amended Indictment are explored further below.

4. On the matter of the Consolidated Amended Indictment, the Trial Chamber directed each of the Accused to file any response pursuant to Rule 50(A)(i)(c) of the Rules of Procedure and Evidence ("Rules")[11] to the Prosecution Application to Amend the Indictments together with any preliminary motion pursuant to Rule 72 alleging defects on the form of the Consolidated Amended Indictment.[12] They did so within the deadline set by the Trial Chamber.[13] Given that the Trial Chamber had already decided upon a preliminary motion from Mrksic on the form of an earlier indictment, it directed him to restrict his submissions to any fresh issues raised in the Consolidated Amended Indictment.[14]

5. The Prosecution responded to the Accused in a single document.[15] For that purpose it sought a variation of page-limits at the time it filed the Prosecution Response.[16] The Trial Chamber hereby allows the variation.

6. The Trial Chamber denied requests from Mrksic and Radic respectively to reply to the Prosecution's Response.[17]

II. THE CONSOLIDATED AMENDED INDICTMENT

7. As indicated earlier, the Consolidated Amended Indictment "re-unifies the indictments against all three Accused" in this case.[18]

8. The Consolidated Amended Indictment eliminates for Mrksic the charge of imprisonment that was brought against him in the Second Amended Indictment.[19] The Consolidated Amended Indictment eliminates two counts of grave breaches of the Geneva Conventions against Radic and Sljivancanin which were contained in the 1997 Amended Indictment,[20] and adds four new charges against them: persecution, extermination and torture, the latter as both a crime against humanity and a violation of the laws and customs of war. These charges were already brought against Mrksic in the Second Amended Indictment. According to the Prosecution, these

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additional charges against Radic and Sljivancanin "are based on the same operative facts" as the original charges in the 1997 Amended Indictment, and their addition "brings the charges against all three Accused into conformity with one another".[21]

9. Thus, in the Consolidated Amended Indictment, the Accused are charged with various offences allegedly committed subsequent to the Serb takeover of the city of Vukovar (Republic of Croatia), pursuant to Articles 7(1) and 7(3) of the Statute of the Tribunal ("Statute"),[22] which are namely, with the following eight counts:

(a) persecutions,[23] extermination,[24] and inhumane acts,[25] as crimes against humanity;

(b) cruel treatment[26] as a violation of the laws and customs of war;

(c) murder, as both a crime against humanity[27] and a violation of the laws and customs of war[28] and

(d) torture, as both a crime against humanity[29] and a violation of the laws and customs of war.[30]

III. GENERAL PLEADING PRINCIPLES

10. The Decision on Form of Second Amended Indictment was limited to Mrksic. Nevertheless, it outlined the general pleading principles that may be applicable to the present case.[31] Because it was issued publicly, the Trial Chamber finds it unnecessary to reproduce those principles here. Those principles apply in full to the present decision as well.

IV. OBJECTIONS TO AMENDING THE INDICTMENTS

11. Sljivancanin is the only Accused to expressly oppose the Prosecution Application to Amend the Indictments. This notwithstanding, all three Accused object to the Prosecution's attempt to amend the allegations contained in the indictments without producing the evidence to support these amendments.[32] The Prosecution responds that the supporting material is sufficient in this regard.[33]

12. For the purpose of addressing the objections raised by the Accused, the Trial Chamber finds it convenient to distinguish between the new *charges* brought by the Prosecution against Radic and Sljivancanin in the Consolidated Amended Indictment, and the amended *factual allegations* contained in it.

13. The Prosecution specifies that the new charges against Radic and Sljivancanin in the Consolidated Amended Indictment are "based on the same operative facts" as the original charges.[34] The Trial Chamber has verified this statement with the 1997 Amended Indictment and is satisfied that this is the case. Sljivancanin agrees.[35] He nonetheless submits that the Prosecution may only be allowed to introduce new charges "upon presentation of new evidence or new factual allegations".[36] Sljivancanin's submission is ill founded; he misconstrues Rule 47(I), which applies in the event that the reviewing Judge dismisses a count in an indictment at the time of its confirmation, which is not the present case. There is no provision that would prevent the Prosecution from applying to amend the indictment basing amended charges on the same operative facts and without adducing new evidence. Sljivancanin's objection is rejected.

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14. Regarding the amended factual allegations in the Consolidated Amended Indictment, Mrksic submits that the Prosecution must provide an explanation to justify the amendments it seeks, in particular the withdrawal of allegations that appeared in the Second Amended Indictment.[37] The Prosecution responds that the fact that it is free to choose how to plead its case has been recognised by this Trial Chamber in its Decision on Form of Second Amended Indictment.[38] The Trial Chamber agrees that it is not necessary for the Prosecution to provide a more detailed explanation of its reasons for applying to amend the indictments than that contained in the Prosecution Application for Leave to Amend the Indictments.[39] The Prosecution is free to plead its case as it sees fit, as long as it sets out the material facts that will allow the Defence to meet the case. Mrksic's request for explanation is rejected.

15. The same reasoning applies to Radic's complaint that the Prosecution has significantly modified the legal qualifications of the acts and the form of the Accused's criminal participation in the Consolidated Amended Indictment. Nothing prevents the Prosecution at this stage from changing its pleading strategy, a change that may simply reflect practices adopted since on the basis of the evolving jurisprudence of the Tribunal. As addressed in more detail below,[40] the issue is not whether amendments to the indictment prejudice the Accused, but whether they do so *unfairly*.[41] Radic's objection is also rejected.

16. Finally, Mrksic submits that, whilst the Prosecution has "significantly altered " the factual allegations for several counts in the Consolidated Amended Indictment compared to those contained in Second Amended Indictment, it has not supplied any supporting material that would sustain those changes.[42] These changes are the object of specific challenges and are addressed in more detail below. However, prior to addressing these concerns, it is necessary to dispel the confusion surrounding the information annexed to the Consolidated Amended Indictment, information which the Prosecution has somewhat unfortunately labelled "material in support of the Consolidated Amended Indictment". Mrksic contends that this material, which consists of only two documents, is insufficient to support the allegations in the Consolidated Amended Indictment. The Trial Chamber notes that this material corresponds to the particulars that the Prosecution was ordered to provide pursuant to the Trial Chamber's Decision on Form of Second Amended Indictment. It is not the only evidence supporting the allegations therein. The Trial Chamber has received assurances that the supporting material on the basis of which the Initial Indictment was originally confirmed has been provided to the Accused.[43]

17. In its Decision on Form of Second Amended Indictment, the Trial Chamber established the following:

> The jurisprudence is clear that it is not necessary to plead in an indictment the evidence which would tend to support the alleged material facts, and that it is inappropriate at this stage of proceedings for the Defence to challenge the sufficiency of the evidence. The Trial Chamber finds it necessary, however, to distinguish between those material facts which were part of the indictment as originally confirmed, and those added subsequently. Concerning the original charges and facts, it is not at this stage possible for the Defence to challenge the sufficiency of the evidence. However, it is acceptable for the Defence to challenge the sufficiency of the evidence for charges that are newly added (...) and for material facts newly added in support of existing charges.[44]

Accordingly, in examining the specific challenges made by the Accused, this distinction will be applied in determining the validity of their objections.

V. CHALLENGES TO THE FORM OF THE CONSOLIDATED AMENDED INDICTMENT

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18. The Accused submit that the form of the Consolidated Amended Indictment is defective, generally alleging that the Prosecution has not set out all of the relevant material facts to allow the Defence to properly prepare its case. The Prosecution generally responds that all relevant material facts have been provided and that the sufficiency of the evidence is a matter for trial. Specific challenges are addressed below.

A. The Nature of the Alleged Responsibility of the Accused

1. Article 7(1)

19. The Appeals Chamber has repeatedly held that "[s]ince Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity (...) such ambiguity should be avoided and (...) where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial".[45] In accordance with this jurisprudence, the Trial Chamber interprets that the Prosecution in the Consolidated Amended Indictment is pleading the heads of responsibility in Article 7(1) in their entirety with respect to each count and each Accused.[46]

20. The Prosecution also specifies, in paragraph 4 of the Consolidated Amended Indictment, that "[b]y using the word "committed" in this indictment, the Prosecutor does not intend to suggest that any of the [A]ccused physically committed any or all of the crimes charged personally. "Committed" in this indictment includes each of the [A]ccused's participation in a joint criminal enterprise". While this specification accords with the Trial Chamber's preferred manner of pleading, the term "including" could give rise to ambiguity.[47] The Trial Chamber will therefore direct the Prosecution to replace it with the exhaustive phrase "is limited to". The same observation applies to paragraph 13 of the Consolidated Amended Indictment, which, in light of what is contained in paragraph 4, could also result in ambiguity. In paragraph 13, the Prosecution alleges that the Accused are individually criminally responsible for the crimes in the Indictment pursuant to Article 7(1) for their participation in a joint criminal enterprise "*in addition to* their responsibility under the same Article for having planned, instigated, ordered, *committed*, or otherwise aided and abetted in the planning, preparation, execution, and commission of these crimes".[48] The Prosecution will be ordered to remove the term "committed" from this phrase, because there is no case pleaded that the Accused "committed" in a way other than by participating in a joint criminal enterprise.

Joint Criminal Enterprise

21. The Accused raise a number of general and specific objections regarding the pleading in the Consolidated Amended Indictment of a joint criminal enterprise (" JCE").

22. Radic and Sljivancanin submit that the material facts to support their alleged participation in a JCE are lacking in the Consolidated Amended Indictment.[49] Sljivancanin specifically raises the absence of particulars regarding "any element of SaC common plan". Sljivancanin also submits that the purpose of the JCE pleaded by the Prosecution is vague.[50] Radic adds that the Prosecution has failed to plead the exact or the approximate date of the existence of the JCE.[51] The Prosecution responds that, in its Decision on Form of Second Amended Indictment, the Trial Chamber approved of the manner in which the Prosecution had pleaded the JCE.[52]

23. The Consolidated Amended Indictment identifies the purpose of the JCE as "the persecution of Croats or other non-Serbs who were present in the Vukovar Hospital after the fall of Vukovar, through the commission of crimes in violation of Articles 3 and 5 of the Statute".[53]

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The Trial Chamber would have preferred that the Prosecution make an explicit reference to the Counts in the Indictment rather than to Articles of the Statute. It is, however, of no consequence since an accused cannot be tried for offences other than those contained in the indictment against him. Sljivancanin argues that the stated purpose of the JCE should be narrowed down and limited to the persecution of the several hundred non-Serbs who were actually removed from Vukovar Hospital, rather than of those who were merely present there. The Trial Chamber does not find this necessary. The Prosecution is free to plead its case as it deems fit within the limits of the respect for the rights of the Accused. The purpose of the JCE as charged is pleaded with enough detail to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently.[54] Sljivancanin's objection is rejected.

24. The relevant period of the existence of the JCE is identified by using the following formula: "?tghe joint criminal enterprise was in existence at the time of the commission of the underlying criminal acts alleged in this indictment and at the time of the participatory acts of each of the accused in furtherance thereof ".[55] The underlying criminal acts present no difficulty, limited as they are to "from or about 18 November 1991 until 21 November 1991".[56] The reference to the Accused's "participatory acts" necessitates further perusal of the Consolidated Amended Indictment,[57] but does not detract from the fact that the period of the existence of the JCE is pleaded with enough detail to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Although the Trial Chamber's preferred manner of pleading would have been for the Prosecution to pin down expressly the date the JCE came into existence, there is no material defect in the way it is currently pleaded. Radic's objection is rejected.

25. The element of a common plan has been designated expressly in various paragraphs of the Consolidated Amended Indictment, such as the allegations that the Accused "worked in concert with or through several individuals in the joint criminal enterprise ".[58] Additional information can be gathered from reading it as a whole. Anything further does not concern the pleading of material facts but concerns the sufficiency of the evidence and is a matter properly resolved at trial. Sljivancanin's complaint about the absence of information regarding a common plan is therefore rejected.

26. Finally, contrary to the submissions from Radic and Sljivancanin,[59] the ways in which they allegedly participated in the JCE are expressly pleaded in paragraphs 11 and 12 of the Consolidated Amended Indictment, with enough detail to inform them of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Their objection in this respect is rejected.

27. The next objection raised by Radic and Sljivancanin concerns the inclusion in the Consolidated Amended Indictment of a reference to a "wider joint criminal enterprise".[60] They submit that the material facts related to this wider JCE have not been pleaded. They question the need for its inclusion altogether and submit that it should be removed.[61] The Prosecution responds that the reference to the wider JCE is included as background information only, since no charges stem from it, and that in accordance with the Trial Chamber's Decision on Form of Second Amended Indictment the Accused are not entitled to further particulars with respect to "background facts of a general nature ".[62]

28. The Trial Chamber agrees with the Prosecution that, in line with the Trial Chamber's previous decision, "?igt is in relation to material facts dealing with each count rather than the background facts of a general nature only, that the Accused is entitled to proper particularity in the indictment".[63] Nevertheless, this statement needs to be placed in its proper context. The

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Trial Chamber was at the time addressing the allegation that Mrksic was entitled to particularity of pleading with respect to background facts relating to the military operations surrounding the siege of Vukovar, and to the siege itself. The alleged criminal responsibility of the Accused stems only from events which occurred after the end of the siege. On the other hand, the reference to the existence of a wider JCE goes beyond a mere background factual allegation, amongst other reasons because it involves a legal characterisation. Its position in the Consolidated Amended Indictment already provides an indication of its different nature: whilst the background facts mentioned earlier appear under the title "Factual Allegations", the reference to the wider JCE appears in the section dealing with the individual criminal responsibility of the Accused.

29. The reference to a wider JCE could give rise to ambiguity in the Consolidated Amended Indictment. Although the Consolidated Amended Indictment expressly states that, for its purpose, participation in the "[JCE] charged" is limited to the Accused and two other named individuals, doubt must arise as to whether this is so. As recognised by the jurisprudence of this Tribunal, participation in a JCE requires the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed.[64] Radic is correct in protesting that the link between the JCE in which the Accused are alleged to have participated and the wider JCE is not pleaded, and that this could give rise to ambiguity.[65] This ambiguity is already apparent, since the purpose of the wider JCE differs from that of the JCE charged in the Consolidated Amended Indictment.[66]

30. Although the reference to a wider JCE appeared already in the Second Amended Indictment, it was not challenged and the Trial Chamber did not address it in its Decision on Form of Second Amended Indictment.[67] That it did not do so is of no consequence because "SiCt is *not* the function of a Trial Chamber to check for itself whether the form of an indictment complies with the pleading principles which have been laid down. It is, of course, entitled *proprio motu* to raise issues as to the form of an indictment but, unless it does so, it waits until a *specific* complaint is made by the accused before ruling upon the compliance with the indictment with those pleading principles".[68]

31. As noted, the Prosecution maintains that the allegation of a wider JCE has no purpose beyond that of providing the backdrop to the Consolidated Amended Indictment.[69] The Prosecution provides no reason, let alone a compelling one, for its inclusion. The implications for the Accused of that allegation remaining in the Consolidated Amended Indictment outweigh the considerations put forth by the Prosecution. Consequently, the objection by Radic and Sljivancanin is upheld and the Prosecution will be ordered to remove this reference.

32. The next objection by Radic relates to the manner in which the extended form or third category of JCE has been pleaded in the Consolidated Amended Indictment.[70] Radic submits generally that the relevant material facts are lacking that would establish that the crimes enumerated in Counts 2 to 8 were the natural and foreseeable consequences of the execution of the JCE. In particular, he maintains that the Accused's awareness that the crimes enumerated in Counts 2 to 8 were the possible consequence of the execution of the JCE must be "*ab initio* clearly, unambiguously and sufficiently determined in the ?Consolidated Amendedg Indictment for each of the ?Agccused individually".[71] The Prosecution Response does not expressly address this issue.

33. The Tribunal's jurisprudence establishes that "it is preferable for an indictment alleging the accused's responsibility as a participant in a joint criminal enterprise also to refer to the particular form (basic or extended) of joint criminal enterprise envisaged".[72] The Consolidated Amended Indictment complies with this jurisprudence because it pleads in the alternative the

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basic form of JCE and the extended form of JCE.[73] Insofar as the basic form of JCE is concerned, the Trial Chamber interprets that the Prosecution pleads the first category of JCE, but not the second category of JCE.[74] The Trial Chamber believes it is appropriate to clarify this already at this stage of proceedings to avoid any ambiguity. If the Prosecution considers that the Trial Chamber has misconstrued its intentions on the matter, the Trial Chamber invites it to dispel any ambiguity either by requesting the Trial Chamber to revisit its decision or by seeking leave to further amend the Indictment.[75]

34. The jurisprudence also establishes that, in relation to the relevant state of mind (*mens rea*), either the specific state of mind itself should be pleaded (in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded), or the evidentiary facts from which the state of mind is necessarily to be inferred, should be pleaded.[76] Paragraph 6 of the Consolidated Amended Indictment pleads the specific state of mind required for the third category of JCE in terms where it alleges that "the crimes enumerated in the Counts 2 to 8 were the natural and foreseeable consequences of the execution of the ?JCEg and each of the accused was aware that these crimes were the possible consequence of the execution of the ?JCEg".[77] The state of mind is clearly set out with respect to each of the three Accused. Accordingly, Radic's objection is rejected.

2. Article 7(3)

35. The Accused submit separately that the Consolidated Amended Indictment is defective because it fails to properly plead their alleged superior responsibility. Mrksic also challenges the sufficiency of the supporting materials to substantiate the fresh allegations contained in the Consolidated Amended Indictment. The Trial Chamber deems it appropriate to take these objections in turn.

36. Radic and Sljivancanin each submit that the Consolidated Amended Indictment lacks the material facts relating to their acts as superiors and the acts of their alleged subordinates.[78] The Prosecution responds that, read as a whole, the Consolidated Amended Indictment sufficiently pleads the responsibility pursuant to Article 7(3) of the Accused.[79]

37. Radic submits that the material facts regarding the acts of his subordinates, for which he is allegedly responsible, are insufficiently pleaded and that, in effect, his responsibility stems solely from his position in the JNA and specifically in the 1st Battalion of the 1st Guards Motorised Brigade. The Trial Chamber finds that the material facts regarding the acts committed, the individuals who committed them and their relationship to Radic are set out throughout the Consolidated Amended Indictment with enough detail to inform him of the nature and cause of the charges against him thus enabling him to prepare a defence effectively and efficiently.[80] Radic's objection is without merit and is rejected.

38. Sljivancanin submits that there is "no information whatsoever" in the Consolidated Amended Indictment (a) that the individuals who were his *de facto* subordinates committed *any* crimes and (b) that he had effective control over those who allegedly committed the crimes.[81] Sljivancanin also submits that the Prosecution's submissions are contradictory with respect to his position of superiority, because whilst paragraph 18 of the Consolidated Amended Indictment alleges that he was *de facto* in charge of a military police battalion, paragraph 19 alleges that all three Accused "exercised both *de jure* and *de facto* power over the forces under their command". The Trial Chamber finds that the Consolidated Amended Indictment identifies the "physical" perpetrators of the underlying acts for which the Accused are charged with enough detail to inform them of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently. Whether it is true that the

alleged "physical " perpetrators were Sljivancanin's *de facto* subordinates because he had effective control over them in the sense of a material ability to prevent the offences or punish the perpetrators is a matter to be resolved at trial.

39. On the other hand, the Trial Chamber upholds the objection regarding the nature of Sljivancanin's alleged position of superiority over his subordinates. The Trial Chamber's order to the Prosecution is in the following terms. If it *is* the Prosecution's case that Sljivancanin exercised both *de jure* and *de facto* power over the forces under his command, the Prosecution needs to plead this expressly by identifying those forces over which he held a *de jure* position of superiority, as it has done for Mrksic and Radic. In the event that this is *not* the Prosecution's case, it needs to amend paragraph 19 of the Consolidated Amended Indictment accordingly.

40. The next set of objections relate to the Prosecution's obligation to plead, in a case of superior responsibility, that the Accused must have known, or had reason to know, that his subordinates were about to commit the crimes alleged or had done so, and failed to take the necessary and reasonable measures to prevent these crimes or to punish the perpetrators thereof. Mrksic and Radic submit that these material facts have been insufficiently pleaded.[82] Mrksic emphasises that the Prosecution has failed to comply with the Trial Chamber's earlier order that the Prosecution plead these as material facts.[83] The Prosecution responds that the relevant material facts are fully pleaded.[84]

41. The Trial Chamber agrees that these material facts are pleaded with enough detail in the Consolidated Amended Indictment to inform the Accused of the nature and cause of the charges against them thus enabling them to prepare a defence effectively and efficiently.[85] Mrksic's and Radic's objections are rejected. Radic's request that further particulars be pleaded in the Consolidated Amended Indictment is also refused.[86] While the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Consolidated Amended Indictment.[87]

42. As an additional challenge, Mrksic submits that the Prosecution did not provide any supplementary evidence to support these material facts, and in particular the fresh allegations contained in paragraph 32 of the Consolidated Amended Indictment.[88] The Prosecution responds that the supporting material is sufficient in this regard. Should the Trial Chamber find that it is insufficient, the Prosecution proposes to augment it with two statements previously disclosed to the Accused: the statements of Bogdan Vujic and Sljivancanin respectively to the Belgrade Military Tribunal.[89] In order for the Trial Chamber to determine whether the material which supported the indictments as originally confirmed is sufficient to substantiate material facts not previously pleaded, it must examine the relevant portions.[90] Accordingly, the Prosecution is directed to provide that material that it believes supports the newly pleaded material facts contained in the second and third sentence of paragraph 32 of the Consolidated Amended Indictment.

43. Radic also complains that the allegation in paragraphs 16 and 17 of the Consolidated Amended Indictment that Miroljub Vukanovic and Stanko Vujanovic were subordinate to Mrksic and Radic does not provide enough information to distinguish the area of responsibility of each within the JNA.[91] The Trial Chamber finds that this submission does not concern the sufficiency of pleading of material facts in the Consolidated Amended Indictment, but concerns instead the sufficiency of the evidence, and is an issue properly resolved at trial. Radic's objection is rejected.

44. Similarly, Mrksic's submission at paragraph 15 of his Motion, regarding conclusions to be

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drawn from the "Decision of the Great People's Assembly of the Serb province of Slavonija, Baranja and Western Srem", does not concern the sufficiency of pleading of material facts in the Consolidated Amended Indictment, but concerns instead an issue properly resolved at trial. The same applies to his submission that paragraph 32 of the Consolidated Amended Indictment is unclear about whether the "TO, volunteer and paramilitary soldiers [...] torturing and killing non-Serb prisoners being held at the Velepromet" were, if at all, subordinated to Mrksic.[92] Mrksic's objections are rejected.

B. Other Alleged Deficiencies in Particularity of Pleading

1. Relevance of Factual Allegation

45. Mrksic questions the significance of the allegation contained in paragraph 35 of the Consolidated Amended Indictment regarding the "meeting of the so-called government of the SAO SBWS" that was being held on 20 November 1991 at the Velepromet building, "a short distance away from the JNA barracks" where the detainees from Vukovar Hospital were being kept.[93] In addition, Mrksic complains about the omission of the material facts regarding this meeting that appeared in the Second Amended Indictment.[94] Paragraph 25 of the Second Amended Indictment stated that "[a]t this meeting, the JNA agreed to transfer the detainees to Ovcara farm, located about four kilometres southeast of Vukovar, and thereafter to relinquish custody of them to the local Serbs".[95] The Prosecution responds that in the Consolidated Amended Indictment this event is included as background information only and that no charges stem from it, so that the Prosecution "is under no obligation to prove any facts related to this meeting".[96] The Trial Chamber reiterates that the Prosecution is free to choose how to plead its case, as long as it sets out the material facts that will allow the Defence to meet the case. However, the Trial Chamber agrees with Mrksic that it is not apparent what the reference to the "meeting of the so-called government of the SAO SBWS", in paragraph 35 of the Consolidated Amended Indictment, was designed to achieve or how it is relevant. This paragraph could give rise to ambiguity, particularly in light of the material facts that were pleaded in the Second Amended Indictment. The Prosecution will be ordered to supplement its pleadings in the Consolidated Amended Indictment regarding the said meeting so that its relevance to the allegations contained therein becomes evident.

2. Designation of "Serb Forces" and Related Terms

46. The Accused challenge the Prosecution's use of the term "Serb forces" in the Consolidated Amended Indictment, on the grounds that it is imprecise.[97] The Prosecution responds that, in compliance with the Trial Chamber's previous order, the term "Serb forces" is designated in paragraph 7 of the Consolidated Amended Indictment and used consistently throughout, with the exception of those sections of it "where the term seemed over-inclusive"; there, the Prosecution has "specifically identified the subset of these Serb forces that participated in the events in question ".[98]

47. Mrksic raises a number of objections at paragraphs 6, 7, 8 and 16 of his Motion regarding the use of the term "Serb forces" in the Consolidated Amended Indictment. It is unnecessary to reproduce these objections here. The Trial Chamber agrees with the Prosecution that these submissions do not concern the sufficiency of pleading of material facts, but concern instead the sufficiency of the evidence and are issues properly resolved at trial.[99]

48. Sljivancanin submits that the reference to the category of "radical local Serbs " which appears in paragraph 12(f) of the Consolidated Amended Indictment is not designated as part of the "Serb forces" in paragraph 7 and is unclear.[100] The Trial Chamber upholds Sljivancanin's

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objection to the extent that the Prosecution must plead this category with a higher degree of specificity. If the Prosecution was referring to radical local Serb civilians, it should plead so in terms. 11777

49. Sljivancanin further submits that the Consolidated Amended Indictment contains no definition of the category of "JNA forces" which appears in paragraphs 12(d) and 33.[101] The Trial Chamber understands this reference to mean JNA soldiers (or, as they appear in paragraph 7, members of the JNA). If its understanding is correct, the Trial Chamber invites the Prosecution to amend the Consolidated Amended Indictment accordingly. If it is not correct, the Prosecution must plead this category with a higher degree of specificity. To this extent, Sljivancanin's objection is upheld.

50. Sljivancanin's final challenge to paragraph 7 of the Consolidated Amended Indictment consists of the submission that "the epithet "Serb forces" is completely inappropriate when it comes to StheC JNA", because according to him it is "undisputable" that in the period relevant to the Consolidated Amended Indictment, a "significant number of JNA members were of all nationalities and that its constitutional function was to protect StheC territorial integrity of SFRY".[102] The Trial Chamber reiterates that it is for the Prosecution to choose how to plead its case. If the Defence wishes to make a specific challenge to the way in which the Prosecution has done so, it can do this at trial. Sljivancanin's objection is rejected.

51. Sljivancanin also raises an objection to other terms employed in the Consolidated Amended Indictment. He submits that the Prosecution uses inconsistently the terms "individuals in a joint criminal enterprise" and "members of a joint criminal enterprise ". Whilst the Trial Chamber's preferred term is "members of a joint criminal enterprise ", nevertheless the Consolidated Amended Indictment is already sufficiently clear in this respect. Sljivancanin's objection is rejected.

3. Discrepancy in the Number of Victims

52. Mrksic notes the discrepancy in the Consolidated Amended Indictment between the number of victims alleged in paragraphs 39 and 45.[103] The Prosecution responds that Mrksic has failed to show that this discrepancy would prejudice the Accused; both paragraphs employ the phrase "at least", "thus giving the Accused adequate notice of the scope of the victims of the crimes charged", and the Annex to the Consolidated Amended Indictment specifies the victims' particulars.[104] For the sake of consistency, the Trial Chamber upholds Mrksic's objection and directs the Prosecution to harmonise these two paragraphs.

4. Requests for Further Particulars

53. The Trial Chamber has previously recognised that, while the Prosecution is under an obligation to provide the best particulars that it can in presenting its case, this does not affect the form of the Consolidated Amended Indictment.[105] It is inappropriate at this stage for the Accused to challenge the sufficieney of the evidence. If the information the Accused seek is not apparent from the witness statements made available by the Prosecution in accordance with Rule 66(A), the Accused's remedy lies in requesting the Prosecution to supply particulars of the statements upon which it relies to prove the specific material facts in question. If the Prosecution's response to that request is unsatisfactory, then and only then, the Accused may seek an order from the Trial Chamber that such particulars be supplied.[106]

54. The Trial Chamber finds that Sljivancanin's request for the Prosecution to plead more details with respect to the approximate time when he allegedly became aware that the crimes had been committed and what steps, if any, he took to conceal these crimes is a request effectively

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seeking particulars regarding material facts.[107] The same applies to his objection that "it is unclear how and by what means [he] personally prevented international observers from reaching the Vukovar Hospital".[108] The Trial Chamber agrees with the Prosecution that it is not required to plead evidence.[109] As stated above, Sljivancanin's remedy does not lie with the Trial Chamber at this time.[110] Sljivancanin's request is refused and his objection rejected.

55. In its Decision on Form of Second Indictment, the Trial Chamber ordered the Prosecution to disclose the identities of as many of the sick and wounded detainees referred to as were available to it.[111] Mrksic claims that the Prosecution has failed to comply with the Trial Chamber's order.[112] The Prosecution describes the measures it has taken to comply with this order and claims that it has done so to the best of its ability.[113] The Trial Chamber urges it to continue in its efforts to supplement them as best it can and provide them to the Accused.

56. Sljivancanin also raises the objection that the material facts regarding his alleged participation in negotiations over the evacuation of patients at Vukovar Hospital, and his subsequent disregard of the agreements reached are insufficiently pleaded in the Consolidated Amended Indictment.[114] The Prosecution responds that these material facts have been sufficiently pleaded and are substantiated by the supporting materials. It claims that Sljivancanin has failed to read the Consolidated Amended Indictment as a whole.[115] The Consolidated Amended Indictment specifies in paragraph 29 that the evacuation of Vukovar Hospital in the presence of international observers was agreed upon in Zagreb in negotiations between the JNA and the Croatian government on 18 November 1991. The Prosecution further maintains that paragraph 31 shows that Sljivancanin "was assigned the task of organising and executing the evacuation pursuant to this agreement".[116] The Trial Chamber disagrees that the allegation that he was acting pursuant to this agreement is apparent from paragraph 31; if this is the Prosecution's case then it should plead it in terms. Moreover, the allegation that Sljivancanin was acting pursuant to an agreement is a far cry from the claim that he himself "participated in negotiations over the evacuation of patients at Vukovar Hospital".[117] Sljivancanin's objection is upheld. The Prosecution is ordered to plead its case more specifically as regards the alleged participation, if any, of Sljivancanin, and also of Mrksic,[118] in the negotiations between the JNA and the Croatian government on 18 November 1991 in Zagreb, if necessary by amending paragraphs 10(b), 12 (b), 29 and 31 of the Consolidated Amended Indictment.

5. Standard of Form of the Indictment

57. Radic and Sljivancanin contend that an indictment is required to satisfy the standard that the accused himself will understand its contents, whether factual or legal.[119] To enable him to do so, Radic requests that the Prosecution reorganise the Consolidated Amended Indictment.[120] The Prosecution resists this call for reorganisation and disputes the assertion that the legal standard required for the form of an indictment is that the indictment be presented "in a specific form understandable to every accused person, irrespective of the accused's general culture and level of education".[121] The Prosecution does not identify the relevant standard, but submits instead that "the Consolidated Amended Indictment is clear with respect to the charges against the Accused and the material facts supporting these charges".[122]

58. Indeed, the Appeals Chamber did not envisage the standard put forward by Radic and Sljivancanin when it held that:

> An indictment shall, pursuant to Article 18(4) of the Statute, contain "a concise statement of the facts and the crime or crimes with which the accused is charged ". Similarly, Rule 47(C) of the Rules provides that an indictment, apart from the name and particulars of the suspect, shall set forth "a concise statement of the facts of the case". The Prosecution's obligation to set out

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> concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21 (2) and (4)(a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.[123]

Radic's and Sljivancanin's objection is rejected and Radic's request refused.

VI. THE APPLICATION TO AMEND

59. As stated earlier, the Prosecution Application for Leave to Amend the Indictments specifies that the Consolidated Amended Indictment "re-unifies the indictments against all three Accused".[124] It eliminates counts from previous indictments against the Accused and contains additional counts against Radic and Sljivancanin. These additional charges are, according to the Prosecution, "based on the same operative facts" as the original charges.[125] Furthermore, the Prosecution submits that the Consolidated Amended Indictment includes the information required by the Trial Chamber in its Decision on Form of Second Amended Indictment. Finally, the Prosecution claims that it "provides greater detail as to the nature of the individual criminal responsibility of all of the Accused, including their participation in the joint criminal enterprise".[126]

60. As noted earlier, only Sljivancanin expressly opposes the Prosecution's application to amend the existing indictments, and calls upon the Trial Chamber to "completely and thoroughly assess whether the Prosecution has given relevant argumentation in support of its request".[127] His grounds for opposing it have been explained throughout the present decision.[128]

61. The Tribunal's jurisprudence establishes as follows:

> The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the Accused unfairly. The word "unfairly" is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case.[129]

62. There is nothing that in the belief of the Trial Chamber would indicate that the requested amendments could in any way prejudice the Accused unfairly.

63. The Trial Chamber has accepted that the Consolidated Amended Indictment contains certain deficiencies that need to be addressed and will order the Prosecution to amend it accordingly. Provided these defects are remedied, the Trial Chamber sees no reason to prevent the Prosecution from amending the existing indictments. Consolidating the charges against the Accused under a single indictment will ensure that the real issues in the case will be determined. Leave will accordingly be granted subject to the condition that the defects upheld by the Trial Chamber are cured. Radic and Sljivancanin will be allowed to enter a plea on the new charges as soon as practicable thereafter.

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VII. DISPOSITION

For the foregoing reasons,

PURSUANT TO Rule 50(A)(i)(c) and Rule 72 (A)(ii),

TRIAL CHAMBER II HEREBY

1. **ALLOWS** a variation of page-limits regarding the Prosecution Response;

2. **ORDERS** the Prosecution to modify the Consolidated Amended Indictment attached to the Prosecution Application to Amend the Indictment in the terms set out in paragraphs 20, 31, 39, 45, 48, 52 and 56 of this decision and **INVITES** it to modify it in the terms set out in paragraph 49 of this decision;

3. **ORDERS** the Prosecution to provide the Trial Chamber with the supporting material referred to in paragraph 42 of this decision;

4. **GRANTS** the Prosecution leave to amend the 1997 Amended Indictment and the Second Amended Indictment as proposed in the Consolidated Amended Indictment subject to its modification pursuant to the order in number 2 above;

5. **DECIDES** that the modified Consolidated Amended Indictment shall replace the 1997 Amended Indictment and the Second Amended Indictment with respect to all charges against Mrksic, Radic and Sljivancanin;

6. **ORDERS** the Prosecution to file the modified Consolidated Amended Indictment within 14 days of the filing of this decision, *i.e.* by no later than 6 February 2004;

7. **DECIDES** that a further appearance of Radic and Sljivancanin will be scheduled by the Trial Chamber to be held as soon as practicable thereafter to allow them to enter a plea on the new charges contained in the Consolidated Amended Indictment;

8. **DECIDES** that Mrksic, Radic and Sljivancanin shall have a further period of 30 days, *i.e.* until no later than 8 March 2004, in which to file preliminary motions pursuant to Rule 72 in respect of the new aspects of the Consolidated Amended Indictment.

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

Dated this twenty-third day of January 2004,
At The Hague
The Netherlands

Carmel Agius
Presiding Judge

[Seal of the Tribunal]

1 - Prosecution's Motion for Leave to File a Consolidated Amended Indictment, 21 July 2003 ("Prosecution Application to Amend the Indictments").
2 - *Prosecutor v Mrksic, Radic and Sljivancanin*, Case IT-95-13-I, Indictment, 7 Nov 1995 ("Initial Indictment").

3 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-I, Indictment, 1 Apr 1996 ("1996 Amended Indictment"); see also Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic (†), Case IT-95-13a-I, Amendement de l'acte d'accusation, 3 Apr 1996.
4 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†), Case IT-95-13a-PT, Amended Indictment, 2 Dec 1997 ("1997 Amended Indictment").
5 - *Prosecutor v Mrksic, Radic, Sljivancanin and Dokmanovic* (†),Case IT-95-13-a-T, Order Terminating Proceedings against Slavko Dokmanovic, 15 July 1998.
6 - *Prosecutor v Mrksic*, Case IT-95-13/1, Decision on Leave to File Amended Indictment, 1 Nov 2002.
7 - *Prosecutor v Mrksic*, Case IT-95-13/1, Second Amended Indictment, 29 Aug 2002 ("Second Amended Indictment"). The Trial Chamber will adopt this term for the sake of consistency and in order to avoid further confusion.
8 - *Prosecutor v Mrksic*, Case IT-95-13/1-PT, Decision on Form of the Indictment, 19 June 2003 ("Decision on Form of Second Amended Indictment").
9 - Sljivancanin initially appeared before a Judge of the Tribunal on 3 July 2003, but did not enter a plea until his further initial appearance on 10 July 2003.
10 - In this connection, Radic cautions that his current preliminary motion may repeat some of his earlier submissions contained in his "Defence Preliminary Motion" filed on 17 June 2003. This was to be expected to an extent. The Trial Chamber recalls that Radic's previous motion was dismissed because the alleged defects pertain to an earlier indictment which the Prosecution is presently seeking to amend. *See* Decision Dismissing Miroslav Radic's Preliminary Motion, 25 June 2003.
11 - Rules of Procedure and Evidence, IT/32/Rev.28, 28 July 2003.
12 - Scheduling Order for Filings, 25 July 2003. The deadline of 25 August 2003 established in the said "Scheduling Order for Filings" was postponed until 30 days after Sljivancanin was assigned defence counsel, which in practice turned out to be 31 October 2003. See Decision to Postpone the Deadline Established in the Scheduling Order for Filings, 1 Aug 2003; Second Scheduling Order for Filings, 7 Oct 2003.
13 - Defence Preliminary Motion, 8 Aug 2003 ("Mrksic Motion"); Preliminary Motion of the Accused Radic pursuant the Rule 72(A)(ii), 23 Oct 2003 ("Radic Motion"); Defendant Veselin Sljivancanin's Preliminary Motion, 31 Oct 2003 ("Sljivancanin Motion").
14 - Scheduling Order for Filings, 25 July 2003.
15 - Prosecution's Consolidated Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment, 13 Nov 2003 ("Prosecution Response").
16 - *See* Prosecution Motion Requesting Variation of Page Limit for the Prosecution's Consolidated Response to Defence Motions Alleging Defects in the Form of the Indictment, 13 Nov 2003. *See also* Practice Direction on the Length of Briefs and Motions, IT/ 184 Rev.1, 5 Mar 2002, par C.5: "Motions and replies and responses before a Chamber will not exceed 10 pages or 3000 words, whichever is greater".
17 - *See* Defense Request to File a Reply to Prosecution's Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment dated 13 November 2003, 17 Nov 2003; Request by the Accused Radic's Defence to Trial Chamber to Grant Leave to File a Reply to Prosecution's Consolidated Response to Motions by Accused Mile Mrksic, Miroslav Radic and Veselin Sljivancanin Alleging Defects in the Form of the Consolidated Amended Indictment Filed 13.11.2003, 20 Nov 2003; *See* also Decision Denying Mrksic's Request for Leave to File a Reply, 21 Nov 2003; Decision Denying Radic's Request for Leave to File a Reply, 28 Nov 2003.
18 - Prosecution Application to Amend the Indictment, par 7.
19 - Second Amended Indictment, Count 5. See also fn 7 above.
20 - 1997 Amended Indictment, Count 1 ("wilfully causing great suffering") and Count 4 ("wilful killing"). *See* also n 4 above.
21 - Prosecution Application to Amend the Indictments, pars 7 and 14.
22 - Statute of the International Criminal Tribunal for the former Yugoslavia ("Statute"), as amended by SRES/1481 (19 May 2003). Hereinafter, "Article" or "Articles" refer to an Article or Articles of the Statute.
23 - Count 1, Article 5(h) of the Statute.
24 - Count 2, Article 5(b) of the Statute.
25 - Count 6, Article 5(i) of the Statute.
26 - Count 8, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.
27 - Count 3, Article 5(a) of the Statute.
28 - Count 4, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.
29 - Count 5, Article 5(f) of the Statute.
30 - Count 7, recognised by Common Article 3(1)(a) of the Geneva Conventions and punishable under Article 3 of the Statute.
31 - Decision on Form of Second Amended Indictment, pars 7-14.
32 - Mrksic Motion, par 5; Radic Motion, par 46; Sljivancanin Motion, par 6.
33 - Prosecution Response, par 29.
34 - Prosecution Application for Leave to Amend the Indictments, pars 7 and 14.
35 - Sljivancanin Motion, pars 6 and 8.
36 - Sljivancanin Motion, par 14.
37 - Mrksic Motion, pars 5, 10.

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38 - Prosecution Response, par 25.
39 - *See* par 59 below.
40 - *See* pars 61-62 below.
41 - Decision on Form of Second Amended Indictment, par 24; *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 50.
42 - Mrksic Motion, par 5.
43 - Transcript of the Status Conference of Mrksic and Radic on 2 July 2003, at page 80; *See* also Transcript of the initial appearance of Sljivancanin on 3 July 2003, at page 110.
44 - Decision on Form of Second Amended Indictment, par 18 (footnotes omitted). In support of this conclusion, the Trial Chamber quoted from a decision in the case of *Prosecutor v Brdanin and Talic* which established as follows: "Although it is no longer necessary for an amended indictment to be "confirmed" after the case has been assigned to a Trial Chamber, leave will not be granted to add *new* allegations to an indictment unless the prosecution is able to demonstrate that it has material to support these new allegations –unless, of course, the evidence has already been given and the indictment is being amended merely to accord with the case which has been presented". *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Fourth Amended Indictment, 23 Nov 2001, par 21.
45 - *Prosecutor v Krnojelac*, Case IT-97-25-A, Judgement, 17 Sept 2003 ("*Krnojelac* Appeals Judgement"), par 138.
46 - See Consolidated Amended Indictment, pars 4, 13 and Counts 1-8.
47 - See *Prosecutor v Blaskic*, IT 95-14, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (Vagueness/Lack of Adequate Notice of Charges), 4 Apr 1997, par 22.
48 - Emphasis added.
49 - Radic Motion, pars 16-17; Sljivancanin Motion, pars 48-49.
50 - Sljivancanin Motion, pars 40-44.
51 - Radic Motion, pars 18 and 21.
52 - Prosecution Response, par 17.
53 - Consolidated Amended Indictment, par 5.
54 - See *Prosecutor v Kupreskic et al*, IT-95-16-A, Appeal Judgement, 23 Oct 2001 ("*Kupreskic* Appeal Judgment"), par 88; Articles 18(4), 21(2) and 21(4)(a) and (b) and Rule 47(C), which essentially restates Article 18(4).
55 - Consolidated Amended Indictment, par 7.
56 - See Consolidated Amended Indictment, pars 41, 44 and 47.
57 - See Consolidated Amended Indictment, pars 10, 11 and 12.
58 - Consolidated Amended Indictment, par 9. *See* also *ibid*, pars 7, 10-12.
59 - Radic adds the submission that "[p]aragraph 11 (a) of the Indictment is in direct disagreement with the paragraph 7 (c) of the Indictment" (Radic Motion, par 16). There is no paragraph 7 (c) in the Consolidated Amended Indictment. The Trial Chamber has understood Radic to mean paragraph 9 (c) instead, but fails to appreciate any inconsistency between the two said paragraphs.
60 - Paragraph 8 of the Consolidated Amended Indictment provides as follows: "[a]though this joint criminal enterprise was part of a wider joint criminal enterprise whose purpose was the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of Croatia through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal, including those who were present in the Vukovar Hospital after the fall of Vukovar, for the purpose of this indictment participation in the joint criminal enterprise charged in this indictment is limited to Mile MRKSIC, Miroslav RADIC, Veselin SLJIVANCANIN, Miroljub VUJOVIC and Stanko VUJANOVIC, and their subordinates".
61 - Radic Motion, pars 22-29; Sljivancanin Motion, pars 45-47.
62 - Prosecution Response, par 15.
63 - Decision on Form of Second Amended Indictment, par 33.
64 - *Prosecutor v Vasiljevic*, Case IT-98-32-T, Judgment, 29 Nov 2002 ("*Vasiljevic* Trial Judgement"), par 66.
65 - Radic Motion, pars 23-24.
66 - In this connection Radic raises the concern as to whether the crimes alleged in the Consolidated Amended Indictment were also natural and foreseeable consequences of the execution of the wider JCE: Radic Motion, par 27.
67 - See Second Amended Indictment, par 6.
68 - "This is fundamental to the primarily adversarial system adopted for the Tribunal by its Statute." *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Objections by Momir Talic to the Form of the Amended Indictment, 20 Feb 2001, par 23 (footnotes omitted).
69 - The Prosecution concedes that "[t]he description of a wider joint criminal enterprise is included as background information only" and that "[n]one of the Accused face charges in connection with the wider joint criminal enterprise". Prosecution Response, par 15.
70 - For the different categories of JCE, *see Prosecutor v Tadic*, Case IT-94-1-A, Judgement, 15 July 1999 ("Tadic" Appeals Judgement), pars 185-229; *see* also *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, pars 24-32.
71 - Radic Motion, par 15.
72 - *Krnojelac* Appeals Judgement, par 138.
73 - Consolidated Amended Indictment, pars 4 and 6.
74 - Consolidated Amended Indictment, par 6, because it does not plead that the Accused were acting in furtherance of a particular system in which the crime is committed by reason of the Accused's position of authority or function, and with knowledge if the nature of that system and intent to further that system. See Krnojelac Appeal Judgement, par 80; See also *Vasiljevic* Trial Judgement, par 64.

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75 - See *Krnojelac* Appeals Judgement, par 141.
76 - Third *Brdjanin & Talic* Decision, par 33.
77 - Consolidated Amended Indictment, par 6. See *Prosecutor v Brdanin and Talic*, IT-99-36-T, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 30; *See* also *Prosecutor v Milutinovic, Sainovic and Ojdanic*, IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanic to Jurisdiction –Joint Criminal Enterprise, 21 May 2003, par 11.
78 - Radic Motion, par 36; Sljivancanin Motion, par 35.
79 - Prosecution Response, pars 19 and 21.
80 - *See* Consolidated Amended Indictment, pars 7, 17, 18, 34-41.
81 - Sljivancanin Motion, par 35.
82 - Mrksic Motion, par 12; Radic Motion, pars 40, 42 and 45.
83 - Mrksic Motion, par 12. See also Decision on Form of Second Amended Indictment, par 65.
84 - Prosecution Response, par 19.
85 - *See e.g.*: Consolidated Amended Indictment, pars 20 and 32.
86 - Radic Motion, par 45.
87 - *See* par 53 below.
88 - "By no later than the onset of the evacuation operation, Mile MRKSIC, Veselin SLJIVANCANIN and Miroslav RADIC knew of had reason to know of the serious threat radical elements of Serb forces comprised of JNA, TO, volunteer and paramilitary soldiers posed to the security of the patients and other people evacuated from the hospital, and the desire of these elements of Serb forces for revenge against the evacuees. In November 1991 before the fall of Vukovar, Miroslav RADIC was present with Stanko VUJANOVIC and others when Vojislav SESELJ visited the house of Stanko VUJANOVIC and publicly pronounced "Not one Ustasha must leave Vukovar alive". On the evening of 19 November 1991, reports reached Mile MRKSIC and Veselin SLJIVANCANIN that certain TO, volunteer and paramilitary soldiers were torturing and killing non-Serb prisoners being held at the Velepromet". Consolidated Amended Indictment, par 32. Mrksic also alleges that the material *annexed* to the Consolidated Amended Indictment fails to support the Prosecution's allegation that Vukovar TO units, volunteers and paramilitaries were subordinated to the Accused (Mrksic Motion, par 13). The difficulties that stem from calling these documents "Material in Support of the Consolidated Amended Indictment" have already been indicated, and also that it is the Trial Chamber's understanding that this is not the sole supporting material has already been indicated in par 16 above.
89 - Prosecution Response, par 29.
90 - According to the Prosecution, besides the supporting material it submitted with the Initial Indictment, the Prosecution submitted additional material for the confirmation of the 1997 Amended Indictment. See Prosecution Application to Amend, par 4.
91 - Radic Motion, par 35.
92 - Mrksic Motion, par 14.
93 - Mrksic Motion, par 10. See Consolidated Amended Indictment, par 35.
94 - Mrksic Motion, par 10.
95 - Second Amended Indictment, par 25.
96 - Prosecution Response, par 25.
97 - Mrksic Motion, pars 6-7; Radic Motion, par 36; Sljivancanin Motion, pars 58-59.
98 - Prosecution Response, par 14. *See* also Consolidated Amended Indictment, e.g.: pars 34, 35 and 37.
99 - Prosecution Response, pars 12 and 23.
100 - Sljivancanin Motion, par 58.
101 - Sljivancanin Motion, par 59.
102 - Sljivancanin Motion, par 57.
103 - Mrksic Motion, par 10. Par 39 of the Consolidated Amended Indictment alleges that "at least two hundred and sixty-seven Croats and other non-Serbs from Vukovar Hospital" were killed, whilst par 45 alleges that "at least two-hundred and fifty-five Croats and other non-Serbs were taken in groups and executed".
104 - Prosecution Response, par 26. The Trial Chamber notes that the Annex contains the names of 277 victims, including around 82 persons missing whose remains have not yet been identified.
105 - Decision on Form of Second Amended Indictment, par 48.
106 - *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Third Amended Indictment, 21 Sept 2001, par 8.
107 - Sljivancanin Motion, pars 54-55.
108 - Sljivancanin Motion, par 53.
109 - Prosecution Response, par 32.
110 - *See* par 53 above.
111 - Decision on Form of Second Amended Indictment, par 48.
112 - Mrksic Motion, par 18. See Decision on Form of Second Amended Indictment, par 48.
113 - Prosecution Response, pars 27-28.
114 - Sljivancanin Motion, pars 50-51.
115 - Prosecution Response, par 31.
116 - Prosecution Response, par 31.
117 - Consolidated Amended Indictment, par 12(b).
118 - *See* Consolidated Amended Indictment, par 10(b).
119 - Radic Motion, pars 28, 47-50. Sljivancanin Motion, par 24.

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120 - Radic Motion, pars 49-50.
121 - Prosecution Motion, par 34.
122 - Prosecution Motion, par 34.
123 - *Kupreskic* Appeal Judgement, par 88 (footnotes omitted).
124 - Prosecution Application for Leave to Amend the Indictments, par 7.
125 - Prosecution Application for Leave to Amend the Indictments, pars 7 and 14.
126 - Prosecution Application for Leave to Amend the Indictments, par 7.
127 - Sljivancanin Motion, pars 11 and 15.
128 - See pars 11 and 13 above.
129 - *Prosecutor v Brdanin and Talic*, Case IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, par 50 (footnotes omitted).

ANNEX 5(h)

IT-03-66-PT
D 1461 - D1450
13 February 2004

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UNITED NATIONS

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

Case No: IT-03-66-PT

Date: 12 February 2004

Original: English

BEFORE THE TRIAL CHAMBER

Before: **Judge Alphons Orie, presiding**
Judge Amin El Mahdi
Judge Martín Canivell

Registrar: **Mr. Hans Holthuis**

Decision of: **12 February 2004**

PROSECUTOR

v.

FATMIR LIMAJ
HARADIN BALA
ISAK MUSLIU

DECISION ON PROSECUTION'S MOTION TO AMEND THE AMENDED INDICTMENT

Counsel for the Prosecutor:

Mr. Andrew Cayley
Mr. Alex Whiting

Counsel for the accused:

Mr. Michael Mansfield for Fatmir Limaj
Mr. Peter Murphy for Haradin Bala
Mr. Steven Powles for Isak Musliu

1. Introduction

1. This Trial Chamber (the "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 (the "Tribunal") is seized of the "Prosecutor's Motion to Amend the Amended Indictment" of 6 November 2003 (the "Motion") filed pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (the "Rules") and to which are attached as Annex A the "Proposed Second Amended Indictment" and as Annex B supporting material. The "Response of Haradin Bala to Motion of Prosecution to Amend Amended Indictment" ("Bala Response") and the "Response to Prosecutor's Motion to Amend the Amended Indictment" by the Accused Musliu ("Musliu Response") were both filed on 20 November 2003. The Accused Fatmir Limaj did not file a response. On 1 December 2003, the Prosecution filed the "Prosecutor's Consolidated Reply Regarding its Motion to Amend the Amended Indictment" (the "Reply").

2. The original indictment against the accused Fatmir Limaj, Haradin Bala and Isak Musliu (the "Accused") was confirmed on 27 January 2003. On 7 March 2003, the Prosecution proposed an amended indictment to "reflect the dismissal of all charges against the person referred to in the original indictment as Agim Murtezi" ("Amended Indictment"). Leave to amend the indictment was granted by the Trial Chamber on 25 March 2003.[1]

3. The Amended Indictment is comprised of nine counts charging the Accused with crimes against humanity (4 counts) and violations of the laws or customs of war (5 counts), pursuant to Articles 3 and 5 of the Amended Statute of the Tribunal (the "Statute"). It is alleged that all acts or omissions charged in the Amended Indictment occurred between May and July 1998 in the prison camp of Lapušnik/Llapushnik in Kosovo, for which the accused Limaj incurs criminal responsibility under both Article 7(1) and 7(3) of the Statute and the accused Bala and Musliu incur criminal responsibility under Article 7(1) of the Statute. It is alleged that during the Amended Indictment period, the Accused, acting individually and in concert with others, participated in the crimes alleged in the Amended Indictment.

4. The Prosecution requests leave to make the five following amendments to the Amended Indictment:

a) the addition of allegations of joint criminal enterprise liability against all three accused;

[1] Decision to Grant Leave to Amend the Indictment, 25 March 2003.

b) the addition of allegations of superior responsibility under Article 7(3) of the Statute against the Accused Musliu;

c) the addition of one count of Inhumane Acts under Article 5 of the Statute based on factual allegations already included in Count 5;

d) the addition of one incident of murder to the charges under the existing Counts 6-7; and

e) the correction of a small number of errors, as well as some clarification of language, in the current Amended Indictment.

5. The Defence of the Accused Bala object to the amendments a) and c) and the Defence of the Accused Musliu objects to the amendments a) and b). These objections will be discussed in turn after a discussion on the law concerning amendment of indictment.

2. Rule 50 of the Rules

6. Rule 50 of the Rules of Procedure and Evidence governs the amendment of indictments. Rule 50 (A) provides modalities concerning the competent judge and time at which an indictment may be amended. Rule 50 (B) expressly addresses the issue of new charges, without specifying whether new charges can only be based upon new facts, and Rule 50 (C) contemplates that the accused may require additional time to prepare for trial as a result of an amendment that involves adding a further count.[2]

7. The first substantive question the rule is concerned with is the type of amendment which may be made to an indictment. In the instant case, the Prosecution proposes to include two new forms of liability (joint criminal enterprise and command responsibility), a new incident based on new facts and evidentiary material under existing charges in current counts 6 and 7, a new charge based on existing facts and evidentiary material (proposed count 5), and some corrections to the language and annexes of the Amended Indictment.

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[2] (A) (i) The Prosecutor may amend an indictment:
[...]
(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
(ii) After the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed.
(iii) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.
(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.
(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

8. There is no doubt that new factual or evidentiary material may result in an amendment if such material constitutes *prima facie* evidence. The Defence of the Accused Bala argues that new evidentiary material supporting amendments to the indictment must be put to scrutiny by a confirmation judge.[3] Rule 50 (A)(ii) which sets out that "after the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed" must be interpreted in fairness to the Accused and with due regard to the spirit of the rule, as giving the Trial Chamber, *and not the original confirming judge*, the duty to act as confirming judge when examining new evidentiary material brought in support of an amendment to an indictment.[4] In relation to the addition of new charges even in the absence of new factual or evidentiary material, this has been accepted in other cases before the ICTY and the ICTR.[5] For instance, in the *Naletilić and Martinović* case, the Trial Chamber agreed to add a new charge of "Dangerous or Humiliating Labour" in the absence of new evidence.[6] In the *Musema* case, the Trial Chamber allowed a new charge of complicity in genocide as an alternative to the existing charge of genocide rather than as an additional count.[7] Also, in the *Niyitegeka* case, the Trial Chamber said that new charges could be added to an indictment to "allege an additional legal theory of liability with no new acts".[8] In sum, although the case-law of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 demonstrates that a decision to accept an amendment will normally be forthcoming unless prejudice can be shown to the accused, it still remains understood that amendments prompted by newly discovered evidence must be supported by *prima facie* evidence.

9. The second substantive question the rule is concerned with and which is the second key consideration for the Trial Chamber in granting leave to amend the indictment, is to ensure that the accused is not prejudiced by an amendment of the indictment against him in the conduct of his defence. Therefore, although there are no express limits on the exercise of the discretion contained in Rule 50, when viewing the Statute and Rules as a whole, that discretion must be exercised with regard to the right of the accused to a fair trial. In particular, depending on the circumstances of the case, the right of the accused

[3] Bala Response, para. 5.
[4] Rule 50 (A)(ii) was amended during the July 2000 Plenary of judges to ensure that applications for amendment of indictment be filed before the Trial Chamber seized of the case, when this was the case, and not before the original confirming judge or another judge acting as the original confirming judge.
[5] See *Prosecutor v Šešelj*, Case No. IT-98-33-PT, "Amended Indictment", 27 October 1999.
[6] *Prosecutor v Naletilić and Martinović* ("*Naletilić* case"), Case No. IT-98-34-PT, Decision on Prosecution Motion to Amend Count 5 of the Indictment, 28 November 2000.
[7] See *Prosecutor v Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 18 November 1998.
[8] See *Prosecutor v Niyitegeka*, Case No. ICTR-96-14-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000.

to an expeditious trial, to be promptly informed of the charges against him, and to have adequate time and facilities for the preparation of his defence, potentially arise when considering objections to an amended indictment.[9] Also, when deciding the question of whether the amendment results in any prejudice to the accused, due consideration must be given to the "Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber".[10]

10. Thus, in determining whether any prejudice to the accused will follow from an amendment to the indictment, regard must be had to the circumstances of the case as a whole. If additional time to prepare the conduct of the defence is given to the accused, an amendment does not need to result in prejudice to the accused.[11] Such a decision is taken in light of all aspects of the case. The delay to the trial of the accused resulting from the amendment should not be unreasonable in light of the complexity of the case and when considering the crimes contained in the existing indictment at the time of his arrest, so that his right to be promptly informed of the charges against him is not violated by the amendment.

3. The Amendments Proposed by the Prosecution

11. The Prosecution makes the general argument that the proposed amendments will not cause prejudicial delay and should be allowed in view of the fact that the indictment against the Accused, by Tribunal's standards, is narrow in scope - it covers a short period of time (four months), a small part of Kosovo and a clearly identified set of events.[12]

12. The Defence of the Accused Musliu also makes a preliminary argument concerning the lack of sufficient explanations regarding the tardiness (the amendments are sought eight months after the Accused Musliu has been held in custody) with which the Prosecution is making the present application.[13] The Prosecution replies to Musliu's argument concerning the tardiness of the Motion that it has waited to make the application to

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[9] See *Naletilić case*.
[10] See for example, *Prosecutor* v *Musema*, Case No. ICTR096-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999.In *Prosecutor* v *Kabiligi and Ntabakuze*, Case No. ICTR-97-34-I/ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999.
[11] See *Prosecutor* v *Kovačević*, Case No. IT-97-24-PT, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998.
[12] Reply, para. 24.
[13] Musliu Response, paras. 9-12.

amend the Amended Indictment until it believed, based on additional investigation, that the charges could be proven beyond reasonable doubt.[14]

13. The Trial Chamber recalls that the showing of whether amendments to an indictment are brought forward in a timely manner must be "measured within the framework of the overall requirement of the fairness of the proceedings."[15] The Trial Chamber is satisfied with the Prosecution's explanations in relation to the delay of the application to amend the Amended Indictment. In the present case, there is no suggestion that the Prosecution seeks an improper tactical advantage by filing the Motion. Furthermore, the amendments sought are not such in scope, having had due regard to the case as a whole, that, at the outset and even with additional time to prepare the conduct of the Defence, the Accused's right to a fair trial would be prejudiced following the amendments.

14. The Trial Chamber turns now to examine each of the proposed amendments to the Amended Indictment.

a) The addition of allegations of Joint Criminal Enterprise ("JCE") liability against all three accused

15. The Prosecution submits that the purpose of this amendment is to reflect the existence of a JCE among the Accused and other individuals involved in the detention, mistreatment and murder of persons detained at the Lapušnik/Llapushnik Prison Camp in the summer of 1998.[16] The Prosecution argues on the one hand that it was "abundantly clear" from the current indictment, and particularly the many witness statements, summaries and interview transcripts disclosed to the Defence that the Accused were acting in concert with one another and with others. On the other hand, the Prosecution argues that the proposed amendment is "the result of investigative work, post-indictment, which has revealed that the role of the three accused can be most accurately characterised as participation in a joint criminal enterprise".[17]

16. The Defence of the Accused Bala and Musliu objects to the addition of JCE allegations in the Amended Indictment on the grounds that these allegations are not supported by any facts not known to the Prosecution at the time of the original Indictment, that the

[14] Reply, paras 5, 7.
[15] *Prosecutor v Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 31.
[16] Motion, para. 10.
[17] Motion, para. 11. Paragraphs 10-12 of the proposed Second Amended Indictment set forth the individual responsibility of each of the Accused in the JCE, Motion, para. 12.

proposed amendment lacks necessary specificity (there is no details concerning the beginning, the end or the other members of the JCE according to the Defence) and that it expands the scope of the case against the Accused to an unknown extent.[18] The Defence of both Accused emphasises that since the Prosecution argues that the current Amended Indictment already makes it "abundantly clear" that the three accused were acting in concert with one another, such amendment is not necessary.[19]

17. The Prosecution explains that the principal effect of the newly obtained evidence has not been to reveal additional criminal acts by the accused but rather to persuade itself that the Accused's participation in crimes at the camp was done in furtherance of a JCE in which they shared a common purpose.[20] The Prosecution acknowledges that the inclusion of the legal liability may require the Defence of the Accused to undertake additional investigation but emphasises that the scope of such work is exaggerated by the Defence.[21] Finally, the Prosecution argues that allegations of JCE are sufficiently specified in the proposed Amended Indictment. It contends that the time, the geographical extent and participants of the JCE are described in the Amended Indictment and in the supporting material with sufficient detail to put the Accused on notice.[22]

18. The Trial Chamber is satisfied with the explanations provided by the Prosecution. It further recalls one of the Appeals Chamber's conclusions in the *Karemera* case, which it endorses, that "the specific allegation of a joint and criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes. Particularized notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case".[23] The Trial Chamber acknowledges that in the present case, there may indeed be a need for the accused to conduct new inquiries, approach new witnesses, or expend some additional resources if allegations of JCE are added to the Amended Indictment. These new investigations do not appear so extensive in scope however that even with an additional period of time to prepare, the conduct of

[18] Bala Response, paras 2, 4, 5 ; Bala Defence argues that statements and summaries of witnesses L-01, L02, L-05, L-10, L-11 and Shefqet Gashi simply re-state the allegations that Bala personally committed certain offences during the indictment period and that the interview with Ramiz Qeriqi provides no evidence against Bala; Musliu Response, paras 16-18.
[19] *Ibid.*
[20] Reply, paras 6, 7
[21] Reply, para. 21.
[22] Reply, paras 11-14.
[23] *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 2 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 27.

the Defence would be irremediably hindered following the proposed amendment. The trial of the Accused is not yet scheduled to begin, nor is the case ready for trial. The Trial Chamber sees no prejudice to the Accused's right to a fair trial in granting leave to amend the Amended Indictment in respect of JCE liability if additional time to prepare for trial is available to the Defence.

19. Accordingly, the Trial Chamber grants leave to the Prosecution to amend the Amended Indictment to include allegations of JCE.

20. The Defence also raise the issue of lack of specificity of allegations of JCE. This issue is legitimately raised here by the Defence as a preliminary objection on the form of the proposed second amended indictment – pursuant to Rule 72 of the Rules – insofar as it relates to the new allegations of JCE. The Trial Chamber recalls that what is required to be pleaded by the Prosecution with respect to added allegations of JCE, and in addition to the underlying offences committed in the JCE, is the purpose and period of the enterprise, the identity of the participants in the enterprise, and the nature of the participation of the accused in that enterprise.[24] The Trial Chamber is satisfied that the Prosecution has discharged its obligation to specify the relevant aspects of JCE in the proposed second amended indictment in a satisfactory manner.[25]

21. The Trial Chamber dismisses the Defence's objections concerning the form of the indictment insofar as they relates to allegations of JCE.

b) The addition of allegations of superior responsibility under Article 7(3) of the Statute against the Accused Musliu

22. The Prosecution submits that evidence obtained since the filing of the Amended Indictment has persuaded the Prosecution that the Accused Musliu's position was such that he should be held responsible for his knowing failure to prevent or punish the charged crimes as well as for his individual participation therein.[26] The Prosecution argues that the addition of these charges will not prejudice the Accused Musliu because the majority of the evidence supporting these charges of superior responsibility will be offered into evidence in any event since it is relevant to other charges in the case.[27]

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[24] *See Prosecutor v Kordić* Case No. IT-95-14/2-PT, Decision on Preliminary Motion on the Form of Amended Indictment, 11 February 2000.
[25] *See* Annex A to the Motion (proposed second amended indictment), paras 6 to 13.
[26] Motion, para. 13.
[27] *Ibid.*

23. The Accused Musliu objects to that amendment on the grounds that the inclusion of allegations of command responsibility will necessitate investigations of all the factual allegations in the Indictment because the preparation of the Defence only concentrated on those incidents where the Accused Musliu's direct participation was alleged.[28] The Prosecution replies that Musliu fails to identify any unfair prejudice resulting from the amendment and notes that the issue of Musliu's command responsibility is not completely new because it was raised in connection with Musliu's application for provisional release and furthermore, such a charge would not require extensive investigations beyond that required by the other charges.[30]

24. The Trial Chamber sees no reasons to deny the Prosecution the possibility to prosecute the Accused Musliu to the full extent of the law. It is persuaded that the inclusion of command responsibility liability is based on *prima facie* evidence contained in the supporting material attached to the Motion. The Trial Chamber acknowledges that the inclusion of such liability may require the Defence to approach new witnesses and conduct new inquiries. Such work would indeed necessitate additional time for the Defence to prepare. However, as mentioned above, the trial of the Accused is not scheduled to start soon. The Defence of the Accused has not shown any other prejudice which could not be prevented or cured by additional time to prepare.

25. Accordingly, the Trial Chamber grants leave to amend the Amended Indictment to include command responsibility liability against the Accused Musliu.

c) The addition of one count of Inhumane Acts under Article 5 of the Statute based on factual allegations already included in Count 5

26. The Prosecution submits that one count of "Inhumane Acts" under Article 5 of the Statute is added to complement the existing Count 5 ("Cruel Treatment" under Article 3 of the Statute) in order to maintain a consistent charging practice throughout the indictment whereby the alleged crimes are charged under both Articles 3 and 5 of the Statute. The Defence of the Accused Bala objects to the addition of this new count of "Inhumane Acts" on the ground that the offence of "Inhumane Acts" under article 5 of

[28] Musliu Response, para. 5.
[29] Reply, para. 15.
[30] Reply, para. 22.
[31] Motion, para. 9.

the Stat[illegible]ical t[illegible]he offence of "Cruel Treatment" as currently charged under Article [illegible] Statute [illegible] count 5. It adds that it is unclear whether the proposed new count i[illegible]cumulat[illegible]e or alternative to the proposed counts 3, 4 and 6.[32] The Prosecu[illegible]es that [illegible]cause offences under Articles 3 and 5 of the Statute require differe[illegible]t requir[illegible]ents, counts 5 and 6, as amended in the proposed second Amend[illegible]ment (Annex A of the Motion), are pleaded cumulatively and in accords[illegible]e jurisprudence of the Tribunal.[33]

27. As not[illegible]Prosecu[illegible]on, the practice of cumulative charging was endorsed by the Appeal[illegible]s of the [illegible]ribunal which has set this matter.[34] In the present case, it is not entirely [illegible]the P[illegible]ecution did not bring the proposed amendment at an earliest stage, f[illegible]when [illegible]he original indictment was amended in March 2003. Indeed, the pur[illegible]e amen[illegible]ment is to maintain a consistent charging practice throughout the ind[illegible]reby [illegible]alleged crimes are charged under both Articles 3 and 5 of the Statute[illegible], the Tr[illegible] Chamber does not disregard the fact that the Prosecution is entitled[illegible]e to t[illegible]full extent of the law within certain limits. Having due regard to the [illegible]cole[illegible] Trial Chamber is not convinced that the inclusion of a new count [illegible]ame A[illegible] would cause prejudice to the preparation of the Accused's defence.

28. Accord[illegible]Trial C[illegible]mber grants leave to amend the Amended Indictment to add a new co[illegible]ming Acts".

d) The ad[illegible]e incl[illegible]nt of murder to the charges under existing Counts 6-7

29. The Pr[illegible]s[illegible] little additional investigative work would be required by the inclusi[illegible]of murder of Ajet Gashi (proposed paragraph 29).[35] The Defenc[illegible]ecused [illegible]presses no views on these proposed amendments.

30. The Tr[illegible]is sa[illegible]fied that the proposed new incident is prompted and based on *prima* [illegible]vidence does not identify any prejudice from the inclusion of the ne[illegible]under existing charges. The Trial Chamber sees no reasons

[32] Bala Response, par[illegible]does not object to this proposed amendment and the Accused Limaj did not file a response to t[illegible]
[33] Reply, paras 19-20.
[34] See *Prosecutor v. [illegible]*, Case No. IT-96-21-A, 20 February 2001, para. 400.
[35] *See* Motion, para. [illegible]

to deny [illegible] st to include a new incident of murder to charges under existing [illegible] time is available to the Defence to prepare for trial.

31. Accord [illegible] request to include one incident of murder to the charges under e [illegible] Amended Indictment is granted.

f) Correc [illegible] as some clarification of language, in the current Amend [illegible]

32. The Pr [illegible] ese corrections include changes to some of the victims listed i [illegible] I to the Amended Indictment, based on new evidence obtaine [illegible] vestigations into these crimes.[36] The Prosecution adds that liti [illegible] ive work would be required by the changes in Annex I (propos [illegible] The Defence of the Accused does not oppose these "correc [illegible] ". The Trial Chamber finds that the changes made to Annex [illegible] ended Indictment are sufficiently supported by evidence contain [illegible] Motion. The Trial Chamber sees no prejudice to the Accuse [illegible] accepting these proposed amendments if additional time is grant [illegible] pare for trial.

33. Accord [illegible] grants the Prosecution's request to amend the Amended Indictm [illegible] sed corrections and clarifications.

34. In sum [illegible] ls that the amendments sought by the Prosecution are accepta [illegible] fair prejudice to the Accused's right to a fair trial if sufficie [illegible] nduct of the Defence is granted to the Defence.

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FOR THE FOREGO pursuant to Rules 50 and 72 of the Rules of Procedure and Evidence,

GRANTS the Motion,

ORDERS that the Ac j. Haradin Bala and Isak Musliu enter a plea to the charges under Count 5 of the indictment, and to the new allegation of Joint Criminal Enterprise liability an Isak Musliu enter a plea to the new allegation of command responsibility liability eld on 27 February 2004;

DISMISSES the obje nce of the Accused Bala and Musliu on the form of the amendments to the A

Done in both E , the English text being authoritative.

Judge Alphons Orie, presiding

Dated this 12th day of
At The Hague,
The Netherlands.

l of the Tribunal]

[36] Motion, para. 7.
[37] *See* Reply, para. 21.

Bennett v Horseferry Road Magistrates' Court and another

ANNEX 9(d), (1993) 3 All ER 138 HL(UK), pp. 138 – 169.

HOUSE OF LORDS

LORD GRIFFITHS, LORD BRIDGE OF HARWICH, LORD OLIVER OF AYLMERTON, LORD LOWRY AND LORD SLYNN OF HADLEY

3, 4, 8, 9 MARCH, 24 JUNE 1993

Extradition – Disguised extradition – Deportation to United Kingdom – Applicant arrested in South Africa and put on aircraft bound for England – Applicant arrested on arrival in England and charged – Applicant alleging that he was brought within jurisdiction by improper collusion between South African authorities and English police – Whether alleged collusion between South African authorities and English police amounting to abuse of process of court – Whether court having power to inquire into circumstances in which applicant brought within jurisdiction.

Criminal law – Committal – Preliminary hearing before justices – Abuse of process – Power of justices – Justices having power to refuse to commit for trial on grounds of abuse of process in matters directly affecting fairness of trial – Extent of power – Whether appropriate for justices to decide questions involving deliberate abuse of extradition procedures – Whether proper court to decide such matters is Divisional Court.

The appellant, a New Zealand citizen, was alleged to have purchased a helicopter in England in 1989 by a series of false pretences and then to have taken it to South Africa. In November 1990 he was arrested in South Africa. The English police, who wished to arrest him, were informed but in the absence of an extradition treaty between the United Kingdom and South Africa no proceedings for the appellant's extradition were ever initiated. Instead, the appellant was put on an aircraft bound for London by the South African police and when he arrived in England on 28 January 1991 he was arrested. He was subsequently brought before magistrates who committed him to the Crown Court for trial. The appellant sought judicial review of the magistrates' decision to commit him for trial, claiming that he had been forcibly returned to England against his will and brought within the jurisdiction as a result of disguised extradition or kidnapping. He alleged that the South African police had indicated that he would be repatriated to New Zealand but had then arranged with the English police that he would travel via England to enable him to be arrested and tried in England. He contended that the subterfuge and complicity between the English police and the South African police to obtain his presence within the jurisdiction to enable him to be arrested amounted to an abuse of the process of the court and that it would be wrong and improper for him to be tried in England. The Divisional Court held that, even if there was evidence of collusion between the English police and the South African police in kidnapping the appellant and securing his enforced illegal removal from South Africa, the court had no jurisdiction to inquire into the circumstances by which he came to be within the jurisdiction and accordingly dismissed his application for judicial review. The appellant appealed to the House of Lords.

Held (Lord Oliver dissenting) – The maintenance of the rule of law prevailed over the public interest in the prosecution and punishment of crime where the prosecuting authority had secured the prisoner's presence within the territorial jurisdiction of the court by forcibly abducting him or having him abducted from within the jurisdiction of some other state in violation of international law, the laws of the state from which he had been abducted and his rights under the laws of that state and in disregard of available procedures to secure his lawful extradition to the jurisdiction of the court from the state where he was residing. It was an abuse of process for a person to be forcibly brought within the jurisdiction in disregard of extradition procedures available for the return of an accused person to the United Kingdom and the High Court had power, in the exercise of its supervisory jurisdiction, to inquire into the circumstances by which a person was brought within the jurisdiction and if satisfied that it was in disregard of extradition procedures by a process to which the police, prosecuting or other executive authorities in the United Kingdom were a knowing party the court could stay the prosecution and order the release of the accused. The appeal would therefore be allowed and the case remitted to the Divisional Court for further consideration (see p 150*e* to *h*, p 151*cd*, p 152*hj*, p 155*e* to p 156*a*, p 160*h*, p 162*e*, p 162*j* to p 163*a*, p 163*g*, p 164*h* and p 169*ghj*, post).

R v Hartley [1978] 2 NZLR 199, dictum of Woodhouse J in *Moevao v Dept of Labour* [1980] 1 NZLR 464 at 475–476, *R v Bow Street Magistrates, ex p Mackeson* (1982) 75 Cr App R 24, *S v Ebrahim* 1991 (2) SA 553 and dictum of Stevens J in *US v Alvarez-Machain* (1992) 119 L Ed 2d 441 at 466–467 applied.

R v Plymouth Magistrates' Court, ex p Driver [1985] 2 All ER 681 overruled.

Per curiam. Justices, whether sitting as examining magistrates or exercising their summary jurisdiction, have power to exercise control over their proceedings through an abuse of process jurisdiction in relation to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures. In the case of the deliberate abuse of extradition procedures the proper forum is the Divisional Court and if a serious question as to such a matter arises justices should allow an adjournment so that an application can be made to the Divisional Court (see p 152*e* to *h*, p 156*a*, p 160*g*, p 166*e* and p 169*ghj*, post).

Decision of the Divisional Court [1993] 2 All ER 474 reversed.

Notes

For seizure of persons in violation of international law, see 18 *Halsbury's Laws* (4th edn) para 153.

For committal proceedings generally, see 11(2) *Halsbury's Laws* (4th edn reissue) paras 824–827, and for cases on the subject, see 15(1) *Digest* (2nd reissue) 139–142, *12772–12802.1*.

Cases referred to in opinions

Atkinson v US Government [1969] 3 All ER 1317, [1971] AC 197, [1969] 3 WLR 1074, HL. p. 151 d

Brown v Lizars (1905) 2 CLR 837, Aust HC. p. 144 f

Chu Piu-wing v A-G [1984] HKLR 411, HK CA. p. 150 b – c

Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL. p. 151 c

DPP v Crown Court at Manchester and Ashton [1993] 2 All ER 663, [1993] 2 WLR 846, HL.

DPP v Humphrys [1976] 2 All ER 497, [1977] AC 1, [1976] 2 WLR 857, HL. p. 151 f

Frisbie v Collins (1952) 342 US 519, US SC. p. 148 f, 153 j, 154 e

Grassby v R (1989) 168 CLR 1, Aust HC.

Ker v Illinois (1886) 119 US 436, US SC. p. 148 f, 153 j, 154 e

abused by the fact that a person may or may not have been brought to this country improperly.'

However, in a later passage Woolf LJ drew a distinction between improper behaviour by the police and the prosecution itself. He said ([1993] 2 All ER 474 at 479–480):

'Speaking for myself, I am not satisfied there could not be some form of residual discretion which in limited circumstances would enable a court to intervene, not on the basis of an abuse of process but on some other basis which in the appropriate circumstances could avail a person in a situation where he contends that the prosecution are involved in improper conduct.'

Your Lordships have been urged by the respondents to uphold the decision of the Divisional Court and the nub of its submission is that the role of the judge is confined to the forensic process. The judge, it is said, is concerned to see that the accused has a fair trial and that the process of the court is not manipulated to his disadvantage so that the trial itself is unfair; but the wider issues of the rule of law and the behaviour of those charged with its enforcement, be they police or prosecuting authority, are not the concern of the judiciary unless they impinge directly on the trial process. In support of this submission your Lordships have been referred to *R v Sang* [1979] 2 All ER 1222 esp at 1230, 1245–1246, [1980] AC 402 esp at 436–437, 454–455 where Lord Diplock and Lord Scarman emphasise that the role of the judge is confined to the forensic process and that it is no part of the judge's function to exercise disciplinary powers over the police or the prosecution.

The respondents have also relied upon the United States authorities in which the Supreme Court has consistently refused to regard forcible abduction from a foreign country as a violation of the right to trial by due process of law guaranteed by the Fourteenth Amendment to the Constitution: see in particular the majority opinion in *US v Alvarez-Machain* (1992) 112 S Ct 2188 reasserting the *Ker-Frisbie* rule (see *Ker v Illinois* (1886) 119 US 436 and *Frisbie v Collins* (1952) 342 US 519). I do not, however, find these decisions particularly helpful because they deal with the issue of whether or not an accused acquires a constitutional defence to the *jurisdiction* of the United States courts and not to the question whether, assuming the court has jurisdiction, it has a discretion to refuse to try the accused (see *Ker v Illinois* 119 US 436 at 444).

The respondents also cited two Canadian cases decided at the turn of the century, *R v Whiteside* (1904) 8 CCC 478 and *R v Walton* (1905) 10 CCC 269 which show that the Canadian courts followed the English and American courts accepting jurisdiction in criminal cases regardless of the circumstances in which the accused was brought within the jurisdiction of the Canadian court. We have also had our attention brought to the New Zealand decision in *Moevao v Dept of Labour* [1980] 1 NZLR 464, in which Richmond P expressed reservations about the correctness of his view that the prosecution in *R v Hartley* [1978] 2 NZLR 199 was an abuse of the process of the court and Woodhouse J reaffirmed his view to that effect.

The appellant contends for a wider interpretation of the court's jurisdiction to prevent an abuse of process and relies particularly upon the judgment of Woodhouse J in *R v Hartley*, the powerful dissent of the minority in *US v Alvarez-Machain* (1992) 112 S Ct 2188 and the decision of the South African Court of Appeal in *S v Ebrahim* 1991 (2) SA 553, the headnote of which reads:

'The appellant, a member of the military wing of the African National Congress who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents of the South African State, and taken back to South Africa, where he was handed over to the police and detained in terms of security legislation. He was subsequently charged with treason in a Circuit Local Division, which convicted and sentenced him to 20 years' imprisonment. The appellant had prior to pleading launched an application for an order to the effect that the Court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and thus unlawful. The application was dismissed and the trial continued. The Court, on appeal against the dismissal of the above application, held, after a thorough investigation of the relevant South African and common law, that the issue as to the effect of the abduction on the jurisdiction of the trial Court was still governed by the Roman and Roman-Dutch common law which regarded the removal of a person from an area of jurisdiction in which he had been illegally arrested to another area as tantamount to abduction and thus constituted a serious injustice. A court before which such a person was brought also lacked jurisdiction to try him, even where such a person had been abducted by agents of the authority governing the area of jurisdiction of the said court. The Court further held that the above rules embodied several fundamental legal principles, viz those that maintained and promoted human rights, good relations between States and the sound administration of justice: the individual had to be protected against unlawful detention and against abduction, the limits of territorial jurisdiction and the sovereignty of States had to be respected, the fairness of the legal process guaranteed and the abuse thereof prevented so as to protect and promote the dignity and integrity of the judicial system. The State was bound by these rules and had to come to Court with clean hands, as it were, when it was itself a party to proceedings and this requirement was clearly not satisfied when the state was involved in the abduction of persons across the country's borders. It was accordingly held that the Court *a quo* had lacked jurisdiction to try the appellant and his application should therefore have succeeded. As the appellant should never have been tried by the Court *a quo*, the consequences of the trial had to be undone and the appeal disposed of as one against conviction and sentence. Both the conviction and sentence were accordingly set aside.'

In answer to the respondent's reliance upon *R v Sang* [1979] 2 All ER 1222, [1980] AC 402 the appellant points to s 78 of the Police and Criminal Evidence Act 1984, which enlarges a judge's discretion to exclude evidence obtained by unfair means.

As one would hope, the number of reported cases in which a court has had to exercise a jurisdiction to prevent abuse of process are comparatively rare. They are usually confined to cases in which the conduct of the prosecution has been such as to prevent a fair trial of the accused. In *R v Crown Court at Derby, ex p Brooks* (1984) 80 Cr App R 164 at 168–169 Sir Roger Ormrod said:

'The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant

has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable ... The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness to both the defendant and the prosecution ...'

There have, however, also been cases in which although the fairness of the trial itself was not in question the courts have regarded it as so unfair to try the accused for the offence that it amounted to an abuse of process. In *Chu Piu-wing v A-G* [1984] HKLR 411 the Hong Kong Court of Appeal allowed an appeal against a conviction for contempt of court for refusing to obey a subpoena ad testificandum on the ground that the witness had been assured by the Independent Commission Against Corruption that he would not be required to give evidence. McMullin V-P said (at 417–418):

'there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain.'

And in a recent decision of the Divisional Court in *R v Croydon Justices, ex p Dean* [1993] 3 All ER 129 the committal of the accused on a charge of doing acts to impede the apprehension of another contrary to s 4(1) of the Criminal Law Act 1967 was quashed on the ground that he had been assured by the police that he would not be prosecuted for any offence connected with their murder investigation and in the circumstances it was an abuse of process to prosecute him in breach of that promise.

Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.

Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus sufficient evidence has to be produced to show a prima facie case against the accused and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that

in such circumstances the court should declare itself to be powerless and stand idly by; I echo the words of Lord Devlin in *Connelly v DPP* [1964] 2 All ER 401 at 442, [1964] AC 1254 at 1354:

'The courts cannot contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused.'

The courts, of course, have no power to apply direct discipline to the police or the prosecuting authorities, but they can refuse to allow them to take advantage of abuse of power by regarding their behaviour as an abuse of process and thus preventing a prosecution.

In my view your Lordships should now declare that where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party.

If extradition is not available very different considerations will arise on which I express no opinion.

The question then arises as to the appropriate court to exercise this aspect of the abuse of process of jurisdiction. It was submitted on behalf of the respondents that examining magistrates have no power to stay proceedings on the ground of abuse of process and reliance was placed on the decisions of this House in *Sinclair v DPP* [1991] 2 All ER 366, [1991] 2 AC 64 and *Atkinson v US Government* [1969] 3 All ER 1317, [1971] AC 197, which established that in extradition proceedings a magistrate has no power to refuse to commit an accused on the grounds of abuse of process. But the reason underlying those decisions is that the Secretary of State has the power to refuse to surrender the accused if it would be unjust or oppressive to do so; and now under the Extradition Act 1989 an express power to this effect has been conferred upon the High Court.

MAGISTRATES: pp. 151

Your Lordships have not previously had to consider whether justices, and in particular committing justices, have the power to refuse to try or commit a case upon the grounds that it would be an abuse of process to do so. Although doubts were expressed by Viscount Dilhorne as to the existence of such a power in *DPP v Humphrys* [1976] 2 All ER 497 at 510–511, [1977] AC 1 at 26, there is a formidable body of authority that recognises this power in the justices.

In *Mills v Cooper* [1967] 2 All ER 100 at 104, [1967] 2 QB 459 at 467 Lord Parker CJ, hearing an appeal from justices who had dismissed an information on the grounds that the proceedings were oppressive and an abuse of the process of the court, said:

'So far as the ground upon which they did dismiss the information was concerned, every court has undoubtedly a right in its discretion to decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court.'

Diplock LJ expressed his agreement with this view (see [1967] 2 All ER 100 at 105, [1967] 2 QB 459 at 470).

In *R v Canterbury and St Augustine's Justices, ex p Klisiak* [1981] 2 All ER 129 at 136, [1982] QB 398 at 411 Lord Lane CJ was prepared to assume such a jurisdiction. In *R v West London Stipendiary Magistrate, ex p Anderson* (1984) 80 Cr App R 143 at 149 Robert Goff LJ, reviewing the position at that date, said:

triable for (again in board terms) offences other than those for which he has been extradited unless he has first had an opportunity of leaving the United Kingdom. Thus a person who is returned only as a result of extradition proceedings enjoys, as a result of this statutory inhibition, an advantage over one who elects to return voluntarily or who is otherwise induced to return within the jurisdiction. But these are provisions inserted in the Act for the purpose of giving effect to reciprocal treaty arrangements for extradition. I cannot, for my part, regard them as conferring upon a person who is fortunate enough successfully to flee the jurisdiction some 'right' in English law which is invaded if he is brought or induced to come back within the jurisdiction otherwise than by an extradition process, much less a right the invasion of which a criminal court is entitled or bound to treat as vitiating the process commenced by a charge properly brought. It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad—for instance in securing the deportation of the accused without proper authority—in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage in which the accused might have derived from the extradition process is likewise destroyed. No 'right' of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try.

I would only add that if, contrary to my opinion, such an extended jurisdiction over executive abuse does exist, I entirely concur with what has fallen from my noble and learned friend Lord Griffiths with regard to the appropriate court to exercise such jurisdiction. I would dismiss the appeal and answer the certified question in the negative.

LORD LOWRY. My Lords, having had the advantage of reading in draft the speeches of your Lordships, I accept the conclusion of my noble and learned friends Lord Griffiths and Lord Bridge of Harwich that the court has a discretion to stay as an abuse of process criminal proceedings brought against an accused person who has been brought before the court by abduction in a foreign country participated in or encouraged by British authorities. Recognising, however, the clear and forceful reasoning of my noble and learned friend Lord Oliver of Aylmerton to the contrary, I venture to contribute some observations of my own.

The first essential is to define abuse of process, which in my opinion must mean abuse of the process of the court which is to try the accused. *Archbold's Pleading Evidence and Practice in Criminal Cases* (44th edn, 1992) p 430, para 4.44 calls it 'a misuse or improper manipulation of the process of the court'. In *Rourke v R* [1978] 1 SCR 1021 at 1038 Laskin CJC said: '[The court] is entitled to protect its process from abuse' and also referred to 'the danger of generalizing the application of the doctrine of abuse of process' (at 1041). In *Moevao v Dept of*

Labour [1980] 1 NZLR 464 at 476 Woodhouse J spoke approvingly of 'the much wider and more serious abuse of the criminal jurisdiction in general', whereas Richmond P (at 471), giving expression to reservations about the view in which he had concurred in *R v Hartley* [1978] 2 NZLR 199, referred to the need to establish 'that the process of the Court is itself being wrongly made use of'. I think that the words used by Woodhouse J involve a danger that the doctrine of abuse of process will be too widely applied and I prefer the narrower definition adopted by Richmond P. The question still remains: what circumstances antecedent to the trial will produce a situation in which the process of the court of trial will have been abused if the trial proceeds?

Whether the proposed trial will be an unfair trial is not the only test of abuse of process. The proof of a previous conviction or acquittal on the same charge means that it will be unfair to try the accused but not that he is about to receive an unfair trial. Again, in *R v Grays Justices, ex p Low* [1988] 3 All ER 834, [1990] 1 QB 54 it was held to be an abuse of process to prosecute a summons where the accused had already been bound over and the summons had been withdrawn, while in *R v Horsham Justices, ex p Reeves* (1980) 75 Cr App R 236 it was held to be an abuse of process to pursue charges when the magistrates had already found 'no case to answer'. It would, I submit, be generally conceded that for the Crown to go back on a promise of immunity given to an accomplice who is willing to give evidence against his confederates would be unacceptable to the proposed court of trial, although the trial itself could be fairly conducted. And to proceed in respect of a non-extraditable offence against an accused who has with the connivance of our authorities been unlawfully brought within the jurisdiction from a country with which we have an extradition treaty need not involve an unfair trial, but this consideration would not in my opinion be an answer to an application to stay the proceedings on the ground of abuse of process.

This last example, though admittedly not based on authority, foreshadows my conclusion that a court would have power to stay the present proceedings against the appellant, assuming the facts alleged to be proved, because I consider that a court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case. I agree that prima facie it is the duty of a court to try a person who is charged before it with an offence which the court has power to try and therefore that the jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons. The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings merely 'pour encourager les autres'.

Your Lordships have comprehensively reviewed the authorities and therefore I will be content to highlight the features which have led me to conclude in favour of the appellant. The court in *R v Bow Street Magistrates, ex p Mackeson* (1981) 75 Cr App R 24, while quite clear that there was jurisdiction to try the applicant, relied on *R v Hartley* [1978] 2 NZLR 199 for the existence of a discretion to make an order of prohibition. Woodhouse J in *R v Hartley* (at 217) had also recognised the *jurisdiction* to try the accused Bennett, but expressed the court's conclusion that to do so in the circumstances offended against one of the most important principles of the rule of law'. The court's decision in *R v Plymouth Magistrates'*

Court, ex p Driver [1985] 2 All ER 681, [1986] QB 95 to the contrary effect was influenced by *Ex p Scott* (1829) 9 B & C 446, 109 ER 166, *Sinclair v HM Advocate* (1890) 17 R (J) 38 and *R v O/C Depot Battalion RASC Colchester, ex p Elliott* [1949] 1 All ER 373. *Ex p Scott* and *Sinclair v HM Advocate* were decisions on jurisdiction and formed the basis of the decision in *Ex p Elliott*, in which there was an application for a writ of habeas corpus, based on the allegation that the applicant was not subject to military law and that he was wrongfully held in custody. My noble and learned friend Lord Griffiths has described the argument advanced by the applicant and the manner in which Lord Goddard CJ dealt with that argument in the court's judgment by reference to *Ex p Scott* and *Sinclair v HM Advocate*. Then, having disposed of an argument based on provisions of the Army Act ... relating to arrest, Lord Goddard CJ came to 'The only point in which there was any substance ... whether there has been such delay that this court ought to interfere' (see [1949] 1 All ER 373 at 379). Neither in the discussion and rejection of this point nor anywhere else in the judgment does the question of abuse of process arise and, as the judgment put it (at 379):

> 'What we were asked to do in the present case, and the most we could have been asked to do, was to admit the prisoner to bail until the court was ready to try him.'

This brief review strengthens my inclination to prefer *Ex p Mackeson* to *Ex p Driver* and to the Divisional Court's judgment on the main point in the present case, since I consider that the true guidance is to be found not in the jurisdictional cases but in *R v Hartley*. My noble and learned friend Lord Griffiths has already pointed out that the United States authorities, in which opinion is divided, have involved a discussion of *jurisdiction* and the interpretation of the Fourteenth Amendment.

While on the subject of due process, I might take note of a subsidiary argument by the respondents: the use by the prosecution of evidence which has been unlawfully or dishonestly obtained is regarded in the United States as a violation of due process ('the fruit of the poisoned tree'), but the preponderant American view is in favour of trying accused persons even when their presence in court has been unlawfully obtained; therefore a fortiori the view in this jurisdiction ought to favour trying such accused persons, having regard to the more tolerant common law attitude here to unlawfully obtained evidence, as shown by *R v Sang* [1979] 2 All ER 1222, [1980] AC 402. My answer is that I would consider it a dangerous and question-begging process to rely on this chain of reasoning, particularly where the constitutional meaning of 'due process' is one of the factors. As your Lordships have noted, the respondents also relied on *R v Sang* directly in order to support the argument that it does not matter whether the accused comes to be within the jurisdiction by fair means or foul.

The philosophy which inspires the proposition that a court may stay proceedings brought against a person who has been unlawfully abducted in a foreign country is expressed, so far as existing authority is concerned, in the passages cited by my noble and learned friend Lord Bridge of Harwich. The view there expressed is that the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused. Therefore, although the power of the court is rightly confined to its

inherent power to protect itself against the abuse of its own process, I respectfully cannot agree that the facts relied on in cases such as the present case (as alleged) 'have nothing to do with that process' just because they are not part of the process. They are the indispensable foundation for the holding of the trial.

The implications for international law, as represented by extradition treaties, are significant. If a suspect is extradited from a foreign country to this country he cannot be tried for an offence which is different from that specified in the warrant and, subject always to the treaty's express provisions, cannot be tried for a political offence. But, if he is kidnapped in the foreign country and brought here, he may be charged with any offence, including a political offence. If British officialdom at any level has participated in or encouraged the kidnapping, it seems to represent a grave contravention of international law, the comity of nations and the rule of law generally if our courts allow themselves to be used by the executive to try an offence which the courts would not be dealing with if the rule of law had prevailed.

It may be said that a guilty accused finding himself in the circumstances predicated is not deserving of much sympathy, but the principle involved goes beyond the scope of such a pragmatic observation and even beyond the rights of those victims who are or may be innocent. It affects the proper administration of justice according to the rule of law and with respect to international law. For a comparison of public and private interests in the criminal arena I refer to an observation of Lord Reading CJ in a different context in *R v Lee Kun* [1916] 1 KB 337 at 341, [1914-15] All ER Rep 603 at 605:

> '... the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the State.'

If proceedings are stayed when wrongful conduct is proved, the result will not only be a sign of judicial disapproval but will discourage similar conduct in future and thus will tend to maintain the purity of the stream of justice. No 'floodgates' argument applies because the executive can stop the flood at source by refraining from impropriety.

I regard it as essential to the rule of law that the court should not have to make available its process and thereby indorse (on what I am confident will be a very few occasions) unworthy conduct when it is proved against the executive or its agents, however humble in rank. And, remembering that it is not jurisdiction which is in issue but the exercise of a discretion to stay proceedings, while speaking of 'unworthy conduct', I would not expect a court to stay the proceedings of every trial which has been preceded by a venial irregularity. If it be objected that my preferred solution replaces certainty by uncertainty, the latter quality is inseparable from judicial discretion. And, if the principles are clear and, as I trust, the cases few, the prospect is not really daunting. Nor do I consider that your Lordships ought to be deterred from deciding in favour of discretion by the difficulty, which may sometimes arise, of proving the necessary facts.

I would now pose and try to answer three questions.

(1) What is the position if without intervention by the British authorities a 'wanted man' is wrongfully transported from a foreign country to this jurisdiction? The court here is not concerned with irregularities abroad in which our executive (at any level) was not involved and the question of staying criminal proceedings, as proposed in a case like the present, does not arise. It seems to me, however, that in practice the transporting of a wanted man to the United

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

IN THE APPEALS CHAMBER

ANNEX 9(e)
pp. 1, 2, 23-25, 29-32;
paras. 73-86, 100-113

Before:
Judge Gabrielle Kirk McDonald, Presiding
Judge Mohamed Shahabuddeen
Judge Lal Chand Vohrah
Judge Wang Tieya
Judge Rafael Nieto-Navia

Registrar: Mr. Agwu U. Okali

Decision of: 3 November 1999

JEAN-BOSCO BARAYAGWIZA
v.
THE PROSECUTOR

DECISION

Counsel for the Appellant:
Mr. Justry P. L. Nyaberi

The Office of the Prosecutor:
Mr. Mohamed C. Othman
Mr. N. Sankara Menon
Mr. Mathias Marcussen

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2. Whether the Appellant was held in Cameroon for any period between 23 February 1998 and 11 September 1998 at the request of the Tribunal, and if so, what effect did this detention have in regard to personal jurisdiction

3. The reason for any delay between the request for transfer and the actual transfer

4. The reason for any delay between the transfer of the Appellant to the Tribunal and his initial appearance.

5. The reason for any delay between the initial appearance of the Appellant and the hearing on the Appellant's urgent motion

6. The disposition of the *writ of habeas corpus* that the Appellant asserts that he filed on 2 October 1997

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4. The duty of prosecutorial due diligence

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[redacted]

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B. The Abuse of Process Doctrine

1. In general

73. The Appeals Chamber now considers, in light of the abuse of process doctrine, the Appellant's allegations concerning three additional issues: 1) the right to be promptly informed of the charges during the first period of detention; 2) the alleged failure of the Trial Chamber to resolve the *writ of habeas corpus* filed by the Appellant; and 3) the Appellant's assertions that the Prosecutor did not diligently prosecute her case against him. These assertions will be considered. Before addressing these issues, however, several points need to be emphasised in the context of the following analysis. First and foremost, this analysis focuses on the alleged violations of the Appellant's rights and is not primarily concerned with the entity responsible for the alleged violation(s). As will be discussed, it is clear that there are overlapping areas of responsibility between the three organs of the Tribunal and as a result, it is conceivable that more than one organ could be responsible for the violations of the Appellant's rights. However, even if fault is shared between the three organs of the Tribunal—or is the result of the actions of a third party, such as Cameroon—it would undermine the integrity of the judicial process to proceed. Furthermore, it would be unfair for the Appellant to stand trial on these charges if his rights were egregiously violated. Thus, under the abuse of process doctrine, it is irrelevant which entity or entities were responsible for the alleged violations of the Appellant's rights. Second, we stress that the circumstances set forth in this analysis must be read as a whole. Third, none of the findings made in this sub-section of the Decision, in isolation, are necessarily dispositive of this issue. That is, it is the combination of these factors—and not any single finding herein—that lead us to the conclusion we reach in this sub-section. In other words, the application of the abuse of process doctrine is case-specific and limited to the egregious circumstances presented by this case. Fourth, because the Prosecutor initiates the proceedings of the Tribunal, her special responsibility in prosecuting cases will be examined in sub-section 4, *infra*.

74. Under the doctrine of "abuse of process", proceedings that have been lawfully initiated may be terminated after an indictment has been issued if improper or illegal procedures are employed in pursuing an otherwise lawful process. The House of Lords summarised the abuse of process doctrine as follows:

> [P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place.

It is important to stress that the abuse of process doctrine may be invoked as a matter of discretion. It is a process by which Judges may decline to exercise the court's jurisdiction in cases where to exercise that jurisdiction in light of serious and egregious violations of the accused's rights would prove detrimental to the court's integrity.

75. The application of this doctrine has resulted in dismissal of charges with prejudice in a number of cases, particularly where the court finds that to proceed on the charges in light of egregious violations of the accused's rights would cause serious harm to the integrity of the judicial process. One of the leading cases in which the doctrine of abuse of process was applied is R. v. Horseferry Road Magistrates' Court *ex parte* Bennett. In that case, the House of Lords stayed the prosecution and ordered the release of the accused, stating that:

> [A] court has a discretion to stay any criminal proceedings on the ground that to try those proceedings will amount to an abuse of its own process either (1) because it will be impossible (usually by reason of delay) to give the accused a fair trial or (2) *because it offends the court's sense of justice and propriety to be asked to try the accused in the circumstances of a particular case.*

The abuse of doctrine has been applied in several cases. For example, in Bell v. DPP of Jamaica, the Privy Council held that under the abuse of process doctrine courts have an inherent power to decline to adjudicate a case which would be oppressive as the result of unreasonable delay. In making this determination, the court set forth four guidelines for determining whether a delay would deprive the accused of a fair trial:

1. the length of the delay;

2. the prosecution's reasons to justify the delay;

3. the accused's efforts to assert his rights; and

4. the prejudice caused to the accused.

Regarding the issue of prejudice, in R. v. Oxford City Justices, *ex parte* Smith (D.K.B.), the court applied the abuse of process doctrine in dismissing a case on the grounds that a two-year delay between the commission of the offence and the issuing of a summons was unconscionable, stating:

> In the present case it seems to me that the delay which I have described was not only quite unjustified and quite unnecessary due to inefficiency, but it was a delay of such length that it could rightly be said to be unconscionable. That is by no means the end of the matter. It seems to me also that the delay here was of such a length that it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case.

In R. v. Hartley, the Wellington Court of Appeal relied on the abuse of process doctrine in quashing a conviction that rested on an unlawful arrest and the illegally obtained confession that followed.

76. Closely related to the abuse of process doctrine is the notion of supervisory powers. It is generally recognised that courts have supervisory powers that may be utilised in the interests of justice, regardless of a specific violation. The U.S. Supreme Court has stated that courts have a 'duty of establishing and maintaining civilized standards of procedure and evidence' as an inherent function of the court's role in supervising the judicial system and process. As Judge Noonan of the U.S. Ninth Circuit Court of Appeals has stated:

> This court has inherent supervisory powers to dismiss prosecutions in order to deter illegal conduct. The "illegality" deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation.

The use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process.

77. As noted above, the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused impossible; and (2) where in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. Considering the lengthy delay in the Appellant's case, 'it is quite impossible to say that there was no prejudice to the applicant in the continuance of the case'. The following discussion, therefore, focuses on whether it would offend the Tribunal's sense of justice to proceed to the trial of the accused.

2. The right to be promptly informed of the charges during the first period of detention

78. In the present case, the Appellant makes several assertions regarding the precise date he was informed of the charges. However, using the earliest date, we conclude that the Appellant was

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informed of the charges on 10 March 1997 when the Cameroon Deputy Prosecutor showed him a copy of the Rule 40*bis* Order. This was approximately 11 months after he was initially detained pursuant to the *first* Rule 40 request.

79. Rule 40*bis* requires the detaining State to promptly inform the *suspect* of the charges under which he is arrested and detained. Thus, the issue is when does the right to be promptly informed of the charges attach to suspects before the Tribunal. Existing international norms guarantee such a right, and suspects held at the behest of the Tribunal pursuant to Rule 40*bis* are entitled, at a bare minimum, to the protections afforded under these international instruments, as well as under the rule itself. Consequently, we turn our analysis to these international standards.

80. International standards require that a suspect who is arrested be informed promptly of the reasons for his arrest and the charges against him. The right to be promptly informed of the charges serves two functions. First, it counterbalances the interest of the prosecuting authority in seeking continued detention of the suspect. In this respect, the suspect needs to be promptly informed of the charges against him in order to challenge his detention, particularly in situations where the prosecuting authority is relying on the serious nature of the charges in arguing for the continued detention of the suspect. Second, the right to be promptly informed gives the suspect the information he requires in order to prepare his defence. The focus of the analysis in this Sub-section is on the first of these two functions. At the outset of this analysis, it is important to stress that there are two distinct periods when the right to be informed of the charges are applicable. The first period is when the suspect is initially arrested and detained. The second period is at the initial appearance of the accused after the indictment has been confirmed and the accused is in the Tribunal's custody. For purposes of the discussion in this Sub-section, only the first period is relevant.

81. The requirement that a suspect be promptly informed of the charges against him following arrest provides the 'elementary safeguard that any person arrested should know why he is deprived of his liberty'. The right to be promptly informed at this preliminary stage is also important because it affords the arrested suspect the opportunity to deny the offence and obtain his release prior to the initiation of trial proceedings.

82. International human rights jurisprudence has developed norms to ensure that this right is respected. For example, the suspect must be notified 'in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, as he sees fit, to apply to a court to challenge its lawfulness...'. However, there is no requirement that the suspect be informed in any particular way. Thus, at this initial stage, there is no requirement that the suspect be given a copy of the arrest warrant or any other document setting forth the charges against him; in fact, there is no requirement at this stage that the suspect be notified in writing at all, so long as the suspect is informed promptly.

83. The European Court of Human Rights has held that the required information need not be given in its entirety by the arresting officer at the 'moment of the arrest', provided that the suspect is informed of the legal grounds of his arrest within a sufficient time after the arrest. Moreover, the information may be divulged to the suspect in stages, as long as the required information is provided promptly. Whether this requirement is complied with requires a factual determination and is, therefore, case-specific. Consequently, we will briefly survey the jurisprudence of the Human Rights Committee and the European Court of Human Rights in interpreting the promptness requirement of Article 9(2) of the ICCPR, Article 5(2) of the ECHR and Article 7 of the ACHR.

84. As pointed out above, the Human Rights Committee held in Glenford Campbell v. Jamaica, that detention without the benefit of being informed of the charges for 45 days constituted a violation of Article 9(2) of the ICCPR. Under the jurisprudence of the European Court of Human Rights, intervals of up to 24 hours between the arrest and providing the information as required pursuant to ECHR Article 5(2) have been held to be lawful. However, a delay of ten days between the arrest and

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informing the suspect of the charges has been held to run afoul of Article 5(2). 11807

85. In the present case, the Appellant was detained for a total period of 11 months before he was informed of the general nature of the charges that the Prosecutor was pursuing against him. While we acknowledge that only 35 days out of the 11-month total are clearly attributable to the Tribunal (the periods from 17 April—16 May 1996 and 4—10 March 1997), the fact remains that the Appellant spent an inordinate amount of time in provisional detention without knowledge of the general nature of the charges against him. At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal—and not any other entity—that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.

86. As noted above, in Bell v. DPP of Jamaica, the abuse of process doctrine was applied where unreasonable delay would have resulted in an oppressive result had the case gone to trial. Applying the guidelines set forth in that case convinces us that the abuse of process doctrine is applicable under the facts of this case. The Appellant was detained for 11 months without being notified of the charges against him. The Prosecutor has offered no satisfactory justifications for this delay. The numerous letters attached to one of the Appellant's submissions point to the fact that the Appellant was in continuous communication with all three organs of the Tribunal in an attempt to assert his rights. Moreover, we find that the effect of the Appellant's pre-trial detention was prejudicial.

3. The failure to resolve the *writ of habeas corpus* in a timely manner

87. The next issue concerns the failure of the Trial Chamber to resolve the Appellant's *writ of habeas corpus* filed on 29 September 1997. The Prosecutor asserts that *after* the Appellant filed the *writ of habeas corpus*, the President of the Tribunal wrote a letter to the Appellant informing the Appellant that the Prosecutor would be submitting an indictment shortly. In fact, the President's letter is dated *8 September 1997*, and the Appellant claims that the *writ* was filed on the basis of this letter from the President. Moreover, the Appellant asserts that he was informed that the hearing on the *writ of habeas corpus* was to be held on 31 October 1997. The Appellant asserts that 'the Registry without the consent of the Defence removed the hearing of the motion from the calendar only because the Prosecution promised to issue the indictment soon'. The Appellant also claims that the indictment was filed and confirmed on 22 October 1997 and 23 October 1997, respectively, in order to pre-empt the hearing on the *writ of habeas corpus*. These assertions by the Appellant are, of course, impossible for him to prove, absent an admission by the Prosecutor. We note, however, that the Prosecutor has not directed the Appeals Chamber to any evidence to the contrary, and that the Appellant was never afforded an opportunity to be heard on the *writ of habeas corpus*.

88. Although neither the Statute nor the Rules specifically address *writs of habeas corpus* as such, the notion that a detained individual shall have recourse to an independent judicial officer for review of the detaining authority's acts is well-established by the Statute and Rules. Moreover, this is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights, Article 9(4) of the ICCPR, Article 5(4) of the ECHR and Article 7(6) of the ACHR. The Inter-American Court of Human Rights has defined the *writ of habeas corpus* as:

> [A] judicial remedy designed to protect personal freedom or physical integrity against arbitrary decisions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered.

Thus, this right allows the detainee to have the legality of the detention reviewed by the judiciary.

arrest.

98. Setting aside for the moment the Prosecutor's contention that Cameroon was solely responsible for the delay in transferring the Appellant, the only plausible conclusion is that the Prosecutor failed in her duty to take the steps necessary to have the Appellant transferred in a timely fashion. The Appellant has claimed that the Prosecutor simply forgot about his case, a claim that is, of course, impossible for the Appellant to prove. However, we note that after the Appellant raised this claim, the Prosecutor failed to rebut it in any form, relying solely on the argument that it was Cameroon's failure to transfer the Appellant that resulted in this delay. The Prosecutor provided no evidence that she contacted the authorities in Cameroon in an attempt to get them to comply with the Rule 40*bis* Order. Further, in the 3 June 1999 Scheduling Order, the Appeals Chamber directed the Prosecutor to answer certain questions and provide supporting documentation, including an explanation for the delay between the request for transfer and the actual transfer. Notwithstanding this Order, the Prosecutor provided no evidence that she contacted the Registry or Chambers in an effort to determine what was causing the delay.

99. While it is undoubtedly true, as the Prosecutor submits, that the Registry and Chambers have the primary responsibility for scheduling the initial appearance of the accused, this does not relieve the Prosecutor of some responsibility for ensuring that the accused is brought before a Trial Chamber 'without delay' upon his transfer to the Tribunal. In the present case, the Appellant was transferred to the Tribunal on 19 November 1997. However, his initial appearance was not held until 23 February 1998—some 96 days *after* his transfer, in violation of his right to an initial appearance 'without delay'. There is no evidence that the Prosecutor took any steps to encourage the Registry or Chambers to place the Appellant's initial appearance on the docket. Prudent steps in this regard can be demonstrated through written requests to the Registry and Chambers to docket the initial appearance. The Prosecutor has made no such showing and the only logical conclusion to be drawn from this failure to provide such evidence is that the Prosecutor failed in her duty to diligently prosecute this case.

C. Conclusions

100. Based on the foregoing analysis, we conclude that the Appellant was in the constructive custody of the Tribunal from 4 March 1997 until his transfer to the Tribunal's detention unit on 19 November 1997. However, international human rights standards comport with the requirements of Rule 40*bis*. Thus, even if he was not in the constructive custody of the Tribunal, the period of provisional detention was impermissibly lengthy. Pursuant to that Rule, the indictment against the Appellant had to be confirmed within 90 days from 4 March 1997. However, the indictment was not confirmed in this case until 23 October 1997. We find, therefore, that the Appellant's right to be promptly charged pursuant to international standards as reflected in Rule 40*bis* was violated. Moreover, we find that the Appellant's right to an initial appearance, without delay upon his transfer to the Tribunal's detention unit under Rule 62, was violated.

101. Moreover, we find that the facts of this case justify the invocation of the abuse of process doctrine. Thus, we find that the violations referred to in paragraph 101 above, the delay in informing the Appellant of the general nature of the charges between the initial Rule 40 request on 17 April 1996 and when he was actually shown a copy of the Rule 40*bis* Order on 10 March 1997 violated his right to be promptly informed. Also, we find that the failure to resolve the Appellant's *writ of habeas corpus* in a timely manner violated his right to challenge the legality of his continued detention. Finally, we find that the Prosecutor has failed with respect to her obligation to prosecute the case with due diligence.

D. The Remedy

102. In light of the above findings, the only remaining issue is to determine the appropriate remedy

for the violation of the rights of the Appellant. The Prosecutor has argued that the Appellant is entitled to either an order requiring an expeditious trial or credit for any time provisionally served pursuant to Rule 101(D). The Appellant seeks unconditional immediate release.

103. With respect to the first of the Prosecutor's suggestions, the Appeals Chamber notes that an order for the Appellant to be expeditiously tried would be superfluous as a remedy. The Appellant is already entitled to an expedited trial pursuant to Article 19(1) of the Statute. With respect to the second suggestion, the Appeals Chamber is unconvinced that Rule 101(D) can adequately protect the Appellant and provide an adequate remedy for the violations of his rights. How does Rule 101(D) offer any remedy to the Appellant in the event he is acquitted?

104. We turn, therefore, to the remedy proposed by the Appellant. Article 20(3) states one of the most basic rights of all individuals: the right to be presumed innocent until proven guilty. In the present case, the Appellant has been in provisional detention since 15 April 1996—more than three years. During that time, he spent 11 months in illegal provisional detention at the behest of the Tribunal without the benefits, rights and protections afforded by being formally charged. He submitted a *writ of habeas corpus* seeking to be released from this confinement—and was never afforded an opportunity to be heard on this *writ*. Even after he was formally charged, he spent an additional 3 months awaiting his initial appearance, and several more months before he could be heard on his motion to have his arrest and detention nullified.

105. The Statute of the Tribunal does not include specific provisions akin to speedy trial statutes existing in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, as has been recognised by national courts:

> The criminal defendant's interest in prompt disposition of his case is apparent and requires little comment. Unnecessary delay may make a fair trial impossible. If the accused is imprisoned awaiting trial, lengthy detention eats at the heart of a system founded on the presumption of innocence. ... Moreover, we cannot emphasize sufficiently that the public has a strong interest in prompt trials. As the vivid experience of a witness fades into the shadow of a distant memory, the reliability of a criminal proceeding may become seriously impaired. This is a substantial price to pay for a society that prides itself on fair trials.

106. The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated. What may be worse, it appears that the Prosecutor's failure to prosecute this case was tantamount to negligence. We find this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him. This finding is consistent with Rule 40*bis*(H), which requires release if the suspect is not charged within 90 days of the commencement of the provisional detention and Rule 40 (D) which requires release if the Prosecutor fails to issue an indictment within 20 days after the transfer of the suspect. Furthermore, this limitation on the period of provisional detention is consistent with international human rights jurisprudence. Finally, this decision is also consistent with national legislation dealing with due process violations that violate the right of the accused to a prompt resolution of his case.

107. Considering the express provisions of Rule 40*bis*(H), and in light of the Rwandan extradition request for the Appellant and the denial of that request by the court in Cameroon, the Appeals Chamber concludes that it is appropriate for the Appellant to be delivered to the authorities of Cameroon, the State to which the Rule 40*bis* request was initially made.

108. The Appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. Such a finding is consistent with the jurisprudence of many national systems.

Furthermore, violations of the right to a speedy disposition of criminal charges have resulted in dismissals with prejudice in Canada, the Philippines, the United States and Zimbabwe. As troubling as this disposition may be to some, the Appeals Chamber believes that to proceed with the Appellant's trial when such violations have been committed, would cause irreparable damage to the integrity of the judicial process. Moreover, we find that it is the only effective remedy for the cumulative breaches of the accused's rights. Finally, this disposition may very well deter the commission of such serious violations in the future.

109. We reiterate that what makes this case so egregious is the combination of delays that seemed to occur at virtually every stage of the Appellant's case. The failure to hear the *writ of habeas corpus*, the delay in hearing the Extremely Urgent Motion, the prolonged detention of the Appellant without an indictment and the cumulative effect of these violations leave us with no acceptable option but to order the dismissal of the charges with prejudice and the Appellant's immediate release from custody. We fear that if we were to dismiss the charges without prejudice, the Appellant would be subject to immediate re-arrest and his ordeal would begin anew. Were we to dismiss the indictment without prejudice, the strict 90-day limit set forth in Rule 90*bis*(H) could be thwarted by repeated release and re-arrest, thereby giving the Prosecutor a potentially unlimited period of time to prepare and submit an indictment for confirmation. Surely, such a 'revolving door' policy cannot be what was envisioned by Rule 40*bis*. Rather, as pointed out above, the Rules and jurisprudence of the Tribunal permit the Prosecutor to seek to amend the indictment if additional information becomes available. In light of this possibility, the 90-day rule set forth in Rule 40*bis* must be complied with.

110. Rule 40*bis*(H) states that in the event that the indictment has not been confirmed and an arrest warrant signed within 90 of the provisional detention of the suspect, the 'suspect shall be released'. The word used in this Sub-rule, 'shall', is imperative and it is certainly not intended to permit the Prosecutor to file a new indictment and re-arrest the suspect. Applying the principle of effective interpretation, we conclude that the charges against the Appellant must be dismissed with prejudice to the Prosecutor. Moreover, to order the release of the Appellant without prejudice—particularly in light of what we are certain would be his immediate re-arrest—could be seen as having cured the prior illegal detention. That would open the door for the Prosecutor to argue (assuming *arguendo* the eventual conviction of the Appellant) that the Appellant would not then be entitled to credit for that period of detention pursuant to Rule 101(D), on the grounds that the release was the remedy for the violation of his rights. The net result of this could be to place the Appellant in a worse position than he would have been in had he not raised this appeal. This would effectively result in the Appellant being punished for exercising his right to bring this appeal.

111. The words of the Zimbabwean Court in the Mlambo case are illustrative. In ordering the dismissal of the charges and release of the accused, the Zimbabwean Court held:

> The charges against the applicant are far from trivial and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under... the Constitution has not been infringed. In this case it has been grievously infringed and the unfortunate result is that a hearing cannot be allowed to take place. To find otherwise would render meaningless a right enshrined in the Constitution as the supreme law of the land'.

We find the forceful words of U.S. Supreme Court Justice Brandeis compelling in this case:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself: it invites anarchy. To declare that

in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

112. The Tribunal—an institution whose primary purpose is to ensure that justice is done—must not place its imprimatur on such violations. To allow the Appellant to be tried on the charges for which he was belatedly indicted would be a travesty of justice. Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal, as a court valuing human rights of all individuals—including those charged with unthinkable crimes—would be among the most serious consequences of allowing the Appellant to stand trial in the face of such violations of his rights. As difficult as this conclusion may be for some to accept, it is the proper role of an independent judiciary to halt this prosecution, so that no further injustice results.

V. DISPOSITION

113. For the foregoing reasons, THE APPEALS CHAMBER hereby:

Unanimously,

1. ALLOWS the Appeal, and in light of this disposition considers it unnecessary to decide the 19 October 1999 Notice of Appeal or the 26 October 1999 Notice of Appeal;

Unanimously,

2. DISMISSES THE INDICTMENT with prejudice to the Prosecutor;

Unanimously,

3. DIRECTS THE IMMEDIATE RELEASE of the Appellant; and

By a vote of four to one, with Judge Shahabuddeen dissenting,

4. DIRECTS the Registrar to make the necessary arrangements for the delivery of the Appellant to the Authorities of Cameroon.

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Judge Nieto-Navia appends a Declaration to this Decision.

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

Gabrielle Kirk McDonald — Presiding

Mohamed Shahabuddeen

Lal Chand Vohrah

Wang Tieya

Rafael Nieto-Navia