317 SCSL-2004-14-T (11275 – 11296) 11275

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson
Judge Itoe
Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 14 January 2005

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

CASE NO. SCSL – 2005 – 14 - T

Reply to Defence Response to "Prosecution's Request for Leave to Amend the Indictment Against Norman"

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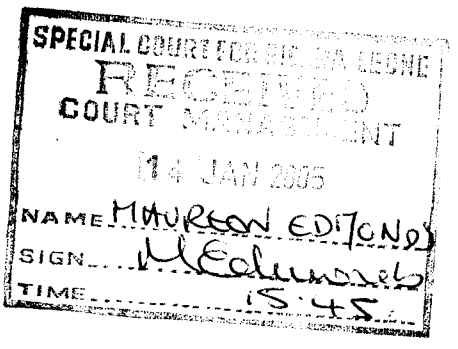

I. Introduction

1. The Prosecution files this Reply to the "First Accused Response to 'Prosecution's Request for Leave to Amend the Indictment Against Norman"[1], filed on 17 December 2004 ("**Defence Response**").

2. The Defence opposes the "Prosecution's Request for Leave to Amend the Indictment Against Norman" ("**Prosecution Request for Leave to Amend**"), dated 8 December 2004 for the following reasons:
    a. The Prosecution has not demonstrated that a sufficient legal and factual basis exists for the proposed amendments.[2]
    b. The Prosecution has not sought leave to amend the indictment without undue delay but waited approximately 22 months since the First Accused was detained to request leave of the Court.
    c. The Prosecution has violated Rule 48(B), 48(A), 50 and 51 of the Rules of Procedure.
    d. The Prosecution's request for leave to amend the Indictment if granted, the right to a fair trial for the First Accused will be irreparably prejudiced.

II. Summary of Prosecution Arguments

3. The Prosecution submits that sufficient legal and factual basis exists in this case for the proposed amendments.

4. The Prosecution further submits that the Prosecution's Request for Leave to Amend was filed in a timely manner and in compliance with Rule 50(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules").

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[1] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "First Accused Response to 'Prosecution's Request for Leave to Amend the Indictment Against Norman", 17, December 2004, Registry Page ("**RP**") 11214.
[2] At p.2, para. 3

5. The Prosecution submits that if leave to amend the Indictment against Norman is granted by the Trial Chamber, no irreparable prejudice will occur to the right to a fair trial for the First Accused.

6. The Prosecution further notes that the Defence Motion exceeds the 10 page limit set out in the Practice Directions of the Court. However, no leave was sought by the Defence to exceed the set page limit.[3]

III. Arguments

(i) The Prosecution has demonstrated sufficient legal and factual grounds for the amendment.

7. The Prosecution submits that the legal basis for the Prosecution's Request for Leave to Amend is Rule 50(A) of the Rules of Procedure and Evidence of the Special Court for Sierra Leone (the "Rules"), which provides that after the initial appearance of an accused, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73.[4] The Prosecution maintains that Rule 50 does not prescribe a time limit for amending an indictment, hence an amendment may be sought at any stage of the trial.[5] However, after the initial appearance of the accused, the granting of an amendment is at the discretion of the Court.[6] The Court in applying its discretion takes cognizance of the overall interests of justice, in particular, the rights of the Accused enshrined in Article 17 of the SCSL Statute.[7] The particular circumstances of the case

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[3] Article 69(C) and (G) of the Practice Direction on Filing Documents before the Special Court of Sierra Leone, 2 February 2003 (as amended on 1 June 2004)

[4] The SCSL Rule 50(A) is identical to Rule 50(A) of the ICTR Rules and Rule 50(A)(i) of the ICTY Rules.

[5] See also *Prosecutor v Akayesu*, ICTR Appeals Chamber, ICTR-96-4, "Judgment", 1 June 2001, para 120.

[6] *Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze*, ICTR-97-34-I and ICTR-97-30-I, "Decision on the Prosecutor's Motion to Amend the Indictment", 8 October 1999, para. 2 (hereinafter "Kabiligi & Ntabakuze-Decision on Motion to Amend, 8 October 1999"); *Prosecutor v. Musema*, ICTR-96-13-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 6 May 1999, para. 17 (hereinafter "Musema- Decision on Leave to Amend, 6 May 1999"). [Authorities cited in Prosecution motion]

[7] Musema- Decision on Leave to Amend, 6 May 1999, para. 17. [cited in Prosecution motion]

including the need for the Prosecution to present all relevant evidence before the Court are also factors for consideration.[8]

8. The Prosecution further submits that the Request for Leave to Amend is in compliance with the "Consequential Order to Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"[9] ("**Consequential Order**"), where the "Trial Chamber Decision" is defined as including the Majority Decision "the Separate Concurring Opinion of Hon. Judge Bankole Thompson and the Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe"[10] ("**Opinions**"). The Consequential Order instructs the Prosecution as to how to comply with the Decision. The Prosecution is now seeking an amendment to the Consolidated Indictment with leave of the Trial Chamber. This application is being made pursuant to the specific instructions as noted in the Consequential Order.[11] Thus, the Prosecution has met the legal threshold to sufficiently establish a legal basis for a Request for Leave to Amend.
9. The Defence argues that the Prosecution cannot rely on evidence already adduced before the Court as supporting material in seeking leave to amend the indictment. The Prosecution submits that evidence already adduced at trial and witness statements, form the factual basis for the determination for granting the amendment to the indictment.[12] Thus, the Prosecution has met the requirement of establishing sufficient factual basis for the motion in this case by relying on the evidence already adduced at trial and witness statements.

(ii) Timing of the amendment is not prejudicial to the rights of the accused

10. Defence Response asserts that the timing of the amendments prejudice the rights of the accused. However, the Defence failed to indicate how the timing of the amendments unfairly prejudice the rights of the Accused. The Prosecution

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[8] Id., para. 18.
[9] *Prosecutor Against Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa,* SCSL-2004-14-T, "Consequential Order to Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 30 November 2004, RP 10895.
[10] Consequential Order, at para. 2, footnote 1, RP 10896.
[11] Id.
[12] *Musema*, supra, paras. 18 and 19.

submits in deciding whether to grant a request to amend, the fundamental consideration is whether the accused will be unfairly prejudiced. Therefore, an objection to the timing of the request without a showing of unfair prejudice is not a ground for denying leave to amend. In this case, the Defence does not allege that they have been denied the opportunity of preparing their defence; or that they have been taken by surprise; or that the amendment will unduly delay the trial of the accused; or that the Prosecution is seeking some improper advantage. The Prosecution asserts that pursuing an amendment at this stage of the trial does not unfairly prejudice the rights of the First Accused, given that he has had ample notice of the relevant charges before the trial and has even defended himself against the impugned charges.

11. The Defence further submits that the amendments are not being sought as a result of newly discovered evidence and, therefore, the delay is not justifiable. In response, the Prosecution asserts that an amendment need not be sought only when new evidence is unearthed. The Prosecution re-echoes the arguments made in its motion that the evidence in question was encompassed in the general language of the Norman indictment as reflected in timely disclosures made to the accused person. In the interest of specificity, and in compliance with the orders of the Court to remove certain language from the indictment, the additional particulars were incorporated in the Consolidated Indictment.

12. The Prosecution's position is that to the extent that the language of the Consolidated Indictment differs from the language of the Original Norman Indictment, these differences in the Consolidated Indictment do no more than spell out with greater precision and specificity the charges against Norman that were contained in the Original Norman Indictment, or are otherwise not material to the charges against Norman. The Prosecution position is that the Consolidated Indictment contains no charge against Norman that was not included within the language of the Original Norman Indictment.

(iii) Prejudice to the rights of the accused

13. The Defence Response argues that the First Accused will be denied the right to cross examine witnesses who have already testified before the court if the amendments are granted. The Prosecution submits that the First accused, at the time the evidence was adduced at trial, was represented by court appointed counsel who had the opportunity of cross examining these witnesses. Thus, his right to cross examine witnesses has not been violated. In any case, the possibility of recalling these witnesses for cross examination in the interest of justice still exists.

14. Over 3 months after the commencement of the trial, on 21 September 2004, Norman filed a motion raising certain objections to the Consolidated Indictment (the "**Norman Motion**").[13] As the Trial Chamber noted in the Norman Decision on Arraignment, Norman "responded to the charges against him" (as laid out in the Consolidated Indictment) in his Pre-Trial Brief filed on 31 May 2004, and has defended the charges against him in the first and second session of the CDF trial.[14] The Prosecution emphasises that until the decision of the Trial Chamber staying portions of the Consolidated Indictment against Norman, the Consolidated Indictment was the presumed valid and operative indictment under which the evidence was presented. The delay in raising the objection to the Consolidated Indictment by the Defence is indicative of the absence of prejudice. Indeed, the Prosecution submits that the Statute and Rules impose on counsel for the parties a requirement to exercise due diligence.[15] Where a party is not diligent in raising an objection, this in itself may be a reason for denying any relief in relation to that objection.[16]

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[13] "Motion for Service and Arraignment on Second Indictment", filed on behalf of Norman on 21 September 2004 (RP 9572-9577).
[14] *Norman et al*, SCSL-04-14-T, 29 November 2004, para. 14.
[15] *Prosecutor v. Tadic, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence*, Case No. IT-94-1-A, Appeals Chamber, 15 October 1998, paras. 44, 38, 47-48.
[16] The Prosecution submits that it is a general principle that where an objection is made before a Chamber, relief may be denied if it is not raised in a timely manner. See, e.g., *Prosecutor v. Kayishema and Ruzindana, Judgement*, Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999, para. 64. Defence counsel in this case suggested in closing argument before the Trial Chamber that the time granted to the Defence to prepare the closing argument had been inequitable. The Trial Chamber said in its judgement (at para. 64) that "were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber."

15. The Prosecution submits that, contrary to Defence arguments, the proposed amended indictment is neither "significantly new" nor does it constitute a "radical change" to the trial of the First Accused.[17] Amendments to an indictment may be made before, during or even at the end of the trial to reflect the evidence adduced. The Prosecution is not barred from making substantial amendments to an indictment in the course of the trial.[18] The extent of the proposed indictment alone does not warrant a denial of the request to amend. There must be demonstrable prejudice resulting from the amendments. There has been no suggestion, for instance, that the amendments might prejudice the right of the Accused to be tried without undue delay, or that the Prosecution has sought some improper tactical advantage by making the amendments, or that the amendments otherwise in any way unfairly prejudice the Accused in the preparation of their defence.[19]

16. Moreover, in deciding whether the accused's rights are prejudiced by the amendments, the Court must decide whether the amendments *unfairly* prejudice or cause irreparable harm to the rights of the accused,[20] and not simply whether they prejudice the rights of the accused. No actual or potential unfair prejudice has been shown in this case. The Defence Response does not demonstrate how the notification of the additional particulars to the Accused at an earlier stage of the proceedings prejudices his rights. The Prosecution submits that given the circumstances of this case, the proposed amendments do not impede his right to a full defence against the proposed charges.

(iv) The Indictment against Norman is amenable to amendment

17. The Defence Response argues that the Consolidated Indictment is not open to amendment for various reasons. The Prosecution submits that these arguments are without merit and should be disregarded.

18. First, the Defence argues that it is formally impossible to amend the Consolidated Indictment as it now stands. The Prosecution reiterates the point that the

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[17] Paragraphs 15 and 16 of Defence Response.
[18] *Karemera et al*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003, para. 11.
[19] Compare *Prosecutor v. Ljubicic, Decision on Motion for Leave to Amend the Indictment*, Case No. IT-00-41-PT, Trial Chamber, 2 August 2002, p. 2.
[20] *Musema*, supra, para. 18.

Consolidated Indictment as it now stands can be amended against the First Accused.

19. In the "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment"[21], the Court stayed certain portions of the Consolidated Indictment against Norman. Therefore, contrary to Defence assertions, the requested amendments are not already fully contained in the Consolidated Indictment as it now stands against Norman.[22] The Prosecution now seeks to incorporate the stayed portions of the Consolidated Indictment to the charges against Norman to fully reflect the charges in the Consolidated Indictment. The Prosecution is acting in accordance with the order of the Court in electing to amend the indictment. There is therefore nothing strange or illogical about the amendments sought as alleged by the Defence Response.
20. As regards the second Defence argument that the non attachment of the Consolidated Indictment is a fatal error, it the Prosecution's submission that that issue has already been decided by the Trial Chamber. It was held that failure to attach the Consolidated Indictment to the request to file a Consolidated Indictment in the joinder decision was not a ground for denying the application for joinder.[23] Since the decision was never appealed, and also not the subject of this motion, it cannot be impugned in the Defence Response.
21. The Defence Response further argues that the Prosecution was wrong to have based its request for joinder of the trials of the three accused and the consolidation of the indictment under Rule 48(B). The Prosecution submits that this argument is totally irrelevant to the issues at stake in this motion. The issue raised by the Prosecution motion is whether there is sufficient basis for granting an amendment in this case. The question of joinder has already been decided by the Court and therefore moot.

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[21] *Prosecutor v. Norman et al*, 29 November 2004.
[22] Defence Response, para. 22.
[23] *Norman et al, Decision and Order on Prosecution Motions for Joinder*, SCSL-2003-08-PT, SCSL-2003-011-PT, SCSL-2003-12-PT, 27 January 2004, para. 11.

IV. Conclusion

22. The Prosecution maintains that it submitted the Request for Leave to Amend in a timely manner in accordance with Rule 50(A) of the Rules.

23. Based on the foregoing submissions, the Prosecution respectfully requests the Court to dismiss the Defence Response in its entirety and grant the Prosecution's Request for Leave to amend.

Freetown, 14 January 2005

Luc Côté

James Johnson

Annex of Authorities

1. Prosecutor v. Karemera et al, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October Denying Leave to File an Amended Indictment, 19 December 2003.

2. Prosecutor v. Ljubicic, Decision on Motion for Leave to Amend the Indictment, 2 August 2002.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Fausto Pocar
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Adama Dieng

Decision of: 19 December 2003

THE PROSECUTOR
v.
ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
ANDRÉ RWAMAKUBA

Case No. ICTR-98-44-AR73

DECISION ON PROSECUTOR'S INTERLOCUTORY APPEAL AGAINST TRIAL CHAMBER III DECISION OF 8 OCTOBER 2003 DENYING LEAVE TO FILE AN AMENDED INDICTMENT

Counsel for the Prosecution Counsel for the Defence

Mr. Don WebsterMs. Dior FallMs. Ifeoma OjemeniMs. Simone MonasebianMs. Holo MakwaiaMs. Tamara Cummings-John Mr. Didier SkornickiMr. John TraversiMr. Charles RoachMr. Frédéric WeylMr. Peter RobinsonMs. Dior DiagneMr. David HooperMr. Andreas O'Shea

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment,"

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filed by the Prosecution on 28 October 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

Procedural History

2. On 29 August 2003, the Prosecution filed a Consolidated Motion ("Motion") in the Trial Chamber. The Motion requested a separate trial for four of the accused in this case, the Accused Karemera, Ngirumpatse, Nzirorera, and Rwamakuba ("Accused"), on the ground that the other indictees remain at large and that postponing the trial until they are apprehended would be prejudicial to the four detained Accused. This request was unopposed and was granted by the Trial Chamber.

3. The Motion also requested leave to file a proposed amended indictment ("Amended Indictment"). The original indictment was filed on 28 August 1998 ("Original Indictment"); a first amended indictment, which is the operative indictment in this case, was filed on 21 November 2001 ("Current Indictment"). The Amended Indictment differs from the Current Indictment not only in that it omits allegations against accused other than the four Accused, but also in that it modifies the allegations against the Accused, most importantly by adding more detailed factual allegations to the general counts charged in the Current Indictment. The Amended Indictment also charges a new theory of commission of some of the alleged crimes, namely that the Accused were part of a joint criminal enterprise to destroy the Tutsi population throughout Rwanda, the natural and foreseeable consequence of which was the commission of numerous alleged crimes within the jurisdiction of the International Tribunal. The Prosecution claimed that the amendments relied on evidence that was not available at the time the Original Indictment was confirmed and that now made it possible to "expand the pleadings in the indictment with additional allegations and enhanced specificity." The Amended Indictment also sought to remove four of the eleven original counts, namely counts charging murder, persecution, inhumane acts as crimes against humanity, and outrages upon personal dignity as a serious violation of Article 3 common to the Geneva Conventions and Additional Protocol II.

4. The Accused opposed the Prosecution's request on various grounds, arguing inter alia that the Amended Indictment was an entirely new indictment and that the Motion, if granted, would result in delay that would violate right of the Accused to a fair trial within a reasonable time.

5. On 8 October 2003, Trial Chamber III issued its decision on the Motion ("Decision"). The Trial Chamber took notice of the argument of the Accused that, with trial scheduled to begin on 3 November 2003, an amendment to the indictment would leave them with insufficient time to prepare their defence. Any further postponement in the trial date would prolong the time the Accused spent in pretrial detention and, according to the Trial Chamber, would violate their right to be tried without undue delay.

6. In response to the Prosecution's argument that the Amended Indictment sought to charge participation in a joint criminal enterprise and relied on new evidence obtained in investigations subsequent to the confirmation of the Original Indictment, the Trial Chamber found that the Prosecution was submitting a totally new indictment. In the view of the Trial Chamber, a new indictment was unnecessary, since the defects in the Original Indictment had already been corrected by the Current Indictment. The Trial Chamber also found that amending the indictment would be contrary to judicial economy.

7. The Trial Chamber nonetheless approved one of the requested amendments, namely the removal of four of the eleven counts in the Current Indictment, and invited the Prosecution to file an amended indictment consistent with the Decision. The Prosecutor filed such an indictment on 13 October 2003.

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and the Prosecution filed

this Appeal. The Appeal contends that the Trial Chamber erred in holding that allowing the amendment would cause undue delay to the prejudice of the Accused, in holding that the proposed Amended Indictment constituted a "new indictment," and in accepting the Prosecution's request to withdraw four counts from the Current Indictment while refusing the remainder of the amendment. Responses to the Appeal were filed by the Accused Karemera, Ngirumpatse, and Rwamakuba. No response was received from the Accused Nzirorera and no reply was filed by the Prosecution.

Discussion

9. Because the question whether to grant leave to amend the indictment is committed to the discretion of the Trial Chamber by Rule 50 of the Rules, appellate intervention is warranted only in limited circumstances. As the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ("ICTY") has explained, the party challenging the exercise of a discretion must show "that the Trial Chamber misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion." If the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently. However, if the Trial Chamber has committed an error that has prejudiced the party challenging the decision, the Appeals Chamber "will review the order made and, if appropriate and without fetter, substitute its own exercise of discretion for that of the Trial Chamber."

10. Although the exact grounds of the Decision are unclear, the Trial Chamber cited four considerations in its reasoning: first, that the indictment was effectively a new indictment; second, that errors in the Original Indictment had already been corrected by the filing of the Current Indictment in 2001; third, that an amendment at this stage would prolong the already lengthy pretrial detention of the Accused, thus violating their right to trial within a reasonable time; and fourth, that the amendment would violate judicial economy.

11. Regarding the first point, the difference between an "amended" indictment and a "new" indictment is not useful. It is true that if an amended indictment includes new charges, it will require a further appearance by the accused in order to plead to the new charges under Rule 50(B). (The Appeals Chamber takes no position on whether the Amended Indictment contains new charges requiring a further appearance under Rule 50(B), but observes that the Prosecution appears to assume that it does.) By contrast, it is not obvious what the Trial Chamber means by a "new indictment" or why its "newness" compels denial of the Motion. Nothing in Rule 50 prevents the prosecution, as a general matter, from offering amendments that are substantial.

12. Similarly, with regard to the second point, the fact that errors in the Original Indictment were corrected by the Current Indictment filed on 21 November 2001 is not a valid reason for denying a further motion to amend the indictment. The Prosecution did not submit the Amended Indictment in order to correct errors in the Current Indictment, but rather to streamline the pleadings and, in the Prosecution's words, to "allege the criminal conduct and responsibility of each accused with greater specificity and expand[] the factual allegations for those seven (7) counts pleaded in the [Current Indictment] that are retained in the [Amended Indictment]." The Prosecution is entitled to decide that its theory of the accused's criminal liability would be better expressed by an amended indictment. Even if the trial can proceed on the basis of the Current Indictment, the Prosecution is not thereby precluded from seeking to amend it.

13. The third point considered by the Trial Chamber was delay. This factor arises from Article 20(4)(c) of the Statute of the International Tribunal, which entitles all accused before the International Tribunal to be "tried without undue delay," and is unquestionably an appropriate factor to consider in determining

whether to grant leave to amend an indictment. Guidance in interpreting Article 20(4)(c) can be found in the ICTY case of Prosecutor v. Kovacevic, in which the Trial Chamber refused amendment of an indictment on grounds that included undue delay. The ICTY Appeals Chamber framed the question as "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in light of the right of the accused to a fair and expeditious trial." The ICTY Appeals Chamber noted that the requirement of trial without undue delay, which the Statute of the ICTY expresses in language identical to Article 20(4)(c) of the Statute of the International Tribunal, "must be interpreted according to the special features of each case." Additionally, the specific guarantee against undue delay is one of several guarantees that make up the general requirement of a fair hearing, which is expressed in Article 20(2) of the Statute of the International Tribunal and Article 21(2) of the ICTY Statute. "[T]he 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."

14. Kovacevic stands for the principle that the right of an accused to an expeditious trial under Article 20(4)(c) turns on the circumstances of the particular case and is a facet of the right to a fair trial. This Appeals Chamber made a similar point recently when it stated, albeit in a different context, that "[s]peed, in the sense of expeditiousness, is an element of an equitable trial." Trial Chambers of the International Tribunal have also used a case-specific analysis similar to that of Kovacevic in determining whether proposed amendments to an indictment will cause "undue delay."

15. In assessing whether delay resulting from the Motion would be "undue," the Trial Chamber correctly considered the course of proceedings to date, including the diligence of the Prosecution in advancing the case and the timeliness of the Motion. As already explained, however, a Trial Chamber must also examine the effect that the Amended Indictment would have on the overall proceedings. Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.

16. The Prosecution also urges that the Trial Chamber erred by failing to consider the rights of victims, the mandate of the International Tribunal to adjudicate serious violations of international humanitarian law, and the Prosecutor's responsibility to prosecute suspected criminals and to present all relevant evidence before the International Tribunal. The Appeals Chamber is hesitant to ascribe too much weight to these factors, at least when they are presented at such a level of generality. The mandate of the International Tribunal, the rights of victims, and the obligations of its Prosecutor are present in every case, and mere reference to them without further elaboration does not advance the analysis.

17. Finally, the determination whether proceedings will be rendered unfair by the filing of an amended indictment must consider the risk of prejudice to the accused.

18. The fourth point considered by the Trial Chamber was "judicial economy." Although the Trial Chamber did not elaborate on this factor, the Appeals Chamber agrees that judicial economy may be a basis for rejecting a motion that is frivolous, wasteful, or that will cause duplication of proceedings.

19. In this case, it appears that the Trial Chamber confined its analysis of undue delay to the question whether the filing of the Amended Indictment would result in a postponement of the trial date and a prolongation of the pretrial detention of the Accused. This analysis addresses some, but not all, of the considerations discussed above that inform the question of undue delay. The Trial Chamber failed to

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assess the overall effect that the Amended Indictment could have on the proceedings by making allegations more specific and averting potential challenges to the indictment at trial and on appeal. In this respect, the Trial Chamber "failed to give weight or sufficient weight to relevant considerations." Likewise, the Trial Chamber "g[ave] weight to extraneous or irrelevant considerations" by considering the "newness" of the Amended Indictment and the fact that prior errors had been corrected by an earlier amendment. Finally, the Trial Chamber's invocation of "judicial economy" did not rest on a finding that the Motion was wasteful, frivolous, or duplicative, and therefore also failed to give weight or sufficient weight to relevant considerations. It is on these bases that the Appeals Chamber will proceed to consider the matter.

20. The Prosecution has provided very little information regarding its diligence in investigating the facts that underlie the Amended Indictment. Its brief on appeal makes repeated references to the acquisition of "new evidence" acquired "recently" but does not elaborate on the nature of that evidence or specify when it was acquired. This information is relevant, for although Rule 50 does not require the Prosecution to amend the indictment as soon as it discovers evidence supporting the amendment, neither may it delay giving notice of the changes to the Defence without any reason. The Prosecution cannot earn a strategic advantage by holding an amendment in abeyance while the defence spends time and resources investigating allegations that the Prosecution does not intend to present at trial. In this regard, it is worth recalling that a substantial delay will be considered undue "if it occur[s] because of any improper tactical advantage sought by the prosecution." Strategic efforts to undermine the conduct of proceedings cannot be tolerated, especially if designed to disadvantage the ability of the Defence to respond to the Prosecution's case.

21. However, the record on this interlocutory appeal does not disclose any basis for concluding that the Prosecution has sought leave to file the Amended Indictment in order to gain a strategic advantage over the Accused. The Trial Chamber did not base its Decision on any misconduct by the Prosecution, and the Accused do not allege bad faith in their responses to the Appeal. While there is an oblique suggestion that the Prosecution brought this Motion in order to delay the start of trial because it is not ready to proceed, this allegation is not developed.

22. The record is nonetheless silent as to whether the Prosecution acted with diligence in securing the new evidence and in bringing the Motion in the Trial Chamber, information that is solely within the control of the Prosecution. Thus, although the Appeals Chamber will not draw an inference of improper strategic conduct by the Prosecution, neither can it conclude that the Prosecution has shown that the factors of diligence or timeliness support granting its Motion in this case. The Prosecution's failure to show that the amendments were brought forward in a timely manner must be "measured within the framework of the overall requirement of the fairness of the proceedings."

23. Nor is the Appeals Chamber convinced that the rights of victims, the mandate of the International Tribunal to try serious violations of international humanitarian law, and the Prosecutor's obligation to present all relevant evidence are have any particular bearing on this matter. The Prosecutor has not shown that proceeding to trial on the Current Indictment will impair the rights of victims or undermine the mandate of the International Tribunal.

24. The Appeals Chamber next considers the likely effect that allowing the filing of the Amended Indictment will have on the overall proceedings. The Trial Chamber found that granting the Motion would result in a substantial delay in the trial. The Prosecution does not dispute this finding, and the Appeals Chamber sees no reason to depart from it. Neither the Trial Chamber nor the Accused offer an estimate of the delay that filing the Amended Indictment would cause. One may safely assume a delay on the order of months, due to motions challenging the Amended Indictment under Rules 50(C) and 72 and additional time to allow the Accused to prepare to respond to the new allegations in the Amended

Indictment. The question is whether this delay may be outweighed by other benefits that might result from amending the indictment. Answering this question requires evaluating the scope of the amendments proposed in the Amended Indictment.

25. The major differences between the Amended Indictment and the Current Indictment fall into two categories. The first category consists of amendments that will not cause any significant delay at all. For instance, the Amended Indictment dispenses with several pages of background material in the Current Indictment, including pages regarding "Historical Context" and "The Power Structure" that do not specifically relate to any charge against the Accused. The Amended Indictment also drops four of the eleven counts in the Current Indictment and pleads one count (complicity in genocide) as an alternative to another count (genocide). This first category of amendments will not have any major impact on the overall fairness of proceedings.

26. The second and more important category of amendments comprises the several instances in which the Amended Indictment adds specific allegations of fact to the general allegations of the Current Indictment. For example, where the Current Indictment states that "numerous Cabinet meetings were held" to discuss massacres, the Amended Indictment alleges the dates of several of those meetings as well as the specific matters discussed and the consequences of those meetings. Similarly, where the Current Indictment states that the Accused Nzirorera "gave orders to militiamen to kill members of the Tutsi population," the Amended Indictment lists specific instances where Nzirorera allegedly incited attacks on Tutsi civilians. Some of the expansions on general allegations are quite detailed, such as the new allegations in the Amended Indictment regarding activities in Ruhengeri prefecture and Gikomero commune. The Amended Indictment also expressly states the Prosecution's theory that the Accused participated in a joint criminal enterprise.

27. Compared to the more general allegations in the Current Indictment, the added particulars in the Amended Indictment better reflect the case that the Prosecution will seek to present at trial and provide further notice to the Accused of the nature of the charges against them. Likewise, the specific allegation of a joint 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. Granting leave to file the Amended Indictment would therefore enhance the fairness of the actual trial by clarifying the Prosecution's case and eliminating general allegations that the Prosecution does not intend to prove at trial. These amendments will very likely streamline both trial and appeal by eliminating objections that particular events are beyond the scope of the indictment. Of course, the right of the Accused to have adequate time and facilities to prepare their defence against these newly-specified factual allegations will very likely require that the trial be adjourned to permit further investigations and preparation. Even taking this delay into account, it does not appear that the Motion will render the overall proceedings unfair.

28. The final consideration in determining the effect of the Amended Indictment on the fairness of the proceedings is the risk of prejudice to the Accused. The Trial Chamber concluded that proceeding to trial on the Amended Indictment without giving the Accused additional time to prepare their defence to the Amended Indictment would cause prejudice to the Accused. This problem, however, can be addressed by adjourning the trial to permit the Accused to investigate the additional allegations. The Trial Chamber also retains the option of proceeding with the presentation of the Prosecution case without delay; in such circumstances, however, there would be particular need to consider the exercise of the power to adjourn the proceedings in order to permit the Accused to carry out investigations and the power to recall witnesses for cross-examination after the Accused's investigations are complete.

29. It is unclear to what extent the Trial Chamber was influenced by the fact that the Accused are in

pretrial detention. The Trial Chamber stated, without explanation, that the prolongation of pretrial detention would affect the right of the Accused to be tried within a reasonable time. As stated above, however, there is no reason to believe that the proposed amendments expanding upon general allegations in the Current Indictment will unduly lengthen the overall proceedings. The length of the pretrial detention of the Accused must be assessed in light of the complexity of the case. Further, this is not a situation in which the amendment is made so late as to prejudice the accused by depriving them of a fair opportunity to answer the amendment in their defence. The trial has now started (as of 27 November 2003) and eight prosecution witnesses have been heard, but the case was still in the pretrial stage when the amendment was sought. Although the failure of the Prosecution to show that its motion was brought in a timely manner might warrant a dismissal in other circumstances, this factor is counterbalanced by the likelihood that proceedings under the Amended Indictment might actually be shorter.

30. As for the factor of "judicial economy," the Appeals Chamber concludes that the Motion is not frivolous or wasteful and will not cause duplication of proceedings.

31. Considering all of the relevant factors together, the Appeals Chamber concludes that the circumstances of this case warrant allowing the Appeal. In light of this conclusion, there is no need to consider the Prosecution's added submission that the Trial Chamber erred in granting only the part of the Motion that dropped four counts of the Current Indictment. Nor will the Appeals Chamber address the challenges raised by the Accused Karemera against the legal sufficiency of the pleadings of the Amended Indictment, which the Trial Chamber did not certify for interlocutory appeal and which may in any event be raised in a motion under Rule 72 of the Rules.

Disposition

32. For the foregoing reasons, the Appeals Chamber by majority, Judge Fausto Pocar dissenting, finds that the Trial Chamber erred in concluding that the Indictment could not be amended. The Appeals Chamber therefore vacates the Decision of the Trial Chamber. The matter is remitted to the Trial Chamber for consideration of whether, in light of the foregoing observations, the Amended Indictment is otherwise in compliance with Rule 50 and, if so, for entry of an order amending the Current Indictment.

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

Theodor Meron
Presiding Judge of the Appeals Chamber
Done this 19th day of December 2003,
At The Hague,
The Netherlands.
[Seal of the International Tribunal]

IN THE TRIAL CHAMBER

Before:
Judge Liu Daqun, Presiding
Judge Amin El Mahdi
Judge Alphons Orie

Registrar:
Mr. Hans Holthuis

Decision of:
2 August 2002

THE PROSECUTOR
v.
PASKO LJUBICIC

DECISION ON MOTION FOR LEAVE TO AMEND THE INDICTMENT

The Office of the Prosecutor:

Mr. Mark Harmon

Defence Counsel:

Mr. Tomislav Jonjic

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");

NOTING the "Notice of Filing of Amended Indictment" filed on 5 April 2002 and the "Notice of Filing of Corrected Amended Indictment" filed on 8 April 2002 ("the Amended Indictment);

NOTING the "Defence Objections on the Corrected Amended Indictment" filed on 30 April 2002 by the Defence for the accused Pasko Ljubicic ("the Accused");

NOTING the "Prosecution Response to Defence Objections to the Corrected Amended Indictment," filed on 8 May 2002;

NOTING the " Decision on Defence Objections on Corrected Amended Indictment" of 7 June 2002;

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BEING SEIZED of the Prosecution's "Motion for Leave to Amend the Indictment" filed on 13 June 2002 ("the Motion");

NOTING the Defence's "Response to Prosecution Motion for Leave to Amend Indictment" filed on 25th June 2002 ("the Response");

CONSIDERING that, in the Motion, the Prosecution requests leave to amend the indictment in order to permit the Amended Indictment to stand as indictment against the accused, on the basis that: (1) the amendments are relatively restricted in nature, do not constitute substantively new charges against the accused, set forth the Prosecution's case against the accused in a more understandable fashion and will permit the Trial Chamber to ensure that the real issues in the case are determined; (2) there is no prejudice to the accused in the preparation of his case; and (3) there is no suggestion of the Prosecution seeking an unfair tactical advantage[1];

CONSIDERING that, in the Response, the Accused objects to the Amended Indictment submitted by the Prosecution on the grounds that it is a procedural issue, which has already been regulated by the Chamber and requests that the Motion be dismissed[2]; that it argues that if leave is granted " the Prosecution would be allowed to have the already ruled issue, regulated in another way which is less favourable for the Accused and that this would be a violation of the Accused's right to a fair trial"[3];

CONSIDERING that Article 50(A)(i) of the Rules of Procedure and Evidence ("the Rules") provides that "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";

CONSIDERING that, pursuant to Rule 50(B) of the Rules, "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"; that Rule 50 (C) of the Rules indicates that, "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";

CONSIDERING that, in absence of specific standards set out in the Rules, it is a matter of discretion of the Judge or the Chamber seized of the case whether or not to allow an amendment of an indictment; that this discretion must be exercised taking into account the right of the accused to a fair and expeditious trial, to be promptly informed of the charges against him and to have adequate time and facilities for the preparation of his defence;

CONSIDERING that the fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly[4]; that to be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial[5]; that 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[6];

CONSIDERING that the Prosecution seeks leave to amend in relation of two issues: (i) the separation of counts 3-6 in the First Indictment into two parts in the Amended Indictment: counts 3-6 (wilful killing and causing serious injury concerning the attack on 16 April 1993 on Ahimici, Nadioci, Pirici and

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Santici) and counts 7-10 (wilful killing and causing serious injury concerning the attack on 19 April 1993 on Ocenici); and (ii) references to the use of detainees as human shields and to forcing detainees to lay land mines;

CONSIDERING that, in relation to the separation of counts 3-6 into two parts in the Amended Indictment, the Prosecution argues to the merits of the Motion that retaining counts 3-10 in this current form benefits the accused by: giving him greater detail of the allegations against him, setting forth these allegations in a clearer fashion so as to assist him in the preparation of his defence; and clearly specifying in counts 7-10 of the Amended Indictment the alleged criminal responsibility of the accused in respect of the attack on Ocenici[7];

CONSIDERING that the facts upon which counts 7-10 of the Amended Indictment were already contained in the First Indictment; that no substantive factual allegations were added to the Amended Indictment to support these counts; that in these counts further detail is provided in relation to the attack on the village of Ocenici, and, in particular, the alleged criminal responsibility of the accused in these acts is set out in detail;

CONSIDERING that while the Rule 50(B) and (C) of the Rules expressly address the issue of a new charge, the Rule does not specify that new charges can only be based upon new facts[8]; that this Rule does not require the Prosecution to seek leave to amend the indictment in relation to new counts only when these contain new facts; that in contemplating that the accused may require additional time to prepare for trial as a result of an amendment that involves adding a further count, the rule is simply concerned to ensure that the accused is not prejudiced in the conduct of his or her defence[9]; that, in this case, the right of the accused to be promptly informed of the charges against him has not been violated, since he was informed from the outset of these charges; that thus the re-organisation of the Indictment in this manner does not cause unfair prejudice to the accused in the preparation of his defence;

CONSIDERING that, in relation to the allegations regarding the use of detainees as human shields and forcing them to lay land mines, the Prosecution argues to the merits of the Motion that no unfair prejudice on the preparation of the Defence case exists; that the new factual allegations are of narrow scope and have taken place at an early stage in the proceedings; that, by including specific reference to them, it is complying with its duty to prosecute to the fullest extent of the law and to bring all relevant issues before the Trial Chamber; that, in this sense, it does not intend to seek an improper tactical advantage by adding these new allegations[10];

CONSIDERING that, in relation to the allegations of the detainees being "used as human shields", paragraph 62 (counts 14-15, cruel and inhumane treatment of detainees) states that "Members of the 4th Military Police Battalion, on orders of Pasko Ljubicic, and with his knowledge, participated in the cruel and inhumane treatment of detainees by arresting Bosnian Muslims civilians and transporting them to detention facilities described in this indictment; by guarding them at these detention facilities; by transporting detainees from these detention facilities to front line positions where they were used as human shields or forced to engage in trench digging and other forms of forced labour; by allowing members of the 4th Military Police Battalion, including Miroslav Bralo and Anto Furundzija, and others to physically abuse detainees in their custody"; that paragraph 62(a) further alleges that this conduct included: "On 27 January 1993, members of the 4th Military Police took 13 Muslim men [...] from the Detention Centre at Kaonik and used them as human shields. These prisoners were tied up in the presence of Zarko Milic, a subordinate of Pasko Ljubicic"; that similarly paragraph 33 (count 1, persecutions), in relation to inhumane treatment of civilians, also refers to detainees being "used as human shields";

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CONSIDERING that in relation to the allegations of detainees being forced to engage in other forms of forced labour, "including laying land mines", paragraph 62(d) states that: "On April 1993, 5 Bosnian Muslims [...] were taken to the area of Kratine where they were placed in the custody of subordinates of Pasko Ljubicic, including Anto Furundzija and Miroslav Bralo, and forced to dig trenches for the "Jokers" and for the elements of the HVO. They were also forced to engage in other forms of dangerous forced labour, including laying of land mines. They remained at Kratine until 29 April 1993";

CONSIDERING that the Chamber notes that the amendments made are not substantial in scope; that admitting these amendments at this stage of the proceedings, when the trial is not yet scheduled to begin, will not deny the accused his right to be tried without undue delay; that it does not appear that the Prosecution has sought an improper tactical advantage by seeking to amend the indictment in this way; that thus these amendments do not unfairly prejudice the accused in the preparation of his defence;

CONSIDERING that the Prosecution has indicated that reference to the forced laying of land mines was contained in the supporting material disclosed to the accused on 30 November 2001; that, however, the testimony supporting the allegation of the use of detainees as human shields has not yet been disclosed pursuant to Rule 66 (A) (ii)[1]; that the Chamber reminds the Prosecution of its obligation of disclosure under Rule 66 of the Rules in relation to the new allegations;

FOR THE FOREGOING REASONS,

PURSUANT to Rule 50 of the Rules;

GRANTS the Motion and **DECIDES** that the Amended Indictment should stand as an indictment against the accused;

REQUESTS the Registrar to serve the Amended Indictment to the accused in accordance with the relevant provisions of the Rules;

ORDERS that a further appearance should be held as soon as practicable to enable the accused to enter a plea on the new charges;

REMINDS the Accused that he shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

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

_____
Judge Liu Daqun,
Presiding Judge

Dated this second day of August 2002
At The Hague

[Seal of the Tribunal]

1. The Motion, para. 4.

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2. The Response, para. 2.
3. The Response, para. 5.
4. *Prosecutor v. Brdjanin and Talic*, Case IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 50.
5. *Ibid*, para. 50.
6. *Ibid*, para. 50.
7. The Motion, para. 11.
8. *Prosecutor v Naletelic and Martinovic*, Case IT-98-34-PT, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment, 14 Feb 2001, p 4.
9. *Ibid*, p 4.
10. The Motion, para. 17.
11. The Motion, para. 16.