SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Emmanuel Ayoola, Presiding
Justice George Gelaga King
Justice A. Raja N. Fenando
Justice Geoffrey Robertson, QC
Justice Renate Winter

Registrar: Robin Vincent

Date File: 14 January 2005

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

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

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I. INTRODUCTION

1. The First Accused in the current Civil Defence Forces (CDF) trial hereby notifies and submits to the Appeals Chamber this interlocutory appeal against the Trial Chamber's focal "**Decision**" delivered and filed on 29th November 2004, being a majority decision.[1] Leave to make the said appeal was granted by the Trial Chamber[2] on 16th December 2004, following the First Accused's application of 2nd December 2004 in that regard. This appeal is made pursuant to Rules 73(B) and 108(C) of the SCSL Rules and Article 14 of the Statute.

2. The decision being appealed herein, taken together with the circumstances, factors and issues giving rise to it or involved therein, is closely intermeshed with those of other indictment-based Trial Chamber decisions (whether substantive, procedural or ancillary) since the current consolidated indictment and the commencement of trial proceedings thereon. The first such decision was the Trial Chamber's **Joinder Decision**[3], including one Judge's non-dissenting Separate Opinion[4] of same date appended thereto and the grant of leave to the prosecution[5] on 15th December 2004 to appeal against the said focal Decision. Other main and ancillary decisions and/or opinions belonging in the same series are majority decisions and separate concurring opinions of varying dates on parallel applications by the 2nd and 3rd Accused persons in respect of the said consolidated indictment[6]

3. The circumstances, factors and issues successively giving rise to this plethora of applications and judicial decisions have tended to be of similar character, complexion or nature, and indeed to be the same specific ones in some cases. Furthermore, the relevant issues and respective objections tend to radically affect the nature or subsistent status and validity of the said consolidated indictment and, accordingly or by logical extension, to go to the very root and validity of the entire panoply of criminal proceedings being currently conducted upon it.

4. Thus, the objections to the Trial Chamber Decision of 29th November 2004, which constitute the present Notice and Grounds of Appeal herein, as will be enunciated in the submissions below, will be applicable to the other indictment-based decisions and/or opinions that have emanated and spawned from the Trial Chamber in the current CDF trials since their inception.

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[1] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T: (TC) "Decision on the First Accused's Motion for service and Arraignment on the Consolidated Indictment", 29th November 2004 (majority decision). This decision was also accompanied with two opinions by two other Judges, one concurring and the other dissenting (see notes 15 and 14 below respectively).

[2] Ibid: (TC) "Decision on Application by First Accused for Leave to Make Interlocutory Appeal Against the Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 16th December 2004.

[3] *Prosecutor v. Norman*, SCSL-03-08-PT; *Prosecutor v. Fofana*, SCSL-03-11-PT; *Prosecutor v. Kondewa*, SCSL-03-12-PT: (TC) "Decision and Order on Prosecution Motions for Joinder", 27 January 2004 (unanimous decision).

[4] Ibid: "Separate Opinion of Judge Benjamin Mutanga Itoe on the Nature and Legal Consequences of the Ruling in favour of the Filing of Two Consolidated Indictments", 27th

[5] *Prosecution v. Norman, Fofana, Kondewa* SCSL-04-14-T (TC) "Decision on Prosecution Application for Leave to Appeal Decision on the first Accused's Motion for Service and Arraignment on the Consolidated Indictment", 15th December 2004.

[6] See Decision with respect to 2nd and 3rd Accused dated 6th and 8th December 2004 respectively

II. SUMMARIES OF RELATED PROCEEDINGS

5. As indicated in paragraphs 2 to 4 inclusive above, and as envisaged in paragraph 10(b) of the appellate **Practice Directive**[7] dated 30th September 2004, various indictment-based decisions and/or opinions handed down so far by or in the Trial Chamber did issue from proceedings clearly relating to the focal Decision of 29th November 2004, whether prospectively or retrospectively or indeed synchrospectively.

A. The Original Motions for "Joinder"

6. The fons et origo of decisions founding the current trials was a set of three Prosecution Motions for Joinder[8] dated 9th October 2003.

7. Although the three Prosecution applications in question are usually merely blandly referred to in subsequent literature as "Motions for Joinder" (Emphasis added), it is however necessary here to emphasise that the said applications were expressly specifically made pursuant to Rule 48(B) and Rule 73 of the rules of Evidence and Procedure ("the Rules") of the Special Court for Sierra Leone (SCSL) (See paras. 1, 6, 36 of said Motion). In other words, in so far as joinder rules as such were concerned, the prosecution invoked only Rule 48(B) of the SCSL Rules (and no other such joinder rule in addition or in the alternative) in order, as it were, to kill two birds with one stone or to secure two specific orders from the Trial Chamber, to wit, both that the three accused persons be "jointly tried" and that an order be made to the effect that "a consolidated indictment be prepared" as the basis for conducting the said "joint trial".

8. No attempt is made throughout the said Motion paper to identify any specific rules for the varying modes of joinder envisaged in the SCSL Rules, nor indeed to assess or determine the relevance and appropriateness of Rule 48(B) as a sole joinder vehicle for seeking a consolidated indictment as such or the joint charging of multiple accused persons who are already facing separate individual indictments upon which the prescribed procedures under Rules 47, 52 and 61 of the rules had already been separately concluded with respect to each of the three accused persons.

9. In its decision of 27th January 2004, after an exhaustive analysis especially of the criteria and conditions for grant of "joinder" in the general sense under the sub-rules of Rule 48, the Trial Chamber unanimously granted the two orders as sought by the prosecution, with the joint charging or joint indictment aspect of the application being granted however as one of three "consequential orders" following upon the main order for "joint trial". The prospects of subjection to further approval under Rule 47 and re-arraignment under Rule 61were apparently consciously considered and deliberately rejected by two of the three Judges[9].

10. It should be noted, however, that the Trial Chamber decision of 27th January 2004, in so far as joinder rules under the SCSL Rules are concerned, also confined its own explicit references and analysis as well throughout to rule 48(B) as such; and there is absolutely no indication in it whatsoever even of the mere existence of any other joinder rules such as either sub-rule 48(A) or sub-rule 48(C), nor of course of whether the various sub-rules of Rule 48 of the SCSL rules do in fact envisage or govern any specific distinctive modes of joinder or not[10].

11. Even when the said Trial Chamber decision specifically seeks in its paragraph 15 to consider the "applicable statutory provisions" and "the rules governing the joinder of

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[7] "Practice Directive for Certain Appeals Before the Special Court"
[8] See note 3 above: "Prosecution Motions for Joinder", 9th October 2003
[9] See Note 4 above.
[10] See Note 3 above: paras. 1, 5, 14, 21, 22, 24, 26`

indictments" within the SCSL Rules, it merely finds that they "are embodied in the founding instruments of the Special Court"(Emphases added). The presence, import and effect of Rule 48(A), for example, are nowhere directly adverted to throughout the said Trial Chamber decision; nor of Rule 50 as a potential vehicle for "the joinder of indictments".

12. Two further specific issues in the said original "joinder" proceedings must be noted before concluding this summary: (1) The submission by counsel for Norman that the draft text of the proposed consolidated indictment ought to have been exhibited or annexed to the Prosecution Motions for Joinder. (2) The presence, nature and effect of any elements or material in the proposed consolidated indictment which may be adjudged to be new additions to any of the previous individual indictments.

13. As for the practical, procedural or other need to annex a draft consolidated indictment to a motion seeking it, the Trial Chamber was quite forthright in rejecting or dismissing it (See para. 11 of said Decision). The proposed consolidated indictment was thus allowed to be prepared, filed and served without the Trial Chamber or Defence having had prior sight of a draft text thereof at the stage of approving its existence.

14. The Trial Chamber was equally dismissive in its joinder decision of 27th January 2004 about how certain clear textual and other differences among the previous individual indictments might get reflected in the future consolidated indictment as regards a particular individual Accused (paras. 2, 24 thereof).

15. Although the Trial Chamber's joinder decision of 27th January 2004 was indeed unanimous, one of their Lordships found cause to express severe misgivings about certain aspects of the said decision and he saw it fit to formulate them in a separate opinion[11].

16. As it turned out, however, the prosecution did not even fully carry out the orders obtained, in that instead of the specific forms of direct personal service upon the three accused persons as stipulated in SCSL sub-rules 52(A), 52(B) and 52(C), it resorted instead to service upon the respective Counsel.

B. The Focal Proceedings

17. When the consolidated indictment dated 5th February 2004 was finally filed and affixed with its new case number, the prosecution failed to serve it personally upon the First and Second Accused as stipulated by Rule 52(A) and 52(B) or upon the Third Accused by the special mode in respect of an accused person non-literate in English as stipulated by Rule 52(A) and 52(C), thereby also failing to comply with the third "consequential order" of the trial Chamber's decision of 27th January 2004. Instead, service thereof was immediately effected upon the respective Counsel.

18. Ultimately, when joint trial of the three accused persons was due to commence on 15th June 2004 without either service thereof upon him personally in accordance with the relevant sub-rules of Rule 52 or re-arraignment of him on the new elements therein in terms of Rule 61, the First Accused took the opportunity in his opening statement under Rule 84 of the SCSL Rules to make an oral legal objection as a self-defending accused person at the time that there was/were no charges(s) against him before the Trial Chamber, that he had not been served with any such charges or with the consolidated indictment and that he had not been arraigned upon them or upon it under Rule 61 for him to take his plea(s) upon any new charges or indeed any charges at all therein. In the end, the First Accused withdrew from the trial, and was soon followed by the other two accused persons.

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[11] See Note 4 above, esp. paras. 6-7, 10-12, 16-20 inclusive and 26.

19. And then on 21st September 2004, the First Accused filed his focal motion dated 20th September 2004. His main submissions therein were: that he had not been served with the consolidated indictment according to law; that it contained new elements, factors and even new charges which necessitated his having to be arraigned on it in order to take his pleas thereon as appropriate in terms of Rule 61 of the SCSL Rules; that he stood in danger of being adversely affected by the rule against double jeopardy, in that his previous individual indictment seemed to be still standing against him even though the new consolidated indictment was now effectively in force against him; and that the said previous individual indictment against him alone should be either withdrawn or quashed to forestall any double jeopardy within his national legal system or otherwise.

20. It should be noted at this stage that the other two accused persons subsequently filed separate parallel motions along similar lines like the First Accused, which were separately decided and otherwise opined upon by the Trial Chamber majority[12].

21. It would be best to proceed by taking individual issues in turn, with due regard as applicable for the interplay and interactions between sets of issues and/or among all the relevant issues.

(i). Differences Between Consolidated and Individual Indictments

22. By far the most crucial issue or set of issues raised in the focal proceedings is the nature, scope and implications of the perceptible differences (if any) between the consolidated indictment and the separate individual precursor indictments for the three accused persons and more especially that precursor indictment for the First Accused alone.

23. The Trial Chamber's findings on the issue of differences between the indictments with respect to the First Accused are extensively recorded in paragraphs 19 and 38 of its focal majority decision and also summarised in its paragraphs 20 and 38 and more particularly in the first paragraph 30 thereof[13] as follows:

> "Upon close analysis of the Consolidated Indictment, there are clearly new factual allegations adduced in support of existing confirmed counts, as well as new substantive elements of the charges that were not in the Initial Indictment of the First Accused. In the opinion of the Trial Chamber these changes do not appear to be simply 'semantic' as alleged by the prosecution in their Motion for Joinder, but rather are material to the indictment. While some of the differences between the two indictments simply provide greater specificity, and provide background facts, many of the changes are, however, material to the indictment. Such as the addition of geographic locations in paragraphs 23 to 27 of the consolidated indictment, that introduce new districts, such as Bonthe and Moyamba, and the extension of temporal jurisdiction for some counts from April 1998, as outlined in the initial indictment, to December 1999 in the consolidated Indictment, constitute material changes to the indictment. In addition, there are new substantive elements of charges, in paragraphs 24 to 27 and 29 of the Consolidated indictment, that are material, and include the charges of unlawful arrest and detention, 'conscription' of children, personal injury and extorting of money from civilians" (Emphases added).

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[12] See Note 6 above

[13] There are two paragraphs numbered 30 each.

The details of the differences or changes in relation to the First Accused are also replicated ipsissima verba in paragraph 63 of the minority Dissenting Opinion[14] and characterised as both major and material in several other paragraphs thereof (See paras. 64, 72, 85, 93, 94, 107 136 thereof).

24. The majority and minority Judges deal with the import and implications of these changes in divergent ways as to whether, for example, they make the consolidated indictment such a new instrument as to require its subjection to the approval processes under Rule 47 or to service and re-arraignment procedures Rules 52 and 61 respectively, or indeed whether the apparently continuing existence of both the precursor individual indictments and the consolidated indictment (without the former having been withdrawn formally under Rule 51 or otherwise) gives rise to exposure to the rule against double jeopardy. These were the main issues raised in the First Accused's focal motion, on which some direct answers were sorely needed from the Trial Chamber.

25. With respect to the perceived differences and changes, the following majority conclusion is characteristic of their general strategy:

> "We consider that all these additions to the Consolidated indictment, without any amendment to the counts against the Accused and personal service on the Accused, in accordance with the prescribed procedure, could prejudice the Accused's right to a fair trial if the trial proceeds on this basis" (para. 30; emphases added)

The suppositious, contingent, and even conditional mood and usage of language here should be noted as a feature of the language of both the majority Decision and minority Dissenting Opinion when they seek to determine the effect of the changes and additions and the ideal remedy required in the circumstances. Neither is the language in either case categorical enough nor is the temporal focus widened to include the entire past period of the current proceedings.

26. Moreover, the majority has eschewed here some crucial preliminary questions that should automatically arise from the fact, extensiveness and severity of the changes and differences so meticulously itemised in its paragraph 19 among others. For instance: Since the trial of the First Accused upon the said consolidated indictment with all the said additions had already proceeded "without any amendment" for at least three trial sessions over a period of six months and nearly forty prosecution witnesses, to what extent, if at all, has the Accused's right to a fair trial been already prejudiced since the trial has proceeded on that basis throughout that period of time? Nor of course does the majority (nor even the entire Trial Chamber) raise the even more radical question that almost begs to be asked and answered. And that is: What is the effect on or implication for the legal status, validity or otherwise of the consolidated indictment, of the fact of its mode of procuration and genesis, to wit, the process and manner by which it was sought, obtained and brought into existence through the invocation and application of Rule 48(B) alone of all the SCSL joinder rules and without annexing a draft thereof to the application?

27. With the greatest respect, by ignoring such crucial questions in dealing with the itemised differences, the Separate Concurring Opinion of the second majority Judge,[15] for instance, prises itself into certain false positions and deceptive distinctions even for the purpose of answering the questions it chooses to pose in the circumstances. Firstly, in seeking to determine whether the new material additions "are of such a nature as to

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[14] See Note 1 above: "Dissenting Opinion of Hon. Judge Benjamin Mutanga Itoe, Presiding Judge on the Chamber Majority Decision", 29th November 2004

[15] Ibid: "Separate Concurring Opinion of Judge Bankole Thompson", 29th November 2004

prejudice the right of the First Accused to a fair trial on the Consolidated indictment" (Emphasis in original text), this Opinion considers it necessary first to recapitulate rules and principles governing the framing of indictments. This tangent then plunges the Opinion into a fairly sustained re-statement of the jurisprudence of the ICTY and ICTR and also the recent evolving SCSL principles on the "framing" of indictments, especially with regards to the common Rule 47(C) and Article 17(4) of the SCSL Statute[16]. With respect, however, such a focus is narrower than necessary in the circumstances. For in determining the possible prejudicial effects of the consolidated indictment on the fair trial of the Accused thereon, a much wider perspective is required, to wit, the rules and principles governing the regulation or management of indictments that had already been framed, and that involves the relevance, applicability and effect of such regulatory provisions as Rules 47, 48, 50, 51, 52, 61, 62, 66, 72 and 73, among others, and any possible deprivations thereunder vis-à-vis the rights of the accused as stipulated in the relevant statutory provisions, including not only the SCSL Statute but also the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples Rights (ACHPR), and the Constitution of Sierra Leone, Act No. 6 of 1991, especially its Chapter III on "the fundamental human rights and freedoms of the individual", as may be applicable.

28. The Separate Concurring Opinion even misconceives what it calls "the pith of the First Accused's complaint here" (para. 15). For that complaint is not the "framing" idea that the consolidated indictment is "as it were, overloaded with particulars and details" in relation to the First Accused which were not included in his separate precursor individual indictment (Emphasis added); but rather, quite simply, the "regulatory" idea that such crucial new or additional materials in relation to him do appear in the consolidated indictment, thereby warranting that they be personally served upon him directly and that he be re-arraigned and allowed to plead upon them as necessary, within the provisions in SCSL Rules 52 and 61 respectively. By the same token, that complaint is not either about "exceeding the degree of particularity required by law" in framing the consolidated indictment as it stands (Emphasis added; para. 15).

29 There are also the purely definitional infelicities and false distinctions with respect to relevant crucial concepts in the circumstances, to which the Separate Concurring Opinion resorts in order to reinforce itself in the feeling that, notwithstanding all the itemised differences or additions, the consolidated indictment is nonetheless not "new" after all. Take its preferred definition of the concept of "amend" (para. 18). From the entire range of definitions for the verb "to amend", it preferentially selects the prescriptive or value-laden one of "to improve, correct or rectify", without any indication of awareness of a purely descriptive or value-neutral dimension thereof in the sense of "to alter or revise or change". Based on that obviously one-sided definition, the said Opinion finds itself "fortified" in its conclusion "that a consolidated indictment is not necessarily, without more, an amended indictment by reason of its consolidated nature or being the product of the merger of, at least, two separate original indictments" (Emphasis in original text). On the contrary, and with the greatest respect, it will be easily apparent on a non-prescriptive or value-neutral definition of "amend" that consolidation is surely one mode of amendment which is manifested by being "the product of the merger of" two or more pre-existent entities or phenomena. On an assumption of the "validity" of its one-sided analysis, the said Opinion then postulates a so-called "lacuna in our regime of rules as to the requirement of re-arraignment on a consolidated indictment simpliciter" (Emphasis in original text. See also paras. 40, 41 below).

30. There is also the Separate Concurring Opinion's asserted synonymity of the concepts "offence", "crime" and "charge" not only with each other but also of all of them

[16] Ibid: para. 6-15

together as against the phenomenon of "a New indictment", which latter phraseology the Opinion would "apply only and restrictively to an accusatory instrument charging new offences or new crimes using the terms 'offences', 'crimes' and 'charges' synonymously in this context" (All emphases in original text)[17]. Surely, only predetermined definitions can assert or endorse the absolute synonymities between or among any three or more of these four concepts, a "charge" being more an allegation or statement of the commission of an "offence" or a "crime".

31. Without going as far as such collapsing definitions or deceptive distinctions, the main majority Opinion itself sometimes resorts instead to a cryptic parataxis of utterances or statements when it has to consider some of the material issues in the focal proceedings. But again, more of that sooner or later.

(ii) Double Jeopardy and Parallel Indictments

32. The sheer fact of the apparent continuing existence of his precursor individual indictment, even as the First Accused was also being effectively tried on the subsequent consolidated indictment, was also raised as a matter for concern by the said First Accused in his focal motion for service and arraignment. He therefore sought to have that precursor individual indictment against him personally either formally quashed or otherwise withdrawn without further delay, especially considering that there was a specific rule for withdrawal of indictments (Rule51) in the SCSL rules.

33. The prosecution's response on this issue was that since the SCSL, as an international tribunal, applies internationally recognised legal principles, then its trial of the First Accused on the superceding consolidated indictment should, in itself, prevent retrial on the preceding separate individual indictment against him; and so there was no need for a formal quashing or withdrawal of the latter.

34. The majority Decision in effect accepted the position and attitude of the prosecution on this issue[18]. The majority reasoning on this issue, if such indeed it be, as presented in paragraphs 36 and 37 of the focal Decision, is sparsely and/or obliquely insinuated in an almost cryptic parataxis of discrete sentences or statements. No statutory, regulatory or jurisprudential basis or justification is given by either the prosecution or the majority for the conclusion.

(iii). Service and Arraignment

35. The First Accused's position generally in his focal motion was that as there were crucial and material additions in the consolidated indictment which were not present in the previous individual indictment against him alone, upon which he had gone through the procedures under Rules 47, 52, and 61 of the SCSL Rules, it would therefore be necessary and in accordance with the relevant applicable law that he be personally served with the consolidated indictment under Rule 52 and that he be arraigned thereupon for the purpose of taking his plea upon the charges or the new charges in it, as stipulated in Rules 50(B) and 61 of the SCSL Rules respectively.

36. The prosecution response on the issue of service is that indeed service had not been effected personally on the Accused but only vicariously upon Counsel; but that in any case the Accused had demonstrated knowledge of the charges in the consolidated indictment by defending himself and even cross-examining prosecution witnesses on the said charges for at least two trial sessions. As to re-arraignment of the First Accused on the consolidated indictment, the prosecution submitted that there was no need for

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[17] Ibid: para. 21

[18] See Note 1 above : para. 36

this as there were no new charges in it and the accused had already been arraigned upon them in the form of the previous individual indictment against him.

37. Again, the majority Decision practically adopted this prosecution approach to both issues of the requirement for service and re-arraignment. Without determining at any point whether any unfair prejudice has resulted to the Accused from the non-service over the past period of trial proceedings, the majority Decision ultimately concludes speculatively as follows on the issue of service and re-arraignment:

> "We consider that all these additions to the Consolidated Indictment, without any amendment to the counts against the Accused and personal service on the Accused, in accordance with the prescribed procedure, could prejudice the Accused's right to a fair trial if the trial proceeds on this basis..... the Trial Chamber finds that the Accused has not been afforded the opportunity to make a plea to these material changes to the indictment, and that unfair prejudice may result if the indictment is not amended and the Accused served with the indictment and arraigned on the material changes to the indictment" (paras. 30, 32 thereof; emphases added. See also paras. 2-4, 16-22 Separate Concurring Opinion).

38. The unsatisfactory nature of the reasoning and conclusions of the two majority Judges on the issues of service and re-arraignment, as requested by the First Accused, may be gleaned from the main paragraph on re-arraignment in the majority Decision itself, to wit, paragraph 31 thereof, which states in its entirety:

> "With respect to arraignment on the indictment, it is clear in the rules and the practice of the International Tribunals, that a consolidated or amended indictment need not be confirmed by a Trial Chamber or Judge if the initial indictments that were subject to joinder were already confirmed, and the charges in the amended indictment are essentially the same or similar to the original ones. This position is also clear in national systems. In the United Kingdom case of R. v. Fyffe, it was recognised that the general rule (is) that re-arraignment is unnecessary where the amended indictment merely reproduces the original allegations in a different form, albeit including a number of new counts" (Emphases added).

This paragraph is exactly reproduced as paragraphs 16 and 25 respectively in the majority Decisions in respect of the parallel motions by the 2nd and 3rd Accused.[19]

39. As it stands, however, paragraph 31 of the focal majority Decision regarding the First Accused, together with its recurrences relating to the 2nd and 3rd Accused in the respective decisions, is an unfortunate piece of proffered jurisprudence. Take its citation of the UK case of R.v. Fyffe concerning when re-arraignment may be unnecessary following the amendment of an indictment. The non-applicability of this case to the issue in question here has been convincingly argued by amply distinguishing it in the Dissenting Opinion to the focal Decision[20]. In any case, the principle in respect of which R. v. Fyffe is cited by the majority is expressly specifically excluded here by Rule 50(B) (i) of the SCSL Rules, which stipulates that an Accused shall make a further appearance under Rule 61 for the purpose of entering his plea on any "new charges(s)" in the amended indictment if he/she had previously made an initial appearance (i.e. arraignment) under rule 61 in respect of the previous indictment. However, an even more disturbing feature in paragraph 31 here from the majority Decision relates to its first sentence. The issue in question is re-arraignment; but the endorsing or justifying principle cited from "the practice of International Tribunals" to support it is in fact

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[19] See Note 6 above.

[20] See Note 14 above, paras. 103-110 thereof inclusive.

dealing with "confirming" of an indictment. The former is a Rule 61 exercise, whereas the latter is a rule 47 process otherwise called "review and approval" within the SCSL regime of rules. The latter also usually precedes the former in practice and the two are altogether unrelated for the purpose of the subsequent activity being endorsed or justified by the preceding exercise, as the majority seeks to do here. Accordingly, no case or no convincing case has been made here by the majority to support their rejection of re-arraignment as requested by the First Accused.

40. In this regard, it is necessary to revert once more to some of the superficially attractive distinctions that the Separate Concurring Opinion sought to make in this case, especially the so-called *lacuna* in the rules for the requirement of re-arraignment on a consolidated indictment simpliciter (see para. 29 hereof above). "Given the validity of my analysis, it would follow that there is a *lacuna* in our regime of rules as to the requirement of re-arraignment on a consolidated indictment simpliciter as distinct from re-arraignment on an amended indictment" (para. 18 of the said Opinion; emphasis in original). The Opinion then uses this invented "lacuna" to invoke Article 14(2) of the SCSL Statute and thereby resort to the provisions in subsections 133(1) and (2) of the Sierra Leone domestic Criminal Procedure Act 1965 so as to divine the conclusion "that ordinarily the First Accused is, at this stage of the proceedings, estopped from objecting that he is not properly upon his trial by reason of any defect in the consolidated indictment, having pleaded on the 15th, 17th and 21st March 2003 'not guilty' to... the Original Indictment" (para. 19 of the said Opinion).

41 The simple answer here is that there is no such "lacuna" in the SCSL Rules; and one has only seemed apparent because of the skewed definition of "amend" used in the said Opinion to establish an imaginary dichotomy between the concepts of amendment and consolidation (see para. 29 hereof above). On the contrary, a basic value-neutral or descriptive definition of both concepts, as distinct from the prescriptive and value-laden one used , would have made it easily obvious that these two concepts are in fact relatively overlapping and not absolutely mutually exclusive. Furthermore, if the prosecution had used or been made to use one or other of the only available rules for the purpose (to wit, Rule 48(A) or Rule 50) in seeking the consolidation, it would have been clearly apparent how arraignment or re-arraignment would systemically issue from either of those appropriate rules, judging, in all the circumstances, by the nature and extent of all the changes and material additions that were in fact ultimately made in the current consolidated indictment.

(iv). Majority Conclusions

42. The overall conclusions reached by the majority in the focal proceedings and the orders sanctioned are truly strange. The majority seems to have a genuine ambivalence, in so far as the First Accused's own focal application is concerned, about whether or not some of the affirmed changes and additions in respect of him are material or substantial enough to amount to new charges and/or new offences against him and thereby constitute a potential vehicle for prejudice to his own right to a fair trial.

43. A virtual ritual formula is cultivated, in the circumstances, in the focal majority Decision to enable it from time to time both to appear to concede on a factual level the vastness, gravity and substantive materiality of the affirmed changes and additions in respect of the First Accused and also, at the same time, to seem plausible in appearing to deny on a legal level that any of them has reached the magical point of maturity into new charges or new offences. That formula is the phrase "new substantive elements of charges", which recurs several times in slightly varied formulations following the summary of factual findings in paragraph 19 thereof. Its clearest and fullest formulation appears in the first paragraph 30 thereof, viz.

> "In addition, there are new substantive elements of charges, in paragraphs 24 to 27and 29 of the Consolidated Indictment, that are material, and include the charges of unlawful arrest and detention, 'conscription' of children, personal injury, and extorting of money from civilians."(Emphasis added)

These may indeed be, to the ordinary legal eye or mind, veritable "new charges" and/or "new offences"; but which, to a perhaps Yeatsian poetic mind, may only yet be "slouching to be born" as such[21]. As the minority Dissenting Opinion sees the very same phenomena, "new offences of unlawful arrest and detention, conscription of children, personal injury, and extorting money from civilians, have been added" (para. 64 thereof; emphasis added. See also paras. 93 and 107 thereof).

44. And so the majority's conception of the interests of justice and the Accused's right to a fair trial only require, in so far as the majority is concerned, that some of these portions of substantive materiality be stayed until the prosecution chooses by leave of the Court whether to expunge them or formalise their retention in the text of the consolidated indictment as it now stands(para. 38 of Decision).

45. And then the sole order, expressly "for the First Accused" alone out of the three accused persons, to the effect that the specified portions of the current consolidated indictment will be "stayed" by the Court, with an option to the prosecution to seek leave to either expunge them completely or make an "amendment" whereby they may be retained intact where they already belong, whilst in the meantime the rest of the said indictment still remains valid. It may however be respectfully asked: If the new elements when expunged or re-sanctioned make or leave the consolidated indictment valid, then what has been its validity status whilst it incorporated them? Was their process of first emergence itself attained by any valid means? And, in any case, what instrument becomes the subject of amendment now? Is it the original precursor indictment against the First Accused alone, or is it the consolidated indictment? If it is the existing consolidated indictment that is to be amended in the way and manner proffered here, then would the retention within it of elements already contained within it logically legitimately amount to a true amendment thereof?

(v). Dissenting Minority Conclusions.

46. It should be pointed out at once here that although there are crucial differences between the two majority opinions on the one hand and the minority dissenting opinion on the other, the two sets of opinions are ultimately chips off the old block and do share many significant features and approaches. For instance, the nature and effect of the mode of emergence or coming into being of the current consolidated indictment attracts no diversity of attitude or opinion among the learned Judges of the Trial chamber, including the apparent regularity or otherwise of seeking and granting a consolidated indictment through an application under Rule 48(B) of the SCSL Rules as the only relevant and applicable joinder rule for the purpose and, for that matter, seeking and granting it on the basis of a future text that is not annexed or attached to the application at the time of filing and even up until final decision on the said motion.

47. Furthermore, even after affirmation of several crucial changes and additions in the ultimate consolidated indictment, the effects of such affirmations upon the legal status of the ensuing prosecutorial founding instrument, and their implications for the right of the accused to a fair trial during the period of the past proceedings, do not seem to be much cause for concern to the entire Trial Chamber. Nor even the final suggestion that the current consolidated indictment could be amended in the manner proposed or at all as a continuing basis for the trial of the First Accused. For the dissenting Opinion

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[21] W. B. Yeats, "The Second Coming", in Norton Anthology of Modern Poetry, eds. Ellman and O'Clair, 1973, p. 131.

does propose as its first alternative order essentially the same order as the majority (see paras. 137, 142 of Minority Opinion). To that extent, therefore, this interlocutory appeal against the focal majority Decision of 29th November 2004 also includes all features of perspective and decision which the Dissenting Opinion nonetheless shares with the majority, even if such shared features are not further specified at various points.

48. However, notwithstanding the crucial elements shared between the majority and the minority in the focal proceedings, the latter does distinctively differ in several respects as well from the majority in their overall conceptions and handling of the issues involved.

(1). Interpreting and Applying the Rules.
(See paras. 35-57 inclusive and 126 thereof).

(a) That law and justice are all about upholding the law and preventing breaches of it and providing a remedy for any breaches that may occur, if at all. For "it would indeed be unfortunate for justice and the due process if, by whatever enticing or justifying rhetoric, or by any means whatsoever, however ostensibly credible or plausible it may seem, we reverse this age-long legal norm and philosophy "(para. 41)

(b) That, accordingly, rules and other statutory provisions must be construed in their natural ordinary meaning and purposively, so as to apply them in the intended senses or necessary intendment of the enacting body. And so, "they must not only be strictly interpreted but also, and equally, strictly applied" (para. 50).

(2). Failure to Annex and Relevance of Rule 47.
(See paras. 11-15, 61-62, 66-68, 93-95, 129-130

(a) That the failure of the prosecution to annex a draft consolidated indictment to the original joinder motion was a major flaw, and that the ensuing consolidation elicited and granted on pure trust was "in fact, to all intents and purposes a new indictment which needed to be subjected to the procedures outlined in Rules 47 and 61" (para.66).

(b) That the sheer merger of three separate individual indictments into an altered form, made the resulting consolidated indictment new, even before or without taking into account the textual additions that had been verified (para. 69).

(3). Double Jeopardy and Relevance of Rule 51.
(See paras. 25-34, 121-124)

(a) That it is a seriously anomalous situation to have two sets of indictments hanging over the three accused persons.

(b) That it seems that prosecution wishes to retain the seeming continuing existence and validity of the precursor individual indictments as a smokescreen, as it were, to avoid having to serve the accused persons with or arraign them upon the consolidated indictment on the basis of these exercises having been already performed in respect of the previous individual indictments.

(c) That instead of "transparently ensuring and preserving the integrity of the proceedings" by clearly withdrawing the previous individual indictments (para. 31), retaining them in the circumstances "impacts negatively on the neatness and transparency of the judicial process" (para.32).

(d) That there thus remains hanging over each accused person "a looming threat or a genuine apprehension or a possibility, even if it were not yet real" (para. 27)

that, following acquittal perhaps upon the consolidated indictment, any of them could be re-arrested or re-detained for the purpose of being prosecuted on the previous individual indictment left lying dormant against him (para. 30).

(e) That the continued retention of the three previous individual indictments is thus, in all the circumstances, "manifestly a legal and procedural anomaly and irregularity" (para.121), which creates a doubt as to which charges are actually being faced by the accused, thereby violating Articles 9 and 17(2) and 17(4)(a) of the SCSL Statute and Article 14(7) of the ICCPR in respect of the rights of the accused to a fair trial and the general principle of fundamental fairness (paras.34 and 124).

(4). Effects of Differences and Additions
(See paras. 58-72, 85-110, 116, 120, 127-141).

(a) That, over and above all, a consolidated indictment, pre-sanctioned on trust by the Trial Chamber, had emerged containing elements that were completely unanticipated and unforeseen, in that, at least in respect of the now First Accused and his previous individual indictment, the new consolidated indictment now included additional particulars of existing charges or offences, greatly expanded time frames or temporal jurisdictions, new geographic locations exploding the pre-existing geography with large swathes of territory, and even new charges and new offences, which were not known to or contained in the said previous individual indictment.

(b) That, indeed, such a consolidated indictment can only be a new indictment (paras.69-70).

(c) That, with even far more conviction and certainty now than at the stage of the "credulous" joinder decision (para. 12), "the bare reality of the extensive and fundamental amendments" injected into the consolidated indictment by the prosecution (para.72) would dictate that it ought to be subjected to the triple processes under Rule 47 (paras. 66, 95), Rule 52 (para.71), and Rule 61(paras. 66, 85, 96, 110, 137, 142).

(5). Service and Arraignment
(See paras. 35-57, 72-114, 120, 125-126, 131-134).

(a) That, in view of all the foregoing minority Dissenting conclusions, failure to observe the approval, service and re-arraignment procedures in respect of the current consolidated indictment is and would be a contravention and violation of "not only the provisions of Articles 9(1), 17(2), 17(4)(a), and 17(4)(b) of the Statute of the Special Court as well as those of Articles 9(2) and 14(3)(a) and 14(7) of the International Covenant on Civil and Political Rights, but also those of rules 26bis, 50, 52, and 61 of the Rules" (paras. 120, 131).

(b) That a spectre of ultimate futility hangs over the current entire trial proceedings (paras. 93, 111).

49. The distinctive differing conclusions of the minority Opinion, as set out in the foregoing paragraph 48 hereof, are given considerable force and weight by the high profile fact of their author being at the time no less a person than the very Presiding Judge of the said trial proceedings.

C. Post-Focal Proceedings

50. Apart from the application, response and leave that have given rise to this interlocutory appeal by the First Accused, other related proceedings have taken place since the focal proceedings were set into motion by the application for service and arraignment. The

other accused persons, for example, followed up with similar parallel applications upon which the Trial Chamber decided, with the by now usual majority decisions and Separate Concurring Opinions, to dismiss the said applications in their respective entireties[22].

51. Interestingly, the prosecution, on its part, initially reacted to the focal Decision with seemingly conflicting emotions. Firstly, it sought to appeal against it on 6th December 2004, to which the First Accused rather critically responded on 8th December 2004, with the usual reply by the Prosecution on 10th December 2004, until the grant of leave on 15th December 2004 by the Trial Chamber[23]. But the prosecution also sought to comply with the said focal Decision by its amendment request of 8th December 2004.

III. SUBMISSIONS: BASES FOR APPEAL

52. The First Accused globally submits that, in their entirety, both the current consolidated indictment and the trial proceedings conducted upon it so far and to be so conducted in the future, if at all, whether upon amendment in the manner proposed or otherwise, have been from their inception, are now, and will continue to be in all foreseeable circumstances, not only completely and utterly 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 also of their subsequent and continuing mode of subsistence or 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 have been and continue to be deprived of crucial due process rights and thereby irretrievably prejudiced in their rights to a fair trial under the applicable statutory and regulatory provisions and domestic national and international norms. He further submits that, even were the current consolidated indictment notionally or putatively available for or otherwise capable of amendment, the mode of amendment being at present proffered or proposed is a formal farce, a logical absurdity or impossibility, and thereby a legal non-starter. The First Accused finally submits that the current consolidated indictment is ultimately indivisible in its operation against the three accused persons and, unless it is successfully subjected to the appropriate rule 82(B) procedure or to a wholesale defective indictment application by one accused person or the other in the meantime, it will stand or fall as a whole and not selectively or discriminatorily.

A. Mode of Genesis

53. The current consolidated indictment came into being or existence by a joinder decision upon the prosecution's application under Rules 48(B) and 73 of the SCSL Rules, in the process of which the draft text thereof was not annexed to the application on filing or at any time during the hearing of the said joinder motion, as has been amply set out above. The application under Rules 48(B) and 73 was for both joint trial and joint-charging of the three accused persons who were already facing separate individual indictments upon which each had separately undergone the procedures under Rules 47, 52 and 61 in respect of his own individual indictment. 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 one case but constructive in others, and that the failure to annex the draft

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[22] See the respective majority Decisions and Separate Concurring Opinions in respect of each of the 1st and 2nd Accused persons dated 6th and 8th December 2004 respectively.

[23] See the respective prosecution applications for leave to appeal and amend, as the case may be, dated 8th December 2004 respectively, and their respective responses and/or replies thereto, as applicable.

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. And so the granting of the consolidated indictment aspect of the application was wrongly decided.

(i). Violation of Standard Practice

54. 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" (See para. 13 above hereof).

55. Be that as it may, both the prosecution's response that the need to annex such a draft was not provided for in the rules of procedure and the Trial Chamber's opinion that it was a "procedural technicality" were being either unduly economical with the truth or just plainly evasive or both. For 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 or such other amendments are anticipated, as was the case with this consolidated indictment.

56. A random series of examples from ICTY and ICTR cases, spanning a period from 1998 to 2004, will show that this was relatively consistent standard practice with both consolidation and amendment requests in circumstances similar to what the prosecution faced in its joinder motion. a) Kovacevic: "Decision", 5th March 1998 paras. 2 and 4 (Amendment); b) Kovacevic: "Decision", 2nd July 1998, para. 6 (Amendment); c) Krnojelac:"Decision", 20th May 1999, para. 2 (Amendment); d) Niyitegeka (ICTR): "Decision", 21st June 2000, preambular para. 2(Amendment); e) Kvocka et al: "Decision", 13th October 2000, preambular para. 4(Consolidation); f) Mrksic et al."Decision", 23rd January 2004, para. 1 (Consolidation and Amendment); g). Limaj et al:"Decision", 12th February 2004, para. 1 (Amendment); h) Ademi et al:"Decision", 30th July 2004, final order (Consolidation).

57. An ICTY example that apparently differs from the foregoing examples and at first seems of similar kind to the SCSL Trial Chamber decision of 27th January 2004, is Krajisnik et al: "Decision on Motion for Joinder", 23rd February 2001. However, being an application under the ICTY equivalent of SCSL Rule 48(A), this decision is clearly distinguishable from the SCSL application under its Rule 48(B).

58. Moreover, there is also the question of jurisdiction under the relevant rules. There seem to be two sides to this particular coin. 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, on the other side of the coin, 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 there being no express provisions in any and all of the SCSL joinder rules as to the propriety or expediency of using a notional or imaginary conception of a proposed amended or proposed consolidated indictment in the absence or place of an existent or extant draft thereof in a joinder application, the said rules are reasonably to be construed as having implied prohibitory injunctions against either seeking or ordering 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 in issue here:

> "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).[24]

(ii). Violations of Joinder Rules

59. 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. The violations here are actual or direct in some cases, but only constructive or indirect in the case of other rules. Here, quite simply, it may be said that the prosecution has committed, as it were, something akin to the old biblical sin of lusciously indulging in what it is peremptorily enjoined against and almost studiously avoiding or evading precisely what it is almost mandatorily enjoined to do or at least not to avoid or evade, in its quest to bring forth a consolidated indictment for the trial of the three previously separately and individually indicted persons. The First Accused submits that the said joinder decision with respect to consolidation was procured and granted without jurisdiction or without any basis of authority within the relevant law or practice and applicable SCSL Rules.

60. Although the prosecution application in question and the decision thereon are usually merely blandly referred to as "joinder motion" and "joinder decision" respectively, it is necessary to make the distinctive point here that the motion was made specifically pursuant to SCSL Rules 48(B) and 73, without more. And that it expressly specifically sought both a "joint trial" of the three accused persons and a "consolidation" of their respective existing individual indictments already lying against them as the new basis upon which their joint trial would henceforth proceed. The First Accused submits, however, that although SCSL Rule 48(B) governs applications for "joint trial", it however does only that and is purposely designed to do only that and nothing more, thereby rendering it definitively inappropriate and unavailable as a vehicle for seeking or granting leave for a "consolidation" of 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.

61 Understandably, this relative mutual exclusivity or distinctive individuating emphasis as to the purposes and functions of the respective SCSL joinder rules is not as yet so readily appreciated, especially considering that the currently available related jurisprudence derives from the sister tribunals of the ICTY and ICTR, one or other of which sister tribunals lacks one or other of the wider range of joinder rules in the SCSL. For example, the ICTY has for a long time had only its own Rules 48 and 49, which correspond respectively to SCSL Rules 48(A) and 49. The ICTR has also for some time had only its own Rules 48, 48 bis, and 49, which again correspond respectively to SCSL Rules 48(A), 48(B), and 49. That is to say, that whilst the ICTY has had no direct equivalent of the SCSL Rules 48(B) and 48(C), for example, the ICTR has on its part also lacked any direct equivalent of SCSL Rule 48(C). With each of these subrules or rules being definitively function specific, this streak of relative mutual exclusivity or distinctiveness in its regime of joinder rules affords the SCSL a good opportunity and incentive to endeavour to develop its own function specific joinder jurisprudence and judicial practice in the regulation and administration of criminal justice.

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

62. On a close purposive analysis of the SCSL joinder rules proper, and with due recognition of the slightly differing "same transaction" background criteria for the two main sets of rules (i.e. Rules 48 and 49) respectively, the said rules may be functionally characterised as follows, including one or two related or ancillary rules, viz:

Rule 48(A)

Sub-rule 48(A) provides conjunctively for both the joint charging and joint trial of the appropriate set of accused persons, the two functions not necessarily always being exactly co-extensive or even mutually co-operant, but at least thereby making this subrule 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. There is no express leave requirement for invoking this subrule, without more, especially for direct original joint charging[25]; but impliedly the consolidation of pre-existent indictments for separate persons or groups of persons would seem to require leave[26].

Rule 48(B)

Subrule 48(B) provides for the joint trial of appropriate sets of accused persons who have already been separately indicted. It is concerned only and exclusively with the joint trial of such separately indicted sets of accused persons, whose respective previous indictments thus continue as separate indictments throughout the joint trial under this subrule[27]. There being no express provision in it for such indictments to be joined or consolidated as such at any stage under the subrule, it is accordingly to be construed as having an implied or built-in prohibitory injunction against seeking to use it as a vehicle for either joint charging or the consolidation of any subject indictments thereunder. So that in so far as subrule 48(B) becomes a vehicle for the joint trial of separate pre-existing indictments, it remains so for that purpose alone throughout the joint trial under the subrule; and the said previous indictments are not to be reduced to a single or even further consolidated indictment(s), with due allowance however for any appropriate application under subrule 82(B) for further separating the trials. Subrule 48(B) is thus definitively rendered functionally inappropriate or unavailable as a vehicle for seeking either the joint charging of accused persons or the consolidation of separate pre-existing indictments. However, even for the joint trial expressly provided for, there is an express mandatory requirement for leave pursuant to Rule 73.

Rule 48(C)

As a distinctive function specific provision, subrule 48(C) seems to be peculiar to the SCSL among the sister international tribunals. It provides for the "concurrent hearing of evidence common to" two or more trials that are otherwise going on separately. Its highly compressed phrase, "the trials of persons separately indicted or joined in separate trials," seems to be defining the sorts of separate trials in relation to which concurrent hearing of common

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[25] For an example of this under the equivalent ICTR Rule 48,
See the 8 persons indicted directly and originally in Kajelijeli et al (ICTR-98-44-T), as cited in Bizimana et al: "Decision", 12th July 2000, preambular para. 6 and paras. 11, 26

[26] For a basic instance under the equivalent ICTR Rule 48,
See the 2 indictments of 2 separately charged persons consolidated in Ademi & Norac: "Decision", 30th July 2004. It is a perfect model for the prosecution's desired consolidation here.

[27] For a basic example, see the 2 indictments joined for trial together, but not consolidated as such, in Akiretimana et al: "Decision", 22nd February 2001.

evidence may be sought or applied for. The said phrase, on a proper comminution[28], may thus be said to be referring to the following kinds or scenarios of separate trials, which are veritable limbs of the subrule, to wit (i) of two or more appropriate sets of accused persons who are individually indicted; or (ii) of appropriate sets of accused persons in two or more joint indictments respectively; or (iii) of such appropriate sets of accused persons in mixed sets of both individual indictments and joint indictments, i.e. both (i) and (ii) above. The express requirement in this subrule for leave pursuant to Rule 73 is highly appropriate and necessary.

Rule 49
Rule 49 provides for either the direct charging in a single individual indictment of two or more crimes committed by one person in the same transaction, or the consolidation of two or more such indictments already lying against the same person. There is no express leave requirement here, and ordinarily no leave would seem necessary for the said direct charging. However, in practice, leave has tended to be sought for consolidating into a unified document any two or more indictments already lying against the same person[29].

Rule 50
Rule 50 provides for the amendment of indictment(s) in various circumstances and with different incidents at various pre-trial and on-trial stages. It seems conceptually and analytically capable of being used as a vehicle for seeking consolidation of two or more indictments, i.e. merging them in form, which however seems rare in practice. For joinder purposes, it seems more or less an ancillary rule or it at least usually functions that way. Subrule 50(A) defines three separate limbs for the operation of Rule 50, according to the stage of proceedings at which the prosecutor may wish to seek amendment of the indictment. First Limb: at any time before the indictment is approved in terms of Rule 47; without prior leave. Second Limb: at any time after approval but before the rule 61 initial appearance, arraignment and plea; with leave as specified. Third Limb: at any time during or after the rule 61 initial appearance, etc; with leave as specified.

Rule 51
For joinder purposes, Rule 51 is of strictly ancillary relevance, to the extent that an exercise of any mode of joinder under any of the foregoing rules may necessitate the withdrawal of some indictment or the other, and for good reason, for example, to avoid a feeling of oppressiveness or fear of double jeopardy for accused persons.

63. It is submitted that, so long as the prosecution was seeking as its objective or part thereof 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 from the foregoing characterisation of the joinder rules that Rules 48(B) and 48(C) are not designed to accommodate consolidations of indictments. Rule 49 also was ultimately unavailable in the circumstances, because even though in its own case it does accommodate consolidations of indictments, it may

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[28] For the concept of comminution as an interpretative strategy, see F. R. Bennion, Statutory Interpretation: A Code, London: Butterworths, 1992, pp. 287 – 289.

[29] For an excellent example of both forms of the operation of Rule 49, see the ICTY case of Milosevic: "Decision", 13th December 2001. Two separate pre-existing indictments standing against the same person were consolidated for joint trial, each of them having been a multiple-count indictment against the same person. The motion was pursuant to rule 49.

however only do so in respect of indictments lying against one and the same person, whereas the prosecution had three accused persons and their respective indictments to contend with here.

64. When, therefore, the prosecution sought in its joinder motion leave to consolidate the three previous indictments by resorting to Rule 48(B), it had no authority and/or jurisdiction to seek the consolidation pursuant to that rule, nor did the Trial Chamber as well have jurisdiction or discretion within the relevant Rules to consider and/or decide the said motion by granting the consolidation request.

65. The prosecution of course knew what it was doing all along and why! In the process, it in fact also committed constructive violations or evasions of Rules 48(A), 50, and 51, as also material and applicable procedural rules which were available in the circumstances either each in its own right or in potential selective combination with one or other of them. International joinder jurisprudence has itself tended to give an unintentional fillip to this trend by concentrating so far on analysis of the common background criteria and conditions for the various forms of joinder generally[30]. In the result, the jurisdictional debacle in the genesis of the focal consolidated indictment is only further compounded.

66. At this stage, it would be instructive to consider what possible non-consolidation options as well were available to the prosecution within the rules. The First Accused submits that, in those circumstances, and assuming that the prosecution was not opting for consolidation, then the following alternative choices were legitimately open to the prosecution to pursue: (1) Joint trial, pure and simple, of the three initial individual indictments, whereby the said indictments would remain separate throughout the joint trial thereof, principally pursuant to **Rule 48(B)**, together with Rule 73 for leave purposes, but without the additions and new elements in the current consolidated indictment. (2). Separate trials of the three accused persons on their respective individual indictments, and by making application for "concurrent hearing of evidence common to" the said indictments, principally pursuant to **Rule 48(C) First Limb,** together with Rule 73 for leave purposes, but without the additions and new elements in the current consolidated indictment. (3).Either Option (1) or Option (2) above, but additionally in either case by also making application(s) principally pursuant to **Rule 50(A) Third Limb**, at appropriate stages of the proceedings as applicable, for amendment(s) to any, some or all of the three individual indictments severally in separate or the same proceedings, as required, together with Rule 73 for leave purposes. All the additions and new elements that have now been affirmed as contained in the current consolidated indictment could have been effected in the relevant individual indictment(s)in this third option with little or no controversy as is now raging over them, but **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**. There is nothing abstruse or esoteric about these options within the joinder rules, nor about those making for consolidation as such, nor about their possible procedural and forensic implications, to have concealed their relevance, availability or applicability, or indeed their sheer materiality and/or mandatoriness, from the prosecution, or to have deceived it into a false trial trail. However, it should be noted that the prosecution did not wish to forego the additions and new elements for the First Accused in Options (1) and (2) above; nor, in the case of Option (3), to be subjected to the obligations and/or defence entitlements as highlighted herein.

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[30] See the respective analyses and illustrative cases mentioned in Dixon, Khan & May (eds.), Archbold: International Criminal Courts (3rd ed., 2003), pp. 204-207; and Jones & Powles, International Criminal Practice (3rd. ed., 2003), pp. 516-522

67. Accordingly, the prosecution sedulously and systematically avoided or evaded precisely all the available and applicable joinder options in the circumstances, even when they were material and/or mandatory or imperative, but fixated itself instead upon precisely the joinder rule(s) that was/were definitively functionally unavailable and indeed prohibited for the relevant purpose, with damaging or prejudicial effects on the due process rights of the accused persons, the interests of justice, and the very integrity of the judicial process itself.

B. Modes of Subsistence: Abuses of Process

68. Dogged and calculated prosecution adamancy in the avoidance and evasion of material and/or mandatory rules of procedure, which readily tend to poke one in the eyes as compellingly applicable in the respective circumstances, together with the 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 effectuated modes of subsistence or sustention for the current consolidated indictment which are 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.

69. The rights of the accused persons, substantive and procedural alike, are enshrined in the applicable laws for the Special Court, as listed and categorised in Rule 72 bis. In the circumstances of the Special Court for Sierra Leone, the immediately applicable treaties and conventions may be said to be 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). Among the general principles of law derived from the domestic national legal system of Sierra Leone itself, are those enshrined in the Constitution of Sierra Leone, Act No. 6 of 1991(C 1991 SL), especially the provisions on "the recognition and protection of fundamental human rights and freedoms of the individual" in its Chapter 3.

70. However, this is not intended to be a general survey of the rights of accused persons in international criminal prosecutions; but only as pertinent to the present appeal.

(1) The Substantive Rights

71. The substantive rights of accused persons are typically characterised as fundamental human rights and freedoms in the 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 public and collective interests (Articles 7(1)(a) and 27(2) ACHPR; Article 29(2) UDHR; sections 15 and 23 of C 1991 SL). The only limitations and derogations permitted from these rights are as expressly specified by law.

72. One of the most crucial rights of the accused is **the presumption of innocence** enshrined in Article 17(3) of the SCSL Statute, 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 right stipulates that a person charged with a criminal offence, whether in the international or national jurisdiction, must be presumed innocent until he/she is proved guilty according to the relevant laws or until he/she pleads guilty. The stipulation that the Special Court for Sierra Leone was established **"to prosecute persons who bear the greatest responsibility for"** the commission of serious violations of international humanitarian law and relevant crimes

under the domestic national law committed in the territory of Sierra Leone during the specified period, as provided in the Agreement between the United Nations and Sierra Leone and in the SCSL Statute itself[31], seems to have serious implications for the guaranteed right of the presumption of innocence for the accused persons at present being tried before the Special Court.

73. The substantive right to **protection against double jeopardy**, as restrictively stipulated in a selective form in Article 9(1) of the SCSL Statute but also severely derogated from in Article 9(2) thereof, is also stipulated in more general terms in both Article 14(7) ICCPR and section 23(9) of C 1991 SL. The stipulations as to concurrent jurisdiction between the Special Court and national courts in Articles 8 of the SCSL Statute do, in principle, heighten the potential relevance of this doctrine for SCSL indictees (see paras. 32-34 inclusive and 48(3) above hereof).

74. The rights enshrined in **Article 17(4)(a) and (b)** of the SCSL Statute are closely related enough to be considered together here. These stipulations are 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. It should be appreciated that the rights are granted in peremptory mandatory terms requiring the appropriate action to be taken as specified by the relevant authorities. The need for the prompt and detailed information as to the nature and cause of the charge(s) against the 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.

75. 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 the 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.

76. There are also stipulations in the various human rights instruments applicable in this case, both national and international alike, as to the requirement for affording to anyone whose fundamental rights are violated **an effective and appropriate remedy or set of remedies**. Articles 2(3) ICCPR, 8 UDHR, and 7(1)(a) ACHPR, all make stipulations to the effect. Indeed, the national Constitution of Sierra Leone even includes among such remedies declarations annulling the measures and means constituting the said violation(s) (see sections 28, 127 and 171(15) of C 1991 SL). The general force and effect of the said human rights norms and standards 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.**

2). The Procedural "Rights".

77. 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

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

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. The previously operative SCSL Rule 5, being then in the same terms as ICTR Rule 5, stipulated that relief for non-compliance shall be such as is considered appropriate "to ensure consistency with fundamental principles of fairness."

78. Notwithstanding the severely telescoped amendment of SCSL Rule 5 into its present apparently entirely discretional form, it is submitted that, considering the integration of the fundamental substantive rights of accused persons into the rules of procedure 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**; and that the duty of the Trial Chamber or Designated Judge in the circumstances would be to grant relief as it or he/she considers appropriate "to ensure consistency with fundamental principles of fairness." **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"[32]

79. What then are the procedural "rights" of accused persons?

80. 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.

81 Take some of the post-arrest indictment regulatory processes, for example. Under **the procedure in Rule 47**, for instance, the indictment is reviewed for approval or dismissal, in whole or in part, by a Designated Judge. Under **its Limbs (C) and (E)**, the form and substance of the charge(s) in the indictment are rigorously reviewed so as to determine whether it is or they are properly drawn up, or whether the crime(s) charged is/are cognisable as crimes in the court's jurisdiction or indeed capable of being proven according to law. At this stage the accused person has the opportunity of the charge(s) against him/her being 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

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[32] 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.

a sure foundation. Non-compliance with, or abuse or misuse of, a relevant rule which deprives him/her of these interests and/or entitlements under the Rule 47 procedure would be of grave prejudice to him/her as a suspect or an accused person. It would obviously be possible for non-compliance with or misuse/abuse of some joinder rule or the other to lead to a deprivation of the accused person of the interests and entitlements under a potential resort to Rule 47 in a given case, which could easily redound into a violation of any of the substantive rights under Article 17 SCSL Statute, as specified above.

82. 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). These are very crucial interests and entitlements which could accrue to an accused person upon amendment even after he/she has already undergone all the usual processes under Rules 47, 52, 61 and 72 in relation to the initial or previous indictment. 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 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. And merely deliberately avoiding/evading **Rule 50(A) Third Limb**, in a situation where it is applicable, would result in such deprivation and prejudice; and considering the nature and scope of the said interests and entitlements, it would be a most severe prejudice indeed.

83. Or even take **Rule 52, concerning the service of an indictment.** This exercise 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.

84. 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 Designated Judge is required to have the indictment or charge read to the accused "in a language he speaks and understands" and thereby to "satisfy himself that the accused understands the indictment" or charge (Rule 61(ii)), in the observance and service of the substantive rights of the accused person under SCSL Article 17(2) and 17(4)(a) to (c) inclusive. The Designated Judge is also required to call upon the accused to enter a plea of guilty, or not guilty, on each count or charge in the indictment, thereby proving his understanding of the indictment and also formally subjecting himself to the jurisdiction of the court and triggering off the actual trial process.

85. Even **the possibility of a guilty plea** is a momentous occasion for all involved in the process **(Rule 61(v))**, with its great potential for considerable judicial economy. It is, indeed, so crucial that the Rules stipulate an especially careful and detailed exercise in respect thereof by no less an organ or functionary than the Trial Chamber itself **(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 it should be emphasised that, following an

extensive amendment or a drastic consolidation of indictment(s), 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 be a serious potential prejudice to an accused and even the public interest in the circumstances. And no one can safely predict, and no one must seek to so predict, how an accused person is likely to behave upon arraignment under Rules 61 and 62.

86 There are, of course, other rules of procedure and evidence under which there are perceptible vested interests and entitlements which an accused person may look up to in certain circumstances. **Rule 51**, for instance, would 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.** Although it avails almost entirely at the optional choice of the prosecution, but 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 redound to the great relief of the accused person, that is to say, by putting 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.

87. As indicated above, various means and measures since the constituting of the Special Court, as applicable, and/or their otherwise triggering off or manifestation in the genesis and continued subsistence and operation of the current consolidated indictment, 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. There have been such violations in all the respects surveyed and indicated in paragraphs 52 through 86 above hereof.

(1) The Abuse of Process Doctrine

88. 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[33]. Lord Devlin saw it in Connelly v. DPP (1964)2 All ER 401 HL (UK) at p. 442 A and H as "***an inescapable duty***", a "***responsibility for seeing that the process of law is not abused***", and "***one of great constitutional importance***". And the philosophy informing the doctrine is set out by Lord Lowry in the Bennett case at p. 162 h-j. Some of the informing principles for the doctrine were also outlined in the South African case of Ebrahim, cited therein at p. 149 d-e.

89. As may be gathered from the foregoing philosophy and principles, the factors and circumstances that may give rise to operation of the 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 in footnote

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

33 reference herein), 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***". The wideness and openness of the enabling factors and circumstances and the informing philosophy and principles for the abuse of process doctrine are also emphasised by Lord Griffiths in the same Bennett case when he views the challenge before their Lordships as one of extending the relevance and applicability of the said doctrine beyond merely securing a fair trial or avoiding an unfair one to acceptance by the judiciary of "***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; italics & emphases added).

90. In the case of international criminal tribunals, relevant jurisprudence recognises the nature and scope of the doctrine of abuse of process and its applicability at both the Trial Chamber and Appeals Chamber levels, together with attendant supervisory powers to apply and enforce it directly. (See Barayagwiza, paras. 74, 75, 76).

91. In the case of the Special Court for Sierra Leone, it is clear from the appellate and review jurisdictions under SCSL Articles 20 and 21 respectively, and also from the processes of reference under such rules as Rule 72 (E) and (F) and of interlocutory appeal under Rule 73 (B), for example, that it's Appeals Chamber has a rich repository of supervisory powers over the Trial Chamber and the judicial process generally under its Statute.

(2). The Rights Violations.

92. From the foregoing analysis and submissions, especially in paragraphs 52 through 86 above hereof, 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 benefits 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.

93. As was mooted in paragraphs 68 and 72 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 an element or elements of an offence and therefore not subjected to the usual criminal burden or standard of proof by the prosecution, any person who in fact 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 as having been committed by the accused in question either personally or command vicariously. Under a legal regime which criminalises

command responsibility directly (see 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 for or 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 of the abuse of the process of the court. ***On this ground alone, it is submitted, the current consolidated indictment is fatally substantively flawed and null and void, and so definitively incapable of or unamenable for amendment in any shape or form.***

94. **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 **to formally withdraw the previous separate individual indictments** after the adoption of the consolidated indictment against all three accused persons jointly (see paras. 32 – 34 inclusive, 48(3), 68, 73 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. As the said separate individual indictments were not and have not been so withdrawn, it is submitted, though in the words of the minority Opinion, that this situation "violates the principle of fundamental fairness as well as it contravenes the provisions of Articles 9(1) and 17(2) of the Statute as read with those of Rule 26 bis of the rules" (para.34; also 121 – 124 thereof). ***As a result, both the interests of justice and the dignity and integrity of the criminal judicial process are undermined, unless and until the trial proceedings are stayed on grounds of abuse of the process of the court.***

95. Furthermore, by virtue of the truculent actual and constructive violations by the prosecution of the various relevant and material joinder rules, as analysed in paragraphs 52 to 67 above inclusive hereof, ***the consolidated indictment was rendered fatally substantively defective, null and void, even legally non-existent, and therefore incapable of or unavailable for amendment in any shape or form.*** It is unfortunate that such violations were consistently emphatically endorsed in effect by the Trial Chamber's approving the measures and results involved in their effectuation.

96. So also the sustained violations of the several substantive and procedural rights of the accused persons by the prosecution, as analysed so far in paragraphs 68 through 91 above hereof, have deprived the accused persons of those crucial protections, interests and benefits provided by law and in the Rules, and thereby taken unfair advantage of them. ***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.***

97. It must also be emphasised here that, apart from the substantive unamenability or unavailability of the current consolidated indictment for any amendment at all, because of its legal invalidity as analysed above, ***there is also the logical absurdity and formal impossibility involved in having to "amend" it in the form and manner proffered by the Trial Chamber. For such an "amendment" would in effect and in fact be merely retaining in it whole elements that are already contained in it exactly and precisely as they are.*** The point as to substantive unamenability for any form of amendment is equally applicable to the suggestion of "expunging" any portion of the current consolidated indictment.

98. It is submitted, furthermore, that the sustained and varied violations of the rights of the accused persons and the measures nullifying or invalidating the indictment that have

characterised the proceedings in this trial, as analysed above, ***constitute a gross deprivation and denial of the principle of fundamental fairness, of fundamental human rights and of the rule of law itself.***

(iii) Remedies for Violations and Abuses

99. As indicated in paragraph 76 above hereof, the various relevant national and international human rights instruments, which constitute the SCSL applicable laws, do make provision for effective and appropriate remedies for violations of fundamental human rights for individuals. Such remedies are also both implicitly and explicitly provided for in the primary and secondary legislation of the Special court as well: for example, in the preliminary and general motion processes in Rules 54, 72 and 73, in the interlocutory and final appeals and review provisions in such rules and in Articles 20 and 21 respectively of the Statute, and also of course in the all-embracing Rules 5 and 26 bis.

100. Accordingly, in view of all the foregoing analysis and submissions, remedies for the violations and abuses of process highlighted above are necessary and available as itemised below in paragraph 103 hereof as to the reliefs being sought in this interlocutory appeal.

101. Meanwhile, the remedies proposed and implemented in closely similar circumstances by the Appeals Chamber in the Barayagwiza decision of 3rd November 1999, and the considerations justifying them, are instructive for present purposes and deserve citation in extenso here, even without further comment, viz:

> (1). "The crimes for which the Appellant is charged are very serious. However, in this case the fundamental rights of the Appellant were repeatedly violated.... We find this conduct to be egregious and, in the light of the numerous violations, conclude that the only remedy available..... is to release the Appellant and dismiss the charges against him.... the appeals Chamber further finds that this dismissal and release must be with prejudice to the Prosecutor. 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..... 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" (paras. 106 – 110 inclusive thereof; emphases added).
>
> (2). "***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" (para. 112 thereof; italics & emphasis added).

IV. NOTICE AND GROUNDS OF APPEAL

102. In the light of the foregoing analysis and submissions, the First Accused hereby gives notice to the Appeals Chamber of this interlocutory appeal and that the grounds of appeal against the aforesaid decision of the Trial Chamber dated 29th November 2004 are as follows: (1). That the current consolidated indictment, which is subject of the said Trial Chamber decision, is substantively and definitively unamenable to or unavailable for amendment in any shape or form because it is invalid, null and void by reason of its modes of genesis or coming into being, and therefore legally technically non-existent. (2).That the said consolidated indictment is formally and logically unamenable to or unavailable for amendment in the particular nature, form and manner proffered by the Trial chamber, in that such so-called "amendment" involves a gross logical absurdity or formal impossibility, since it would be seeking to retain intact and in whole in the consolidated indictment precisely and exactly the same "stayed" elements as are at present therein contained, which is not an amendment in the true sense of the word. (3).That the said current consolidated indictment ought to be permanently stayed or terminated with immediate effect, and with prejudice to the Prosecutor, on the ground of egregious abuses of the process of the Special Court for Sierra Leone, whereby the prosecution has taken advantage of the Rules and the accused by depriving the latter of crucial protections and interests provided by law, thereby gravely prejudicing the accused in the conduct of the defence and severely undermining the interests of justice and the dignity and integrity of the international criminal justice process and system, all of which make it a travesty of justice for the accused to continue to be tried on the basis of the said current consolidated indictment.

V. RELIEFS BEING SOUGHT

103. Considering the analysis, submissions, and the authorities cited in all the foregoing paragraphs, the First Accused urges and moves the Appeals Chamber to make disposition and grant reliefs as follows:

(1). INTERIM STAY of all trial proceedings, with immediate effect as from the beginning of the fourth session thereof, pending and up until final determination of this interlocutory appeal.

(2). A DECLARATION that the current consolidated indictment is substantively and definitively unamenable to and unavailable for amendment in any shape or form because it 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 that the current consolidated indictment is formally and logically unamenable to and unavailable for amendment in the particular nature, form and manner proffered by the Trial Chamber, in that the so-called "amendment" involves a gross logical absurdity or formal impossibility as it seeks to retain intact and in whole in the consolidated indictment the said "stayed" elements as they are precisely and exactly contained in it at present.

(4). A DECLARATION 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 abuse of the process of the court in view of sustained and severe violations of the rights of the accused.

(5). TO DISMISS the current consolidated indictment forthwith and immediately, with prejudice to the Prosecutor.

(6). TO DIRECT OR ORDER the immediate release of the Appellant from detention and the custody of the Special Court for Sierra Leone.

(7). TO DIRECT OR ORDER that the Appellant be compensated satisfactorily and in full for his prolonged detention and subjection to trial proceedings so far on the current consolidated indictment.

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

DONE in Freetown this 14th day of January 2005.

Dr. Bu-Buakei Jabbi

COURT APPOINTED COUNSEL

FOR FIRST ACCUSED

Sam Hinga Norman

FIRST ACCUSED (APPELLANT)

ANNEX 1

Connelly v. D.P.P (1964) 2 All Er PP. 401-451(UK) at PP. 401, 441-442

CONNELLY v. DIRECTOR OF PUBLIC PROSECUTIONS.

[HOUSE OF LORDS (Lord Reid, Lord Morris of Borth-y-Gest, Lord Hodson, Lord Devlin* and Lord Pearce), December 10, 11, 12, 16, 17, 18, 19, 1963, January 15, 16, 20 and April 21, 1964.]

Criminal Law—Autrefois acquit—General principles—Test of applicability—Quashing of conviction of murder, in the course of theft, by Court of Criminal Appeal—Sole issue ventilated on appeal was as to accused's presence at scene of crime—Subsequent trial of accused on charge of robbery on same occasion—Whether quashing of murder conviction enabled him to maintain plea of autrefois acquit or res judicata.

Criminal Law—Estoppel—Issue estoppel—Whether doctrine applicable in English criminal law.

Criminal Law—Practice—Trial of indictment—Stay—Discretion—Whether, apart from principles of autrefois acquit and kindred pleas, court has discretion not to proceed with trial of indictment.

Criminal Law—Indictment—Joinder of counts—Charges founded on same facts—Rule of practice to be followed—Charges that may be joined under r. 3 of Sch. 1 to the Indictments Act, 1915 (5 & 6 Geo. 5 c. 90) must, in general, be joined—Rule of practice in R. *v.* Jones ([1918] 1 K.B. 416), *against joinder of other counts with count for murder, no longer to have effect—Power of court to prevent abuse of process.*

The court has discretion (outside the strict limits of a plea of autrefois acquit or autrefois convict) to stay, and in general should stay, a subsequent indictment containing charges founded on the same facts as those on which a previous indictment is based or forming or being part of a series of offences based on one incident. The general rule, accordingly, must be that charges which may be joined in an indictment in accordance with r. 3† of Sch. 1 to the Indictments Act, 1915, should be so joined, but the court retains a discretion in special circumstances not to apply the general rule thus ensuring that there is no abuse of its process; the exceptional rule of practice, whereby no other count should be joined in an indictment with a count for murder or manslaughter (see *R.* v. *Jones*, [1918] 1 K.B. 416 and *R.* v. *Large*, [1939] 1 All E.R. 753) should no longer have effect as a rigid rule to be applied irrespective of prejudice or embarrassment to the defence, the defendant being able to apply for separate trials if he so wishes. (So held by LORD REID, LORD DEVLIN and LORD PEARCE, see at p. 446, letters C and D, p. 449, letter G, p. 451, letters B, C and G, and p. 406, letters E and F, post; LORD MORRIS OF BORTH-Y-GEST and LORD HODSON dissenting as to the discretion to stay an indictment, see p. 401, letter A, p. 409, letter B, p. 411, letter I, to p. 412, letter A, and p. 432, letters C and D, post, but LORD MORRIS concurring as to modification of the rule in *R.* v. *Jones*, see p. 409, letter F, post, and as to the joinder of charges, see p. 417, letter A, post).

R. v. *Miles* ((1909), 3 Cr. App. Rep. 13) and *R.* v. *Barron* ([1914] 2 K.B. 570) considered.

Dictum of LORD GODDARD, C.J., in *R.* v. *Chairman, County of London Quarter Sessions, Ex p. Downes* ([1953] 2 All E.R. at p. 751) explained and not applied.

Maxims "nemo debet bis puniri pro uno delicto" and "nemo debet bis vexari pro eadem causa" considered (see p. 416, letter E, p. 420, letter H, p. 425, letter I, to p. 426, letter A, p. 428, letter C, and p. 436, letter B, post).

Arising out of an armed raid at Mitcham on Nov. 17, 1962, two indictments were preferred against the appellant, one charging him (together with three

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* LORD DEVLIN retired on Jan. 10, 1964.

† Rule 3 is printed at p. 440, letter G, post.

of this kind. The proper course in a case like this is to have two indictments so that the second charge may be subsequently tried if the charge of murder fails and it is thought desirable to proceed upon the second charge."

In *R.* v. *Large* (138) the court said that the same practice should be followed with a charge of manslaughter.

R. v. *Jones* (139) has generally been accepted as a rule of practice and is referred to as such in the Homicide Act, 1957, s. 6 (2). It is a clear example, repeated in 1939, (140) of the exercise by the court of its power to protect an accused from prejudice or embarrassment. It can hardly be doubted that in 1918, (141) the court was, notwithstanding the Indictments Act, 1915, exercising in a limited way and for the benefit of the defence the same sort of power as it had always exercised before 1915. It seems to me that if the court had power in 1918 and 1939 to say that, notwithstanding the permission of Parliament, there must be no joinder of counts, this House must have power in 1964 to say that that is a mistaken or obsolete view and that there is power to stay second indictments in cases in which r. 3 ought quite clearly to have been used and has not been.

I know of no authority for saying that the power has been in any way diminished, and there is indeed good authority for saying that the discretion would apply as much in the one case as in the other. In *R.* v. *Barron* (142) (the case is fully dealt with in the speech of my noble and learned friend, LORD PEARCE) LORD READING, C.J., clearly thought it proper that a

> " judge should not, as a matter of fairness and in the exercise of a proper judicial discretion, have allowed the second trial to take place . . ."

This dictum, which was in a considered judgment, was delivered three months after the dictum, which I have already cited, on the nature of the judicial discretion in criminal matters which LORD READING (then SIR RUFUS ISAACS, C.J.), had delivered in *R.* v. *Lockett* (143). It shows clearly that LORD READING, C.J., considered that a discretion could be used to disallow a second indictment just as well as to separate the charges in one indictment. There is a dictum which I consider to be to the same effect in *R.* v. *Miles* (144). LORD ALVERSTONE, C.J., while saying that there was no rule of law that prevented the appellant being tried for a different offence on the same set of facts, said:

> " The judge has a discretion in such a matter, and if, when a man has been acquitted, he considers the acquittal should make an end of the whole case, he can express his opinion."

This dictum is said to be ambiguous. I cannot think that it means no more than that a judge has a discretion to express an opinion which can be ignored. Finally, under this head I refer to the order of ROSKILL, J., in the present case that the second indictment was to remain on the file, not to be proceeded with without the leave of the court. This is a common form of order that is constantly being made. It is meaningless except on the hypothesis that the court has power to order an indictment not to be proceeded with.

I turn now to my second head. The doctrine of autrefois protects an accused in circumstances in which he has actually been in peril. It cannot, naturally enough, protect him in circumstances in which he could have been put in peril but was not. Yet even the simplest set of facts almost invariably gives rise to more than one offence. In my opinion, if the Crown were to be allowed to prosecute as many times as it wanted to do on the same facts, so long as for each prosecution it could find a different offence in law, there would be a grave danger of abuse and of injustice to defendants. The Crown might, for example, begin with a minor accusation, so as to have a trial run and test the strength of the defence:

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(138) [1939] 1 All E.R. 753 at p. 759. (139) [1918] 1 K.B. 416
(140) Viz., in *R.* v. *Large*, [1939] 1 All E.R. 753.
(141) Viz., in *R.* v. *Jones*, [1918] 1 K.B. 416. (142) [1914] 2 K.B. at p. 575.
(143) [1914] 2 K.B. at p. 731. (144) (1909), 3 Cr. App. Rep. at p. 15.

or, as a way of getting round the impotence of the Court of Criminal Appeal to order a new trial (145) when, as in this case, it quashes a conviction, the Crown might keep a count up its sleeve; or a private prosecutor might seek to harass a defendant by multiplicity of process in different courts.

There is another factor to be considered, and that is the courts' duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should whenever practicable, be tried by the same tribunal and at the same time. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may be accounted for by differences in the evidence. No system of justice can guarantee that every judgment is right, but it can and should do its best to secure that there are not conflicting judgments in the same matter. Suppose that in the present case the appellant had first been acquitted of robbery and then convicted of murder. Inevitably doubts would be felt about the soundness of the conviction. That is why every system of justice is bound to insist on the finality of a judgment arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to re-open again and again what is in effect the same matter. The appellant presses this point so hard as to submit that inconsistent verdicts in two trials ought to be dealt with in the same way by the Court of Criminal Appeal as it deals with inconsistent verdicts in the same trial; and that on that ground the court ought in this case to have quashed the second conviction for robbery. I cannot accept that. As my noble and learned friend, LORD PEARCE, observed in the course of the argument, the ground for quashing inconsistent verdicts in the same trial is not that there is no room for different conclusions on the same facts, but because, if the same body of men reach inconsistent conclusions on the same evidence, there is good ground for thinking that they were subject to confusion of thought affecting their judgment as a whole. I cannot agree, therefore, that inconsistent verdicts in two trials will necessarily produce a miscarriage of justice within the meaning of s. 4 of the Criminal Appeal Act, 1907; but I accept that it is something which in the interests of justice it is very desirable to avoid.

The Solicitor-General does not dispute that if the prosecution were in fact to behave in all the ways in which according to his argument they could legally behave, there would be abuses which ought to be corrected. In his submission the danger of abuse is a matter for the Crown; the Crown itself may be trusted not to abuse its powers and if a private prosecutor is abusing his, the Attorney-General can interfere by means of a nolle prosequi. The fact that the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. 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.

Yet if this matter is governed by the decision of the Divisional Court in *R.* v. *Chairman, County of London Quarter Sessions, Ex p. Downes* (146), as literally interpreted by the Solicitor-General in his argument, this would be the inevitable result. What was decided in that case was that the court had no power to quash

(145) The Criminal Appeal Bill (Bill No. 27), which is at present before Parliament, will empower the Court of Criminal Appeal to order a new trial in certain circumstances.
(146) [1953] 2 All E.R. 750; [1954] 1 Q.B. 1.

an indictment because it was anticipated that the evidence would not support the charges. In the course of his judgment LORD GODDARD, C.J., said (147) that once an indictment was before the court it must be tried except in four cases, namely, if it was defective, if matter in bar was pleaded, if a nolle prosequi was entered and if the court had no jurisdiction. My lords, this statement describes in general terms, and quite sufficiently for the purposes of the point which the Lord Chief Justice was considering, the usual circumstances in which the court will not proceed on an indictment. I think that it is wrong to divorce a statement of this sort from the facts of the case and to treat it as if it were a comprehensive statement of the law for all purposes. On the same page of his judgment LORD GODDARD, C.J. (148), refers to the order that a second indictment is not to be prosecuted without leave as " quite common practice ". This case falls far short of an authority for the view that a vexatious use of process by the prosecution (which the court was not considering) can be dealt with only by means of a nolle prosequi. If, however, the statement is treated as a comprehensive statement of the law for all purposes, I cannot see how otherwise even a flagrant abuse of process could be dealt with. I do not really understand the argument that maintains that, while the statement must be treated as comprehensive, if there is a gross abuse of process the court can in some way or another protect itself against it. The only way in which the court could act in such circumstances would be by refusing to allow the indictment to go to trial; and that must mean that there is a fifth ground to be added to the four given by LORD GODDARD, C.J.

I pass now to consider the position in civil suits. The same fundamental doctrines, although they are often expressed differently, govern the rules of pleading and procedure in civil and criminal cases. In *Castro* v. *R.* (149), LORD BLACKBURN said:

> " I must say at once I totally disagree with what has been repeatedly asserted by both the learned counsel at the Bar—that the pleadings at common law in a criminal case and a civil case were in the slightest degree different. I am speaking, of course, of the time before the Judicature Acts were passed, which swept them all away. Many enactments had from time to time been passed, relieving the strictness of pleadings in civil cases, which did not relieve them in criminal cases; but the rules of pleading at common law were exactly the same in each case."

Where, therefore, four years later in *Metropolitan Bank, Ltd.* v. *Pooley* (150), LORD BLACKBURN said (the passage is quoted in full in the opinion of my noble and learned friend, LORD PEARCE) that from early times the court had inherently in its power the right to see that its process was not abused by a proceedings without reasonable grounds so as to be vexatious and harassing, there can be no doubt that he would have considered his words as applicable to criminal as to civil proceedings. It is therefore very relevant to see how in civil cases the power has been used in matters that are akin to res judicata.

The doctrine of res judicata occupies the same place in the civil law as the doctrine of autrefois does in the criminal. Autrefois applies to offences that are charged and not to those that could have been charged. Res judicata, also, if strictly confined, applies only to issues that are raised and not to those that could have been raised. From early times it was recognised that some protection must be given to defendants against multiplicity of actions in respect of issues that could have been raised and that were not. At first in the civil law (and I shall note later a similar tendency in the criminal law) it was done by trying to extend the doctrine of res judicata. The classic judgment on this point is by WIGRAM, V.-C., in *Henderson* v. *Henderson* (151). He said (152):

(147) [1953] 2 All E.R. at p. 751; [1954] 1 Q.B. at p. 6.
(148) [1953] 2 All E.R. at p. 752; [1954] 1 Q.B. at p. 6.
(149) [1881-85] All E.R. Rep. at p. 436; 6 App. Cas. at p. 243.
(150) [1881-85] All E.R. Rep. 949 at p. 954; 10 App. Cas. 210 at p. 220.
(151) (1843), 3 Hare, 100.
(152) (1843), 3 Hare at p. 114.

ANNEX 2

Bell v. D.P.P of Jamaica(1985)2 All Er at PP. 585-593 PC(Jamaica), the whole.

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ANNEX 2

'I would therefore myself hold that equity has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties. What have sometimes been regarded as fetters to the jurisdiction are, in my view, more properly to be seen as considerations which the court will weigh in deciding how to exercise an unfettered jurisdiction . . .'

If that represents the law, no doubt counsel for Ladup is home. Lord Wilberforce, however, who delivered the leading speech in that case, took a narrower view, and it was with his speech that Viscount Dilhorne, Lord Pearson and Lord Kilbrandon agreed. It is therefore, I think, in Lord Wilberforce's speech that one must look for guidance (see [1973] 1 All ER 90 at 100–103, [1973] AC 691 at 722–725). I refrain from reading it. For present purposes, the crucial points boil down, I think, to this, that there is not and never has been any fetter on the jurisdiction of courts of equity to relieve against forfeiture where the object of the insertion of the right to forfeit is essentially to secure the payment of money, as in the case of a right to forfeit a lease for non-payment of rent (see [1973] 1 All ER 90 at 100, [1973] AC 691 at 722). So far, from counsel for Ladup's point of view, so good, but, as counsel for Williams & Glyn's pointed out, Lord Wilberforce did not deal (because he did not need to) with the question in whose favour the equitable jurisdiction might be exercised. That question, at all events in the particular way in which it arises in the present case, remains free from authority. I am left with these rival submissions on it.

Counsel for Ladup, starting with the unchallengeable propositions that a right to forfeit a lease for non-payment of rent is regarded by equity simply as security for payment of the rent and that relief against forfeiture is granted in equity on the footing that in normal circumstances it would be unconscionable for a landlord who has received his rent in full, with any appropriate interest and costs, to insist (in the absence of any outstanding breach of any other covenant in the lease) on taking advantage of the right to forfeit, submits that that is so whoever the person may be to whose detriment the forfeiture would operate, even be he a mere equitable chargee.

Counsel for Williams & Glyn's, for her part, submits that relief against forfeiture imports that someone should remain in, or assume, possession of the demised property in right of the lease, who will be, in consequence, under a continuing liability to the landlord for the rent and for compliance with the other covenants in the lease, and that that someone cannot be a person such as an equitable chargee who is not entitled to possession.

I feel the force of the submission of counsel for Williams & Glyn's, but it seems to me that counsel for Ladup's submission has greater force. It may be that because of difficulties of the kind suggested by counsel for Williams & Glyn's, there will be cases where the court will be unable to exercise its discretion to grant relief to an equitable chargee where it would have been able to grant relief to an applicant with a right to possession. I do not think, however, that such possible difficulties constitute a compelling reason for holding that the court has no jurisdiction at all to entertain an application for relief made by an equitable chargee. It seems to me that the fact that the court has power, at the suit of an equitable chargee, to order the sale of the property subject to his charge, coupled with the fact that, in the case of land, it has the powers conferred by s 90 of the Law of Property Act 1925, should enable the difficulties in question to be overcome in most or at least many cases. At all events, I am certainly not persuaded that it is plain and obvious that as a matter of law this court has no jurisdiction to entertain Ladup's application. I therefore propose to dismiss the motion to strike it out.

Motion dismissed.

Solicitors: *Lee Goldsmith* (for Ladup); *Stephenson Harwood* (for Williams & Glyn's).

Vivian Horvath Barrister.

(1985) 2 All ER 585 PC (JAM) pp. 585–59

Bell v Director of Public Prosecutions of Jamaica and another

PRIVY COUNCIL

LORD KEITH OF KINKEL, LORD ELWYN-JONES, LORD EDMUND-DAVIES, LORD ROSKILL AND LORD TEMPLEMAN

13, 14 MARCH, 30 APRIL 1985

Jamaica – Constitutional law – Fundamental rights and freedoms – Right to 'fair hearing within a reasonable time' – Reasonable time – Delay – Factors to be considered in determining whether delay unreasonable – Accused ordered to be retried in March 1979 – Accused discharged in November 1981 – Accused rearrested in February 1982 and new trial set for May 1982 – Whether unreasonable delay in bringing accused to trial – Whether accused required to show prejudice – Jamaica (Constitution) Order in Council 1962, Sch 2, s 20(1).

The appellant was arrested in May 1977 and convicted on 20 October 1977 in the Gun Court in Jamaica on a number of serious firearms offences, for which he was sentenced to, inter alia, life imprisonment. The appellant appealed against his convictions to the Court of Appeal of Jamaica and on 7 March 1979 that court quashed his convictions and ordered a retrial. On 12 March 1979 the registrar of the Court of Appeal sent written notice to the registrar of the Gun Court and to the Director of Public Prosecutions that the appellant's appeal had been allowed but that notice was not received by the Gun Court until 19 December 1979. Before a retrial could take place original statements of witnesses were required to be served on the appellant but the investigating officer was not available and the statements could not be traced. The case was mentioned on three occasions in early 1980, and on 21 March 1980, when the case was again mentioned, the appellant was granted bail. Thereafter, more adjournments were granted by the Gun Court until finally on 10 November 1981 the Crown offered no evidence against the appellant, the witnesses not being available, and the appellant was discharged. On 12 February 1982 the appellant was rearrested and, despite objections by his attorney, was ordered to be retried on 11 May 1982. The appellant applied to the Supreme Court of Jamaica for a declaration that his right under s 20(1)[a] of the Constitution of Jamaica to 'a fair hearing within a reasonable time' had been infringed. The Supreme Court dismissed his application and the Court of Appeal of Jamaica affirmed that decision. The appellant appealed to the Privy Council. The Crown contended that the appellant's rights had not been infringed because (i) the appellant could obtain redress by waiting until his retrial and then submitting that the proceedings should be dismissed on the grounds of abuse of process, and (ii) the Constitution of Jamaica conferred no rights on an individual which were not enjoyed before the Constitution came into force and therefore could not confer a right to a speedy trial when there was no such right at common law.

Held – (1) Regardless of the position at common law, the express words of s 20(1) of the Constitution of Jamaica plainly sufficed to confer on an accused the right to a fair hearing 'within a reasonable time'. Furthermore, the accused did not have to show any specific prejudice before being entitled to have charges against him dismissed because of unreasonable delay in bringing him to trial. In determining whether the accused had been deprived of a fair trial by reason of unreasonable delay factors which were relevant were the length of the delay, the reasons given by the prosecution to justify the delay, the efforts made by the accused to assert his rights and the prejudice to the accused. The assessment of those factors would necessarily vary from jurisdiction to jurisdiction and case to case. In particular, the prevailing system of legal administration and economic,

a Section 20(1) is set out at p 587 *b*, post

social and cultural conditions in Jamaica had to be taken into account (see p 587 *j*, p 588 *h j*, p 589 *g* to *j*, p 590 *c d* and p 591 *h* to p 592 *a*, post); *Barker v Wingo* (1972) 407 US 514 adopted.

(2) On the facts, the operative period of delay began on 7 March 1979 when the Court of Appeal ordered a retrial. Although the delay thereafter of 32 months in the Gun Court would not have amounted to an unreasonable delay in a normal trial, given the conditions prevailing in Jamaica, it was unreasonable in the case of the appellant's retrial and it infringed his right to a fair hearing within a reasonable time. It followed that the appellant was entitled to a declaration to that effect and that his appeal would be allowed (see p 590 *h j*, p 591 *f* to *h* and p 592 *d e* and *j* to p 593 *c* and *f* to *h*, post).

Per curiam. At common law, courts have an inherent jurisdiction to prevent a trial which would be oppressive because of unreasonable delay, and can do so by insisting on setting a date for trial and dismissing the charge for want of prosecution if the prosecution does not proceed and also by treating any renewal of the charge after the lapse of a reasonable time as an abuse of process (see p 589 *j*, post); *Connelly v DPP* [1964] 2 All ER 401, *DPP v Nasralla* [1967] 2 All ER 161, *de Freitas v Benny* [1976] AC 239, *Maharaj v A-G of Trinidad and Tobago (No 2)* [1978] 2 All ER 670 and *Abbott v A-G of Trinidad and Tobago* [1979] 1 WLR 1342 considered.

Notes

For the Constitution of Jamaica, see 6 Halsbury's Laws (4th edn) paras 970–971.

Cases referred to in judgment

Abbott v A-G of Trinidad and Tobago [1979] 1 WLR 1342, PC.
Barker v Wingo (1972) 407 US 514, US SC.
Connelly v DPP [1964] 2 All ER 401, [1964] AC 1254, [1964] 2 WLR 1145, HL.
de Freitas v Benny [1976] AC 239, [1975] 3 WLR 388, PC.
DPP v Nasralla [1967] 2 All ER 161, [1967] 2 AC 238, [1967] 3 WLR 13, PC.
Maharaj v A-G of Trinidad and Tobago (No 2) [1978] 2 All ER 670, [1979] AC 385, [1978] 2 WLR 902, PC.
R v Cameron [1982] 6 WWR 270, Alta QB.

Appeal

Herbert Bell appealed by special leave to appeal as a poor person granted by the Judicial Committee of the Privy Council on 11 April 1984 against the decision of the Court of Appeal of Jamaica (Zacca P, Carney and Ross JJA) on 19 May 1983 dismissing the appellant's appeal against the judgment of the Full Court of the Supreme Court of Judicature, Jamaica (Morgan, Bingham and Wolfe JJ) dated 3 June 1982 dismissing a motion filed by the appellant under s 25(1) of the Constitution of Jamaica (see the Jamaica (Constitution) Order in Council 1962, Sch 2) seeking, inter alia, a declaration that his right under s 20 of the Constitution to a fair trial within a reasonable time had been infringed. The respondents to the appeal were the Director of Public Prosecutions of Jamaica and the Attorney General of Jamaica. The facts are set out in the judgment of the Board.

Eugene Cotran and *John Otieno* for the appellant.
The Director of Public Prosecutions of Jamaica (Ian X Forte QC), *The Deputy Director of Public Prosecutions of Jamaica (F Algernon Smith)* with him, in his own behalf.
The Solicitor General of Jamaica (Kenneth Rattray QC) and *The Senior Assistant Attorney General (Ranse Langrin)* for the second respondent.

30 April. The following judgment of the Board was delivered.

LORD TEMPLEMAN. The appellant claims relief under the Constitution of Jamaica, asserting a breach of his fundamental rights to a fair trial within a reasonable time for an alleged criminal offence.

Section 13 of the Constitution which came into force immediately before 6 August 1962 by virtue of the Jamaica (Constitution) Order in Council 1962, SI 1962/1550, to which the Constitution is appended as a Schedule provides that 'every person in Jamaica is entitled to the fundamental rights and freedoms of the individual', including 'the protection of the law' but 'subject to respect for the rights and freedoms of others and for the public interest'.

Section 20 sets out the provisions which by s 13 are afforded to secure the protection of law and provides, inter alia, that—

> '(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law . . .'

As a result of an incident on 17 April 1977 the appellant was arrested on 18 May 1977 and convicted on 20 October 1977 in the Gun Court of illegal possession of a firearm and ammuniton, robbery with aggravation, shooting with intent, burglary and wounding with intent. The Gun Court was established by the Gun Court Act 1974 to try firearms offences. The appellant was sentenced to life imprisonment and to three concurrent sentences of seven, five and ten years for the various offences of which he had been convicted.

On 7 March 1979 the Court of Appeal of Jamaica quashed the convictions and by a majority ordered a retrial. On 12 March 1979 the Registrar of the Court of Appeal sent written notice to the Registrar of the Gun Court and to the Director of Public Prosecutions that the appellant's appeal had been allowed and a retrial ordered. That notice was not received by the Gun Court until 19 December 1979. Before a retrial could take place, original statements of witnesses were required to be served on the appellant but the investigating officer was not available and the statements were not traced. The case was mentioned in the Gun Court on 28 January, 8 and 15 February 1980. On 21 March 1980, when the case was again mentioned, bail was granted to the appellant. On some of the appearances of the appellant before the Gun Court he was represented by counsel. Thereafter there were more adjournments by the Gun Court until finally on 10 November 1981 the Crown offered no evidence, stating that the witnesses were not available, and the appellant was discharged. On 12 February 1982 the appellant was rearrested. Despite the objections of the appellant's attorney, the appellant was ordered to be retried on 11 May 1982.

By s 25(1) of the Constitution, if any person alleges a contravention of his fundamental rights, then 'without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress'. By s 25(2) the Supreme Court shall have original jurisdiction to hear and determine any application—

> 'and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of,'

any of the fundamental rights to which the person concerned is entitled, but it is provided—

> 'that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law'.

By s 25(3): 'Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.'

It was argued on behalf of the respondents that the appellant was able to obtain redress by waiting until his retrial, ordered for 11 May 1982, and then submitting to the Gun Court at the commencement of the retrial that the proceedings should be dismissed on the grounds that in the events which had happened a retrial would be an abuse of the process of the court. Their Lordships cannot accept this submission. If the constitutional rights of the appellant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time.

By a notice of motion dated 5 May 1982 the appellant applied to the Supreme Court for a declaration in the following terms:

> 'That Section 20(1) of the Jamaica Constitution Order in Council 1962 which affords the applicant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.'

After a three-day hearing the Full Court Division of the Supreme Court (Morgan, Bingham and Wolfe JJ) on 3 June 1982 dismissed the appellant's application for redress under the Constitution. The appellant's appeal against the decision of the Full Court was dismissed by the Court of Appeal after a three-day hearing on 19 May 1983. The appellant appeals to the Board with special leave granted by Her Majesty in Council on 11 April 1984. In the mean time the retrial of the appellant has been adjourned and the appellant has remained at liberty on bail.

Counsel for the second respondent now submits that the application to the Supreme Court should have been made by writ and not by notice of motion. Without entering into a consideration of the rules of procedure which apply in Jamaica and are best determined by the courts of Jamaica, their Lordships reject this submission. The appellant fairly raised before the appropriate court his complaint that his fundamental right guaranteed by the Constitution had been infringed.

The respondents next submitted that the Constitution of Jamaica conferred no rights on the individual which were not enjoyed immediately before the Constitution came into force immediately before 6 August 1962 and that there was no right at common law to a speedy trial. For this submission reliance was placed on authority.

DPP v Nasralla [1967] 2 All ER 161, [1967] 2 AC 238 concerned s 20(8) of the Constitution of Jamaica, whereby—

> 'No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence . . .'

The Judicial Committee decided that s 20(8) was intended to embody the common law principles and rules of autrefois acquit. Lord Devlin, delivering the advice of the Board, stated that Ch 3 of the Constitution dealing with fundamental rights and freedoms—

> 'proceeds on the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions. The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed.'

(See [1967] 2 All ER 161 at 165, [1967] 2 AC 239 at 247.)

In *Nasralla*'s case the Board was dealing with the right which had long been recognised by the common law and to which well-recognised principles were applied. Those principles remained in force when the right was codified by s 20(8). In the present case, however, if the common law did not provide for 'a fair hearing within a reasonable time by an independent and impartial court established by law' it is quite plain that the express words of s 20(1) of the Constitution sufficed to confer such a right.

In *de Freitas v Benny* [1976] AC 239 the Board considered the Constitution of Trinidad and Tobago which, as is the case with the Constitution of Jamaica, preserves the validity of laws in force at the commencement of the Constitution. The appellant claimed that a sentence of death pronounced on him after the Constitution came into effect was an 'imposition of cruel and unusual punishment' prohibited by the Constitution and infringed his right under the Constitution not to be deprived of life except 'by due process of law'. The Board held that the executive act of carrying out a sentence of death

pronounced by a court of law was authorised by laws that were in force at the commencement of the Constitution. This decision does not in the view of the Board assist the respondents in the present case where the right to a fair hearing within a reasonable time is expressly conferred by s 20.

In *Maharaj v A-G of Trinidad and Tobago (No 2)* [1978] 2 All ER 670, [1979] AC 385 the Judicial Committee allowed an appeal against a committal for contempt. The Board held that the Constitution had not abolished the common law right of an accused, in accordance with the principles of natural justice, to be informed of the nature of the contempt of which he was accused so that he could have an opportunity to explain or excuse his conduct. Lord Diplock, delivering the advice of the Board, referred to *DPP v Nasralla* and *de Freitas v Benny* and said that in order to understand the legal nature of the fundamental rights and freedoms described in the Constitution—

> 'in broad terms and in language more familiar to politics than to legal draftsmanship, it is necessary to examine the extent to which, in his exercise and enjoyment of rights and freedoms capable of falling within the broad descriptions in the section, the individual was entitled to protection or non-interference under the law as it existed immediately before the Constitution came into effect'.

(See [1978] 2 All ER 670 at 676, [1979] AC 385 at 395.)

Since before the coming into force of the Constitution an individual accused of contempt had a right to a fair trial carried out in accordance with the principles of natural justice, the right to a fair trial guaranteed by the Constitution also preserved the principles of natural justice. The common law protection of the individual was not intended to be whittled away by the Constitution. This decision does not avail the respondents in the present case where they are attempting to whittle away the rights of the appellant under the Constitution by reference to the common law in force before the Constitution.

In *Abbott v A-G of Trinidad and Tobago* [1979] 1 WLR 1342 the Judicial Committee held that delay in the execution of a sentence of death was not contrary to the law existing before the Constitution came into effect and did not therefore amount to an infringement of the appellant's right to life under the Constitution. Lord Diplock, delivering the advice of the Board, reserved the possibility that delay might occur which was so prolonged as to arouse a reasonable belief that the death sentence must have been commuted to a sentence of life imprisonment. He added (at 1348):

> 'In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not "by due process of law" . . .'

In the present case, in determining whether the appellant was afforded a fair hearing within a reasonable time by an independent and impartial court established by law, the practice and procedure of the courts established by law prior to the Constitution must be respected. But by s 20(1) the appellant is entitled to a fair hearing 'within a reasonable time', albeit that, in considering whether a reasonable time has elapsed, consideration must be given to the past and current problems which affect the administration of justice in Jamaica.

Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on setting a date for trial and then, if necessary, dismissing the charges for want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court. In *Connelly v DPP* [1964] 2 All ER 401 at 438, [1964] AC 1254 at 1347 Lord Devlin rejected the argument that an English court had no power to stay a second indictment if it considered that a second trial would be oppressive. In his opinion—

'the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides . . . First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law . . . nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.'

Lord Devlin was there speaking of the power of the court to stay a second indictment if satisfied that its subject matter ought to have been included in the first. But similar reasoning applies to the power of the court to prevent an oppressive trial after delay. Their Lordships agree with the respondents that the three elements of s 20, namely a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial. But the court may nevertheless be satisfied that the rights of the accused provided by s 20(1) have been infringed although he is unable to point to any specific prejudice.

The question then is whether in the circumstances of the present case the appellant's right to 'a fair hearing within a reasonable time' has been infringed.

Some guidance is provided by the judgments of the Supreme Court of the United States in *Barker v Wingo* (1972) 407 US 514. The sixth amendment to the Constitution of the United States provides:

'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .'

Powell J pointed out (at 521–522):

'. . . the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate . . . The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that the defendant who may be guilty of a serious crime will go free, without having been tried.'

Powell J then identified four factors which in his view the court should assess in determining whether a particular defendant has been deprived of his right.

(1) Length of delay (at 530–531):

'Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.'

In the present case it cannot be denied that the length of time which has elapsed since the appellant was arrested is at any rate presumptively prejudicial.

(2) The reasons given by the prosecution to justify the delay (at 531):

'A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.'

In the present case part of the delay after arrest was due to overcrowded courts, part to negligence by the authorities, and part to the unavailability of witnesses.

(3) The responsibility of the accused for asserting his rights (at 531):

'Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.'

Their Lordships do not consider this factor can have any weight in the present case. The appellant and his counsel no doubt took the view that strenuous opposition to an application sought by the prosecution from time to time for an adjournment or an appeal from an order granting an adjournment would be a waste of time. The appellant's complaint is that he was discharged and told to go free and was subsequently in 1982 rearrested for an offence for which he had first been arrested in 1977. The appellant raised that complaint as soon as he was rearrested.

(4) Prejudice to the accused (at 532):

'Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last . . . If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory however, is not always reflected in the record because what has been forgotten can rarely be shown.'

The appellant did not allege the death or disappearance of a witness. Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory, which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the appellant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted.

The four factors considered relevant in *Barker v Wingo* to the constitutional right to a speedy trial were reproduced and adopted by McDonald J sitting in the Alberta Queen's Bench Court in *R v Cameron* [1982] 6 WWR 270. In that case the applicant alleged infringement of the right granted by s 11 of the Canadian Charter of Rights and Freedoms in Pt I of the Constitution Act 1982 to 'Any person charged with an offence . . . (*b*) to be tried within a reasonable time . . .'

Their Lordships acknowledge the relevance and importance of the four factors lucidly expanded and comprehensively discussed in *Barker v Wingo*. Their Lordships also acknowledge the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case.

Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by ss 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time

against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose. Moreover, an injudicious attempt to expand an existing system of courts, judges and practitioners could lead to deterioration in the quality of the justice administered and to the conviction of the innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitution and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls on the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case the Full Court stated that a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses. The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in present circumstances in Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognise the need to take all reasonable steps to reduce the period of delay wherever possible.

Thus, their Lordships accept the submission of the respondents that in general the courts of Jamaica are best equipped to decide whether in any particular case delay from whatever cause contravenes the fundamental right granted by the Constitution of Jamaica. The respondents explained, and their Lordships accept, that a particular current problem arises from the difficulty in securing the attendance of witnesses. Witnesses absent themselves through ignorance or fear, sometimes influenced by intimidation, crude or subtle. The courts of Jamaica must constantly balance the claim of the accused to be tried, notwithstanding the absence of witnesses, against the possibility, unproved and unprovable in many cases, that the absence of a necessary witness has been procured or encouraged by someone acting in the interests of the accused. The courts seek to prevent exploitation of the rights conferred by the Constitution and to weigh the rights of the accused to be tried against the public interest in ensuring that the trial should only take place when the guilt or innocence of the accused can fairly be established by all the relevant evidence. The Board will therefore be reluctant to disagree with the considered view of the Court of Appeal of Jamaica that the right of an accused to a fair hearing within a reasonable time has not been infringed. But since no court is infallible, there remain the power and the duty of the Board to correct any error of principle and to reverse a decision which, in the opinion of the Board, could only have been reached by a reliance on some irrelevant consideration or by ignoring some decisive consideration.

In the present case the Full Court considered that the operative period of delay which must be examined for reasonableness is the period of 32 months beginning with 7 March 1979 when the accused was ordered to be retried. The Court of Appeal considered that the operative period of delay was 27 months beginning with 19 December 1979 when notice of the order for a retrial reached the Gun Court. Their Lordships have no doubt that the operative period of delay began on 7 March 1979 when the Court of Appeal ordered a retrial. From that date it was the duty of those charged with the administration of justice to ensure that the order for a retrial was obeyed without avoidable delay. For the reasons already advanced, their Lordships would in a normal case accept the view of the courts of Jamaica that a delay of 32 months or thereabouts did not infringe the constitutional rights of an accused.

But their Lordships consider that in the present case the courts fell into error when they compared the delay which occurred after the order for a retrial with the average delay which occurs between arrest and trial. The appellant was arrested in May 1977. His trial was defective. The Court of Appeal which heard his appeal against conviction at the first trial could have upheld the conviction if they had been satisfied, notwithstanding the defective conduct of the trial, there had been no miscarriage of justice involved in the conviction. The Court of Appeal quashed the conviction in March 1979 and ordered a retrial. The members of the Court of Appeal must therefore have considered that the accused might be acquitted. The accused having been arrested, detained and submitted to a defective trial and conviction had, through no fault of his own, endured two wasted years and must for the second time prepare to undergo a trial. In these circumstances there was an urgency about the retrial which did not apply to the first trial. A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for retrial and the retrial itself. Far from recognising any urgency, the Full Court excused delay which occurred after March 1979 on the ground that it was partly due, in their words, to 'bureaucratic bungling'.

Moreover, in the present proceedings the Full Court and the Court of Appeal not only overlooked the significance of the fact that the appellant was complaining of delay in the context of a retrial, but also overlooked the significance of the fact that on 10 November 1981 the appellant had been discharged. When the magistrate discharged the appellant on 10 November 1981 the magistrate must have been satisfied and the prosecution does not appear to have disputed that, whatever the reasons for the unavailability of the witnesses at that time, any further delay would be unfair to the appellant and that he was entitled to be discharged in the light of all that had happened to him since his arrest in 1977. If that had not been the position, the prosecution would have sought and the magistrate might have granted a further adjournment. If fairness required the appellant to be discharged on 10 November 1981 fairness required that he should not be rearrested in February 1982. Although the provisions of the Constitution may not have been present to the mind of the magistrate, his discharge of the appellant can only be construed in the circumstances of the present case as recognition of the fact that the appellant had not been afforded a fair hearing within a reasonable time.

Provided that the courts of Jamaica recognised that a retrial required urgency, the Board would not normally interfere with a finding of those courts that a particular period of delay after an order for a retrial did not contravene the constitutional right of an accused to trial within a reasonable time. But in the present case their Lordships conclude that the decisions of the courts of Jamaica were flawed by failure to recognise the significance of the order for a retrial and the significance of the discharge by the magistrate. In these circumstances their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the appellant is entitled to a declaration that s 20(1) of the Constitution which afforded the appellant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.

Their Lordships were reminded by counsel, the Director of Public Prosecutions and the Solicitor General, of the traditional and invariable adherence by the authorities of Jamaica to the spirit and letter of the advice tendered by the Board. In these circumstances it would not be appropriate to accede to the request by the appellant that the Board should order that the appellant be discharged and not tried again on the original or any other indictment based on the same facts.

Appeal allowed.

Solicitors: *Philip Conway Thomas & Co* (for the appellant); *Charles Russell & Co* (for the respondents).

Mary Rose Plummer Barrister.

ANNEX 3

Bennett v. Horseferry Rd. M.C.(1993) 3 All ER pp. 138-169, 149-151, 160-161, 162-163 HL

Bennett v Horseferry Road Magistrates' Court and another

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.

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

Chu Piu-wing v A-G [1984] HKLR 411, HK CA.

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

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.

Frisbie v Collins (1952) 342 US 519, US SC.

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

Ker v Illinois (1886) 119 US 436, US SC.

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.

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

ANNEXES 4-14

4. P. v. Kovacevic:(TC, ICTY) "Decision on Prosecutor's Request to file an Amended Indictment;' 5th march 1998

5.P. v. Kovacevic: (AC, ICTY) "Decision stating Reasons for Appeals Chambers Order of 29 May 1998;" 2 July 1998

6. P. v. Knojelac: (ICTY)"Decision on Prosecutor's Response to Decision of 24 February 1999;" 20 May 1999

7. Barayagwiza v. P.: (AC, ICTR) "Decision", 3 November 1999; pp.1,2,23-25,29-32; or paras. 73-86, 100-113

8. P. v. Niyitegeka:(ICTR) "Decision on Prosecutor's Request for Leave to file an Amended Indictment," 21 June 2000

9.P. v. Kvocka et al: (TC, ICTY), "Decision on Prosecution Request for leave to File a Consolidated Indictment and to Correct Confidential Schedules;" 13 October 2000

10. P. v. Mrksic et al: (TC, ICTY) "Decision on Form of Consolidated Amended Indictment on Prosecution Application to Amend;" 23 January 2004

11. P. v. Simba: (TC, ICTR) "Decision on Defence Motion Alleging Defects in the Form of the Indictment;" 26 January 2004

12. P. v. Limaj et al : (TC) "Decision on Prosecution's Motion to Amend the Amended Indictment Indictment;" 12 February 2004

13. P. v. Ademi et al: (TC, ICTY) "Decision on Motion for Joinder of Accused;" 30 July 2004

14. P. v. Krajisnik et al.: (TC, ICTY) "Decision on Motion for Joinder"; 23 February 2001.

11344

IN THE TRIAL CHAMBER

Before: Judge Richard George May, Presiding

Judge Lal Chand Vohrah

Judge Florence Ndepele Mwachande Mumba

ANNEX 4

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.

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;

(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

> 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:

(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.

11349

Richard
May

Presiding
Judge

Dated this fifth day of March 1998

At The Hague

The Netherlands

[Seal
of
the
Tribunal]

11350

UNITED

NATIONS

ANNEX 5

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

11351

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

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

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").

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

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

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.

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

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

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

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

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.

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

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]

11362

IN TRIAL CHAMBER II

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

ANNEX 6

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

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

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)

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

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

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).

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.

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

IN THE APPEALS CHAMBER

ANNEX 7
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

III. APPLICABLE AND AUTHORITATIVE PROVISIONS

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B. The Rules

C. International Covenant on Civil and Political Rights

D. European Convention on Human Rights

E. American Convention on Human Rights

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3. The delay between the transfer of the Appellant and his initial appearance

B. The Abuse of Process Doctrine

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

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

4. The duty of prosecutorial due diligence

C. Conclusions

D. The Remedy

V. DISPOSITION

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

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

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

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

11379

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

ANNEX 8

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

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*,

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.

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

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.

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.

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

preliminary motions would have long been expired.

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)

IN THE TRIAL CHAMBER

11387

Before:
Judge Almiro Rodrigues, Presiding
Judge Fouad Riad
Judge Patricia Wald

ANNEX 9

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
13 October 2000

THE PROSECUTOR

v.

MIROSLAV KVOCKA
MILOJICA KOS
MLADO RADIC
ZORAN ZIGIC
DRAGOLJUB PRCAC

DECISION ON PROSECUTION REQUEST FOR LEAVE TO FILE A CONSOLIDATED INDICTMENT AND TO CORRECT CONFIDENTIAL SCHEDULES

The Office of the Prosecutor:

Ms. Brenda Hollis
Mr. Michael Keegan
Mr. Kapila Waidyaratne

Defence Counsels:

Mr. Krstan Simic for Miroslav Kvocka
Mr. Zarko Nikolic for Milojica Kos
Mr. Toma Fila for Mladjo Radic
Mr. Slobodan Stojanovic for Zoran Zigic
Mr. Jovan Simic for Dragoljub Prcac

TRIAL CHAMBER I 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 International Tribunal"),

NOTING the "Prosecution's request for leave to file a consolidated indictment and to correct confidential schedules" (hereafter the "Request"), filed by the Office of the Prosecutor on 28 August 2000, and the "Defence's Response to the Prosecution's Request for Leave to File a Consolidated

Indictment and to Correct Confidential Schedules" (hereafter the "Response"), filed on 14 September 2000 by the counsel for Miroslav Kvocka;

HAVING HEARD the oral arguments of the parties on 4, 5 and 6 October 2000;

CONSIDERING that the Prosecution seeks leave to consolidate the two indictments for the accused Prcac (IT-95-4) on the one hand, the accused Kvocka, Radic, Kos and Zigic (IT-98-30) on the other, in order to take into account the joinder of the cases against these five accused in a single case (IT-98-30/1), and to correct various typographical errors in the Confidential Schedules submitted with the Amended Indictment, namely:

- Changing the time frame mentioned in the first cell of each group of counts from "24 May - 30 June 1992" to "24 May – 30 August 1992";

- Correcting the first name of the accused Prcac to "Dragoljub" wherever it appears in the Schedules;

CONSIDERING that the defence counsel for the accused Kvocka objects to changing the dates in the Schedules to 30 August 1992 on the grounds that it cannot be considered a typographical error and that correcting the dates at such a late stage of the Prosecution case in chief would be contrary to the principle of a right to a fair and expeditious trial as guaranteed in Article 20 of the Statute; that, relying on the dates specified in the Schedules and in combination with the Prosecution's acknowledgement that, after June 1992, Miroslav Kvocka was no longer Commander or Deputy Commander of the Omarska Camp, it confined the preparation of Mr. Kvocka's defence to the time period ending 30 June 1992;

CONSIDERING that the defence for the accused Zoran Zigic raises similar objections, and emphasises that one specific crime (the murder of Hanki Ramic) was added to the list of specific murders mentioned in the text of the indictment, so that Zoran Zigic could now be charged with "a couple of thousand murders more"[1];

NOTING that the defence for the accused Radic, Kos and Prcac did not oppose the Request;[2]

NOTING Articles 18 and 20 of the Statute of the Tribunal and Rules 50 and 54 of the Rules of Procedure and Evidence;

CONSIDERING that the time frame for the alleged commission of crimes in the text of the indictment itself has always extended to 30 August 1992;

CONSIDERING that, on 12 April 1999, the Trial Chamber seized of the case at that time (Judge May, presiding, Judges Bennouna and Robinson; hereafter, "Trial Chamber III"), in its "Decision on Defence preliminary motions on the form of the indictment", found that "a challenge [regarding defects in relation to the time-period during which the accused is alleged to have been in the Omarska camp and] based on disagreement with the facts as alleged, is not appropriately raised in a preliminary motion on defects in the form of the indictment Sand that dCisputes as to issues of fact are for determination at trial" [3];

CONSIDERING moreover that, in the footnote linked to paragraph (i) of this decision, Trial Chamber III noted: "The period of events now reads 24th May-30th August 1992, as opposed to 26th May-30th August previously."[4];

CONSIDERING that the mention of the 30 June 1992 date in the first block of the tables in the initial Schedules appears in obvious contradiction with the dates mentioned in the tables themselves

in respect of specific victims;

CONSIDERING in particular that, in the tables regarding the persecution and the torture counts against Miroslav Kvocka, there are victims listed for whom the date mentioned is later than 30 June 1992; that, therefore, in this respect, the Defence cannot reasonably claim that it was not aware of the Prosecution's intention to charge the accused Kvocka with crimes committed after 30 June 1992;

CONSIDERING that while the Defence for the accused Kvocka is right in stating that the Prosecution itself mentioned that the accused ceased to be Commander or Deputy Commander in the Omarska camp sometime in June 1992, it does not follow necessarily that the accused could not be liable for any of the crimes committed after the date his official functions in the camp ceased; that, indeed, it belongs to the Prosecution to present evidence, if any, of such crimes, within the terms of the amended indictment;

CONSIDERING that, in the Decision of 8 November 1999, the Chamber dismissed Zoran Zigic's contention that the Prosecution did not provide enough particulars as to the dates when the alleged crimes were committed, on the ground that the Prosecution was "only directed to delete the word "about", and was not directed to provide the exact date and time of the alleged offences", and that the Chamber then specified that Schedule D provides additional particulars "as to the dates of the alleged offences in respect of individual acts against victims"[5];

CONSIDERING that no murder, and more generally, no crime was added in the schedules concerning the accused Zigic and attached to the Request as compared to those attached to the amended indictment and filed on 31 May 1999;[6]

CONSIDERING, generally, that the Prosecutor, in her opening statement, clearly referred to the period running from the 24th of May to the 30th of August 1992[7], using expressions such as "the spring and summer 1992"[8] and argued that "[t]he evidence presented during [the] trial [would] prove that these accused and others under their supervision confined, beat, tortured, sexually assaulted, and murdered many of the Muslim and Croat detainees at the prison camps during the summer of 1992"[9];

CONSIDERING that the Prosecution repeatedly made arguments that the accused "joined" a "criminal enterprise"[10] and could be responsible for crimes occurring after June 1992 pursuant to a theory of "common purpose"[11];

CONSIDERING therefore that the defence counsel for the accused Miroslav Kvocka and Zoran Zigic cannot reasonably claim that they have been misled by the erroneous dates at stake;

FOR THE FOREGOING REASONS,

HEREBY DISMISSES the objections to the consolidated indictment raised by the Defence for the accused Miroslav Kvocka and Zoran Zigic,

AUTHORISES the Prosecutor to file a consolidated indictment, at the same time as the corrected (Annexes A trough E to the Request).

Done in English and French.

Almiro Rodrigues
Presiding Judge

Dated this thirteenth day of October 2000,
At The Hague
The Netherlands.

[Seal of the Tribunal]

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1. Provisional transcripts (herafter « Transcripts ») p. 6371.
2. Transcripts p.6353-6355.
3. "Decision on Defence preliminary motions on the form of the indictment", Case IT-98-30-PT, 12 April 1999, paragraph 40.
4. "Decision on Defence objections to the amended indictment, Case IT-98-30-PT, 8 November 1999, p.5 (our emphasis).
5. Ibid. page 7, what is true for Schedule D being also true for the others.
6. The schedules (Annex D) are identical but for the date in the first cell of the new table, in particular with respect to one victim of murder, Hanki Ramic, whose name appears in the third cell from the bottom of the murder list, on both the old and the new schedule.
7. Prosecution opening statement, 28 February 2000, Transcript p. 603.
8. Transcripts p. 573.
9. Transcripts p. 575.
10. Transcripts p. 573.
11. Transcripts p. 6586-6589.

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

IN TRIAL CHAMBER II

11391

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

ANNEX 10

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

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

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.

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

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]

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

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

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

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

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.

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 sufficiency 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

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

> 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.

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.

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.

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).

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ANNEX II

OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse
Judge Jai Ram Reddy
Judge Sergey Alekseevich Egorov

Registrar: Adama Dieng

Date: 26 January 2004

THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-2001-76-I

DECISION ON DEFENCE MOTION ALLEGING DEFECTS IN THE FORM OF THE INDICTMENT

The Prosecutor
William T. Egbe
Sulaiman Khan
Amina Ibrahim

The Defence
Sadikou Ayo Alou
Francis Dako

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

SITTING as Trial Chamber I, composed of Judge Møse, presiding, Judge Jai Ram Reddy, and Judge Sergey Alekseevich Egorov ("the Chamber");

BEING SEISED of the Defence "Preliminary Motion for Defects in the Form of the Indictment", etc., filed on 31 October 2002;

CONSIDERING the Prosecution "Response" thereto, filed on 18 February 2003; and the Defence Reply thereto filed on 6 June 2003;

HEREBY DECIDES the Motion.

INTRODUCTION

1. The Indictment was confirmed on 8 January 2002, and the Accused pleaded not guilty to all four counts of the Indictment on 18 March 2002. The present motion was filed on 31 October 2002. On 18 February 2003, the Prosecution filed its submissions in opposition to the motion, arguing that the Indictment was not defective. However, on 28 November 2003, the Prosecution filed a motion requesting leave to amend its Indictment, conceding that it was, in part, an effort to respond to Defence requests for greater specificity in pre-trial motions.[1] On 15 January 2004, the Defence filed a response opposing the amendments, partly because its effect was to improperly deprive the Chamber of the opportunity to decide the present motion.

SUBMISSIONS

2. The Defence asserts that all four counts in the Indictment are defective. The acts supporting the first count, genocide, are not sufficiently identified in time or place, rendering the charge impermissibly vague. The second count, complicity in genocide, is said to be defective because the names of some accomplices are redacted, depriving the Accused of the right to be informed of the nature of the charges against him. The third count, extermination as a crime against humanity, is indistinguishable, in law and in fact, from the second count and, therefore, should be treated as merged with the second count. It is also said to be unduly vague. The final count, murder as a crime against humanity, is also vague as it does not identify any victims by name, fails to allege the requisite connection to "widespread and systematic attacks", and fails to allege the requisite discriminatory motive.

3. The Prosecution submitted a variety of arguments in opposition to the motion in its Response, but substantially changed its position when, on 28 November 2003, it filed a motion to amend the Indictment. The amendments to the Indictment are directly relevant to the defects raised by the Defence in its motion. In a separate decision filed today, the Chamber has granted leave to amend the Indictment.

DELIBERATIONS

4. A review of the Indictment, which the Prosecution has today been granted leave to file, shows that the defects raised by the Defence in respect of Counts One, Two and Four are

[1] Prosecutor's Request for Leave to File an Amended Indictment, 28 November 2003, para. 6(i).

significantly remedied. The particulars supporting the count of genocide are more detailed and more extensive than in the Indictment to which the Defence objected. The names of accomplices to the charge of complicity in genocide, previously redacted, have now been disclosed. The names of victims and more specific details as to time of commission have been included in support of the charge of murder. These changes substantially alter the basis of the Defence motion and render it moot in respect of these counts.

5. Count Three, charging the Accused with extermination as a crime against humanity, remains largely untouched by the amendments approved today. Nevertheless, a decision on the Defence motion on Count Three would be improper. The Chamber has no jurisdiction to decide motions on Indictments which have been superceded; nor to decide motions in respect of Indictment which did not exist at the time of filing. Should the Defence wish to maintain its objections, it must file a new preliminary motion directed at the current Indictment.

FOR THE ABOVE REASONS, THE CHAMBER

DECLARES the motion moot.

Arusha, 26 January 2004

Erik Møse	Jai Ram Reddy	Sergey Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

ANNEX 12

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

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1461

UNITED NATIONS

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

Case 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

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[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 *Milošević*, 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. Karemara et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 13 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]

[24] *See Prosecutor v. [illegible]*, Case No. IT-03-66-PT, Decision on Preliminary Motion on the Form of Amended Indictment, 11 February 2004.
[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 seeks to add one count of "Inhumane Acts" under Article 5 of the Statute in order 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 where illegal crimes are charged under both Articles 3 and 5 of the Statute.[31] 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, [illegible]
[29] Reply, para. 15.
[30] Reply, para. 22.
[31] Motion, para. 9.

the Sta[illegible]eal [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 [illegible]umul[illegible] or alternative to the proposed counts 3, 4 and 6.[32] The Prosecu[illegible] that [illegible]cause offences under Articles 3 and 5 of the Statute require differe[illegible] requi[illegible]ements, counts 5 and 6, as amended in the proposed second Amend[illegible]ex A of the Motion), are pleaded cumulatively and in accord[illegible]idence of the Tribunal.[33]

27. As not[illegible]n, the practice of cumulative charging was endorsed by the Appeal[illegible]Tribunal which has set this matter.[34] In the present case, it is not entirel[illegible]ecution did not bring the proposed amendment at an earliest stage, [illegible]e original indictment was amended in March 2003. Indeed, the pu[illegible]amen[illegible]ent is to maintain a consistent charging practice throughout the ind[illegible]alleged crimes are charged under both Articles 3 and 5 of the Statute[illegible]Chamber does not disregard the fact that the Prosecution is entitle[illegible]full extent of the law within certain limits. Having due regard to the [illegible]Trial Chamber is not convinced that the inclusion of a new count [illegible]would cause prejudice to the preparation of the Accused's defenc[illegible]

28. Accor[illegible]er grants leave to amend the Amended Indictment to add a new co[illegible]",

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

29. The P[illegible]le additional investigative work would be required by the inclus[illegible]f murder of Ajet Gashi (proposed paragraph 29).[35] The Defen[illegible]esses no views on these proposed amendments.

30. The Tr[illegible]ied that the proposed new incident is prompted and based on *prima*[illegible]ce does not identify any prejudice from the inclusion of the n[illegible]r existing charges. The Trial Chamber sees no reasons

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

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

31. Accord request to include one incident of murder to the charges under c Amended Indictment is granted.

f) Correc s some clarification of language, in the current Amend

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

33. Accord grants the Prosecution's request to amend the Amended Indictm ed corrections and clarifications.

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

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

GRANTS the Motion

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

DISMISSES the obj ace 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.

ANNEX B

11424

IT-04-78-PT ~~IT-04-76-I~~ ~~IT-01-46-PT~~
D3 - D1 ~~D1103-D1101~~ ~~D1443-D1441~~
03 August 2004 ~~30 July 2004~~ ~~30 July 2004~~

~~1443~~
~~1&2~~
~~1103~~
1
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

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;

IT-04-78-PT ~~IT-01-46-PT~~ ~~IT-04-76-I~~ ~~7444~~ ~~4101~~ 1

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]

11427

IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar:
Mr. Hans Holthuis

ANNEX 14

Decision of:
23 February 2001

PROSECUTOR

v.

MOMCILO KRAJISNIK

PROSECUTOR

v.

BILJANA PLAVSIC

DECISION ON MOTION FOR JOINDER

Office of the Prosecutor:

Ms. Brenda J. Hollis

Counsel for the Accused:

Mr. Goran Neskovic for Momcilo Krajisnik
Ms. Jasminka Jovisevic for Biljana Plavsic

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

BEING SEISED of the "Prosecution's Motion for Joinder of Accused" filed by the Office of the Prosecutor ("Prosecution") in *Prosecutor v. Momcilo Krajisnik*, Case No. IT-00-39 and in *Prosecutor v. Biljana Plavsic*, Case No. IT-00-40, on 23 January 2001, requesting an order for a joint trial of the two accused,

NOTING the confidential "Motion of the Defendant Mr. Momcilo Krajisnik in Opposition to Prosecution's Motion for Joinder of Accused, of 23 January 2001, and for Reservation of Rights", filed on 5 February 2001 and the confidential "Defence's Response to the Prosecution's Motion for Joinder of Accused" filed by the defence for Biljana Plavsic on 12 February 2001,

CONSIDERING that Momcilo Krajisnik and Biljana Plavsic are accused of identical crimes committed in the course of the same transaction within the same time frame and in the same locations,

CONSIDERING that a joint trial would accelerate the trial of one of the accused, Biljana Plavsic, without prejudice to her or to the rights of the other accused, avoid duplication of evidence, minimise hardship caused to witnesses in travelling to the seat of the International Tribunal in order to testify, and is generally in the interests of judicial economy,

CONSIDERING that the Defence has not made out a case of any conflict of interests within the meaning of Rule 82 (B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"),

CONSIDERING therefore that the interests of justice and a fair trial would be best served by a joint trial in this case,

PURSUANT TO Articles 20 and 21, paragraph 4 (c), of the Statute and Rules 48 and 82 of the Rules,

HEREBY ORDERS that the trial of Biljana Plavsic be joined to the trial of Momcilo Krajisnik, and that the Prosecution submit within 14 days of this decision a consolidated indictment on which the joint trial will proceed,

AND FURTHER REQUESTS the Registry to determine and assign to the joined cases a new case number; all documents filed in those joined cases shall bear this new number as from the day of this decision.

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

Richard May
Presiding

Dated twenty-third day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]