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SCSL-2004-14-T
(11214-11230)

SPECIAL COURT OF SIERRA LEONE

The Trial Chamber

Case No. SCSL-04-14-T

Before:	Judge Benjamin Mutanga Itoe, Presiding Judge Judge Bankole Thompson Judge Pierre Boutet
Registrar:	Robin Vincent
Date:	December 17, 2004

PROSECUTOR **Against** **Sam Hinga Norman**
Moinina Fofana
Allieu Kondewa

First Accused Response to "Prosecution's Request for Leave to Amend the Indictment Against Norman"

Office of the Prosecutor
Luc Cote
James C. Johnson
Kevin Tavener

Court AppointedCounsel for Sam Hinga Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall Jr.

Court Appointed Counsel for Moinina Fofana
Michiel Pestman
Arrow J. Bokarie
Victor Koppe

Court Appointed Counsel for Allieu Kondewa
Charles Margai
Yada Williams
Ansu Lansana

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Introduction

1. On the 8th December 2004 the Prosecution filed a request for Leave to Amend the Indictment (the "Request") against Samuel Hinga Norman, meaning of course the consolidated indictment upon which the trial is currently proceeding, pursuant to Rule 50 of the Rules of Procedure and Evidence for the Special Court ("the Rules"). The First Accused submits herewith its response to the Request.

2. The Prosecution requests that the consolidated indictment as against the First Accused be amended to include the additional material as annexed to its application as contained in the current Consolidated Indictment. These amendments include the additions of geographical locations, the extension of time frames, other material factual allegations and substantive elements of the charges. The Prosecution argues that the amendments to the indictment being sought are timely and will not cause unfair prejudice to the accused persons. All this assumes that the consolidated indictment is clearly amendable to amendment within the relevant provisions of the law and the rules.

3. From the perspective of the potential amenability of the consolidated indictment to amendment within the law and the rules, the First Accused submits that the Prosecution has not demonstrated that a sufficient legal and factual basis exists for the proposed amendments. The First Accused also submits that the Prosecution has not sought leave to amend the indictment without undue delay but has waited approximately 22 months since the First Accused was detained to request leave of the Court. Further, the First Accused submits that if leave to amend the indictment is granted to the Prosecution, the First Accused's right to a fair trial will be irreparably prejudiced.

4. Alternatively, the First Accused submits that, in view of the procedural background history of the consolidated indictment and upon a literal interpretation of the concept of amendment and of the relevant rules thereon, the said

consolidated indictment is not apt to be amended in the respects and manner ordered or proposed; and that, as it stands at present, it is in any case unamenable to amendment of any sort whatsoever within and/or in accordance with the relevant provisions of the law and the rules. The First Accused further submits from this perspective that, in view of the aforesaid procedural history and the nature of the current consolidated indictment itself, the appropriate object and target of the amendment needed at this stage of the present trial ought properly instead to be the original individual indictment approved against the First accused alone and upon which he was arraigned and he pleaded not guilty before the current consolidated indictment was sought, granted and adopted as the extant foundational accusatory instrument for the present trial.

5. The ultimate upshot of the foregoing submissions, and the First Accused accordingly so submits, is that (at least as against him) the said consolidated indictment came into being without any basis, foundation or authority in law and also demonstrably by means of sustained violations and or consistent avoidance of the relevant mandatory procedural rules by which alone it could or ought to have come into existence. It is accordingly finally submitted by the First Accused that the said consolidated indictment has been from its very inception (and still remains) invalid, null and void and that his trial thereupon so far is equally null and void and has, by virtue thereof, occasioned him the greatest possible prejudice to his right to a fair trial by having been subjected to criminal prosecution upon an invalid indictment. Such an absolute nullity cannot be amended in any meaningful sense of that concept within the Rules

Submissions

A). **If and Where Consolidated Indictment is deemed potentially Amenable**

6. The defence submits, on the assumption that the consolidated indictment as it stands is potentially amenable to amendment:

(i) That the burden is on the Prosecution to demonstrate sufficient legal and factual grounds for the amendment[1]

(ii) That the decision to grant a request to amend the indictment is discretionary and must be made in light of the overall interests of justice[2] having particular regard to the specific circumstances of the case and the accused's right to an expeditious trial.[3]

(iii) That in deciding whether the Prosecution's request prejudice fundamental rights of the Accused, the Court must establish (a) whether the Prosecutor acted with undue delay in submitting the request and (b) whether the amendments, if approved, will cause undue delay to the trial of the Accused.

The Defence submits that the Prosecution has not met these requirements and as a result the motion to amend the indictment should be refused.

The Prosecution has not demonstrated sufficient legal and factual grounds for the amendment

7. The standard of proof required to be granted leave to amend an indictment requires that the Prosecutor demonstrate that there are sufficient grounds in both law and fact to allow the amendments.[4] The First Accused submits that the Prosecution has not submitted any supporting or other evidence material that assists the court in determining the merits of the Motion. The First Accused further submits that the Prosecution cannot rely on evidence already put before the court in the form of witness testimony or witness statements to satisfy this requirement. The Prosecution, in not following the Rule of Evidence and Procedure, in particular, Rule 50 with respect to amendments to the indictment

[1] See, for example, Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze, ICTR-97-34-I and ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999, para. 42
[2] Ibid para. 43
[3] Prosecutor v Bizimungu, Mugenzi, Bicamumpaka & Muriraneza, ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003, para. 27
[4] Prosecutor v. Kanyabashi, ICTR-96-15-T, Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, 12 August 1999

either before or after the consolidation of the Indictment cannot now rely on evidence that has been put forth in court on the consolidated indictment as the legal and factual basis for granting the requested amendment.

8. To rely on this evidence would be tantamount to allowing the Prosecution to benefit from its additions to the Consolidated Indictment that the prosecution itself had originally submitted would "not involve any change in the substance of the original indictment", and that Trial Chamber has concluded is beyond a mere "putting together" of the initial three indictments, but in fact elaborates existing counts and adds substantive elements to the Charges.[5]

ii) Delay in submitting its request for Leave to Amend the Indictment

9. The Prosecution suggests that the amendments are being sought at this stage because "it had earlier considered that the additional time frames and geographical locations did not constitute new charges".[6] The First Accused submits that regardless of whether there were new charges or not, the Prosecution is obligated to follow Rule 50 (A) of the Rules of Evidence and Procedure. Rule 50 (A) states:

> The Prosecutor may amend an indictment, without prior leave, at any time before its approval, but thereafter, until the initial appearance of the accused pursuant to Rule 61, only with leave of the Designated Judge who reviewed it but, in exceptional circumstances, by leave of another Judge. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 52 apply to the amended indictment.

10. This Rule applies to <u>any</u> amendment to the indictment. If the amended indictment includes new charges then Rule 50 (B) applies. Therefore, regardless of whether the Prosecution thought the amendments being sought were only additional time

[5] Prosecutor v. Norman, Fofana, Kondewa, "Decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment", 29 November 2004, para. 20

[6] Prosecutor v. Norman, Fofana, Kondewa, "Prosecution Request for Leave to Amend the Indictment Against Norman", 8 December 2004, para. 14

frames and geographical locations and did not constitute new charges, it was still under an obligation to seek leave for an amendment pursuant to Rule 73.

11. The First Accused submits that the Prosecution clearly has not acted in a timely manner but, on the contrary, is not submitting its request for leave to amend the indictment in a timely manner, some 22 months since the date of the detention of the First Accused.

12. The First Accused further submits that the amendments sought are not the result of the subsequent acquisition of materials unavailable at the time of confirmation of the 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.

iii) Prejudice to the Rights of the First Accused

13. The First Accused submits that such late amendment will cause him a substantial prejudice arising from several cumulative factors.

14. The first factor is the timing of the amendment. If the amendment is effected, it will be after the Prosecution witnesses with respect to allegations involving Kenema, Bo Town and surrounding areas, Koribondo and Bonthe have already been heard by the Chamber. This testimony was heard while the decision on the First Accused's Motion for Service and Arraignment on the Consolidated Indictment was still pending. If leave to amend the indictment is granted, these witnesses will have already returned to their homes and the First Accused will not have been granted the opportunity to fully cross-examine the witnesses after the amendment of the indictment.

15. The amended indictment as "significantly new". The proposed amendments contain substantial time frame extensions which include from the consolidated indictment:

    (i) Paragraph 25 (a) extends the timeframes for alleged commission of unlawful killings to 30 April 1998 instead of 1 February 1998
    (ii) Paragraphs 25 (e) and (f) add completely new factual allegations with two new time frames;
    (iii) Paragraph 26(a) extends the time frame for alleged commission of acts of physical violence and infliction of mental harm or suffering to 30 April 1998 which was previously 1 April 1998.
    (iv) Paragraph 24 (d) and (e) add completely new factual allegations with two new time frames;
    (v) Paragraph 26 (b) refers acts from November 1997 to December 1999, whereas the initial indictment referred to the time frame 1 November 1997 to 1 April 1998. This is an additional time frame of over a year and a half.

16. The above proposed amended time frames go beyond the period covered in the original indictment. The First Accused contends that the proposed amendments amounts to a radical change in his trial and given the delay in bringing the request for leave to amend the indictment would result in prejudice to the Accused. Amendments of this proportion should have been made much more promptly and not nearly 22 months after the arrest of the accused and equally that long after approval of the original indictment against him.

17. In the alternative, the First Accused submits that an additional factor aggravated the prejudice already suffered: that is the 21-month time lapse between the date of his detention and the date of requesting leave to amend the indictment. The First

Accused contends that the Prosecutor, had he been diligent, could have requested leave to amend the indictment much earlier.

18. The First Accused maintains that the consequences of such prejudice are irreparable and that the late amendment of the indictment would result in a violation of his right to full answer and defence.

19. The First Accused finally notes that the Prosecution suggests that the fact that evidence has already been presented to the court is a reason to suggest that there is no prejudice to the First Accused and the request for leave should be granted. Specifically the Prosecution states "[t]he evidence relating to allegations involving Kenema, Bo Town and surround areas have been presented in court...Further the Prosecution notes that the evidence on Bonthe was presented before the court in the third trial session"[7] The Prosecution also states "[f]urthermore the edivence on the Bonthe crime base has already been presented to the Court".[8] The First Accused submits that the Prosecution is seeking an amendment by default of the fact that the evidence is already before the Court. This seems to suggest that the fact that the Prosecution did not follow the Rules of Evidence and Procedure in seeking an amendment to the indictment, either to the original or the consolidated indictment, but proceeded to put forward that evidence to the Court, that the Trial Chamber should now just allow leave to amend the indictment because the evidence is now there. The First Accused submits that this would be unjustified and tantamount to allowing the Prosecution to short circuit the Rules and Procedures of this Special Court.

B) **Where the Consolidated Indictment is Adjudged not Amenable**

20. The First Accused submits furthermore that the consolidated indictment is in any case unamenable in its present in its present form or in the manner proposed and also because its procedural background history renders it either non-existent or at

[7] Ibid. para. 20
[8] Ibid. para. 21

least invalid and void ab initio, because of a series of violations or avoidance of material and inescapable mandatory provisions of the Rules.

i) **Formal Impossibility of Amendment.**

21. The prosecution requests leave, pursuant to Rule 50, of the Rules and the direction of the Trial Chamber in its decision of 29th[9] November 2004 and its consequential order thereto of 30th November 2004[10], to effect the proposed amendment by including therein, as against the First Accused , additional material factual allegations, geographical locations, extended temporal jurisdictions, new substantive elements of existing charges, and even new charges, as are comprehensively itemised in the Trial Chambers aforesaid Decision of 29th November 2004, especially in paragraphs 19, 20, 38, and the first paragraph 30 thereof[11]. The said paragraphs 19 and 20 are part of the material fully reproduced as annex 1 attached to the prosecution's request.

22. Now, all the material which are to constitute the proposed amendment are at present fully part of the text of the current consolidated indictment. They are the elements which were not mentioned or included in the initial individual indictment that had been separately approved against and served upon the Accused and upon which he was formally arraigned and took his plea of not guilty, all in march 2003, some 22 months before the prosecution's request for leave to amend.

    If indeed all the material and elements which are to constitute the proposed so-called 'amendment' of the said consolidated indictment are in infact already fully contained therein as it now stands, then it would be strange, if not illogical, use of language to say the said consolidated indictment as such is thereby being amended. This would be an amendment of a specific document by retaining and preserving its very nature, content and form as the self-same document is at present constituted. There is a gross semantic anomaly or logical contradiction or

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[9] Ibid note 5

[10] Prosecution v. Norman, Fofana, Kondowa: Consequential order to Decision on the First Accused's Motion for service and arraignment on the consolidated indictment

[11] Two successive paragraphs are numbered as '30' in the said Decision.

monstrous misnomer involved in the proposed exercise. The Trial Chamber ought to refuse and dismiss this self-stultifying request.

ii) **Failure to Annex Proposed Draft Consolidated Indictment.**

23. Among the fatal non-compliances with and violations and avoidances of standard practice and material mandatory provisions of the Rules, which constitute the procedural background history of the current consolidated indictment upon which the trial of the First Accused has proceeded so far, is the failure by the prosecution to annex a Draft Consolidated indictment to the Motion by which it originally sought joint trial and joint charging of the Accused persons.[12] The said Motion was pursuant to Rules 48(B) and 73 of the Rules. The other two indictees in their written responses to Prosecution Motion and the now First Accused in oral hearing thereon, objected to the proposed consolidated charging aspect of the application, Counsel for the First Accused thereby, expressly and specifically raising the procedural irregularity, anomaly or non-compliance involved in the failure by the prosecution to annex or attach a text draft of the then proposed Consolidated Indictment.
24. But, there admittedly being no specific Rule mandatory such a course of action, the Trial Chamber ruled in favour of the prosecution that it would be 'technical' to insist on such a course of action and that it would additionally impede the speedy and expeditious prosecution of the trial of the three Accused persons.[13] It must be noted here that although the decision on this point was unanimous, one of their Learned Lordships in a Separate Dissenting Opinion attached thereto, did express the hope that such objections be given 'due consideration' in future, 'particularly so because the newly drawn up and yet to be disclose consolidated indictment will, following our judgment, be filed without having satisfied the guarantees and standards stipulated in Rule 47(E).[14]

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[12] Prosecutor v. Norman, Fofana, Kondewa: 'Prosecution Motion for Joinder,' 9th October 2003
[13] Ibid: 'Decision and Order on Prosecution Motion for Joinder', 27th January 2004.
[14] Ibid: 'Separate Opinion of Judge Benjamin Mutanga Itoe on the nature and legal consequences of the Ruling in favour of filing of two consolidated Indictments, paragraph 16. His misgivings in his paragraph 13 to 17 thereof, judging by subsequent proceedings so far in this trial, may turn out to be quite prophetic.

25. However, and with the greatest respect, it should be indicated here that the Trial Chamber may have seriously erred in law in holding, as they unanimously did, that 'it is difficult to require as a mandatory rule in the context of international criminal tribunals such a practice of exhibiting for judicial scrutiny a single anticipated consolidated indictment to the motions'.[15] As a matter of fact, it seems to be quite a hard and fast rule of regular practice in the sister international tribunals of both the ICTY and ICTR that such draft proposed indictments tend invariably to be annexed or attached to the relevant request motions, as a random series of examples, precisely what was done in similar circumstances in the following ICTY cases over a period spanning from 1998 to 2004:

a) Prosecution v. Kovacevic: 'Decision on prosecutor's Request to file an Amended Indictment', 5th March 1998, paragrph6.

b) Prosecutor v. Kovocevic: 'Decision stating reasons for Appeals Chamber's Order of 29th May 1998',

c) Prosecutor v. Krnojelac: ' Decision on Prosecutor's Response to Decision of 24th February 1999,' 20th May 1999, paragraph 2.

d)Prosecutor v. Kvocka, Kos, Radic, Zigic, Prac: 'Decision on Prosecution Request for leave to file Consolidated Indictment and to Correct Confidential Schedules,' 13th October 2000, preambular paragraph 4.

e)Prosecutor v. Milosevic, Milutionovic, Sainovic, Ojdanovic, Stojilkovic: 'Decision on Application to Amend Indictment and on Confirmation of Amended Indictment', 29th June 2001, para. 1.

f) Prosecutor v. Limaj. Bala, Musliu: 'Decision on Prosecution's Motion to amend the Amended Indictment', 12th February 2004, para. 1.

g) Prosecutor v. Ademi, Norac: 'Decision on Motion for Joinder of Accused', 30th July 2004, final Order (ie 'confirms that the Consolidated Indictment that is attached to the motion, is the official indictment against both accused'. (emphasis added.).

(NB: An ICTY example that apparently differs from the foregoing decisions and at first seems on all fours with the SCSL Trail Chamber decision of 27th January 2004 is the Prosecutor v. Krajisnik, Plavsic: 'Decision on Motion for Joinder', 23rd February

[15] Ibid: 'Decision and Order on Prosecution Motion for Joinders', para11

2001.No draft consolidated indictment was annexed to the motion. But that was obviously because the Prosecution applied only for 'joint trial of the two accused' without a request for joint indictment as well. It was the trial Chamber itself that made the additional order for 'a consolidated indictment on which the joint trial would proceed' to be submitted by the prosecution within 14 days of the said decision. In the case of the subject SCSL case, the Prosecution itself had applied Rule 48(B) and Rule of the Rules.)

iii) Prosecution Violation of Rule 48(B) and Avoidance of Rules 48(A), 50 and 51.

26. Probably the most fatal of non-compliances by the Prosecution with standard practice and various mandatory rules of procedure in its quest for a consolidated indictment in the case against the First Accused are concerned with Rules 48(A), 48(B), 50 and 51 of the Rules. Here, very simply, the Prosecution committed the old biblical sin of indulging in what it was enjoined not to do and almost studiously failing or avoiding to do what it was mandatorily enjoined to do, in its quest to bring forth a consolidated indictment for the trial of the three previously indicted person.[16] In the process, it succeeded in persuading the Trial Chamber to make an order regarding the preparation and (re-)numbering of 'a single consolidated indictment' upon which the three accused persons would be jointly tried, but an order which was almost certainly both procured and granted without any basis or authority within the relevant law and applicable Rules.[17]

27. Although the prosecution application in question is usually merely blandly referred to as 'Motion for Joinder', it is necessary here to make the distinctive point that it was an application made specifically pursuant to Rule 48(B) and Rule 73 of the Rules. It also specifically sought both that the three accused persons be 'jointly tried' and that an order be made to that effect that ' a consolidated indictment be prepared' as the basis on which the joint trial would proceed.[18] The First Accused submits, however, that whereas Rule 48(B) governs applications for joint trials it does and is purposefully designed to do only that and nothing more. Upon a literal and purposive interpretation, it will be clear that the said Rule

[16] Prosecutor v. Norman, Fofana, Knodewa: 'Prosecution Motion for Joinder', 9th October 2003.
[17] Ibid: 'Decision and Order on Prosecution Motion for Joinder', 27th January 2004.
[18] Ibid: 'Prosecution Motion for Joinder', 9th January 2003, paras.1, and 36.

48(B) is exclusively and only concerned with the joint trial of separately indicted persons whose previous respective indictments continue as separate indictments throughout the joint trial. S that in so far as the said Rule 48(B) remains the applicable enabling provision in the given case, the said previous indictments are never reduced or to be reduced into a single consolidated indictment there under. That is to say, that Rule 48(B) is a congenitally inappropriate and unavailable vehicle for seeking or granting leave for a consolidation of indictments.

28. Understandably, this distinctive individuating emphasis or relative mutual exclusivity in the regime of joinder rules in the Special Court for Sierra Leone(SCSL) is not readily appreciated, with the presently available jurisprudence thereon so far deriving from the sister tribunals of ICTY and ICTR, one or other of which lacks one or other of the range of joinder rules in the SCSL; for example ,the ICTY had for a long time had its Rules 48 and 49, which correspond respectively in nature force to Rules 48(A) and 49 of the SCSL and the ICTR has for a long time had its Rules 48(A). 48(B) and 49 of the SCSL. As for Rule 48(C) of the SCSL, neither the ICTY nor the ICTR is reputed to have had any direct or express equivalent of it. This relative mutual exclusivity and distinctiveness in its regime of joinder rules afford a good incentive for SCSL to endeavour to develop its own jurisprudence and judicial practice in respect thereof in its administration of criminal justice.

29. On a close analysis and literal interpretation of the SCSL joinder rules, with Rule 48 provisions each being concerned with the common denominator of persons 'accused of the same or different crimes committed in the course of the same transaction' and Rule 49 with where a 'series of facts committed' (by the same accused) together form the same transaction, the said Rules may be characterised as follows:

Rule 48(A): This sub rule provides conjunctively for both the joint charging and joint trial of such persons, thereby making this sub-rule the natural normal vehicle for applying for the consolidation of two or more separate such indictments of persons. There is no express leave requirement for invoking this sub-rule, without more.

Rule 48(B): This sub-rule provides for joint trials of such persons who are already 'separately indicted', who remain and are designed for the purposes of this sub-rule to remain so separately indicted throughout the joint trial of this sub-rule. There being no express provision in it for which indictments to be joined or consolidated as such at any thereof, it is accordingly to be construed as having an implied or built-in injunction against using it as vehicle for seeking consolidation of the subject indictments there under. However, even for the joint trials expressly provided for, there is an express mandatory requirement for leave pursuant to Rule 73 of the Rules.[19]

Rule 48(C): This highly compactly formulated sub-rule provide for the 'concurrent hearing of evidence common to' separate trials.

i) of two or more such persons individually indicted, or

ii) of such persons in various joint indictments, or

iii) of such persons in mixed sets of both individuals and joint indictments.

Here as well, there is an express leave requirement pursuant to Rule 73 of the Rules.

Rule 49: This rule provides for charging in a single individual indictment of two or more crimes committed by one person in the same transaction. There is no express leave requirement. But, in practice, where two or more such individual indictments already lie against the same person, leave has been sought to consolidate them into a single unified indictment against him or her.[20]

30)It is clear from the foregoing characterisation of the SCSL joinder Rules that two or such Accused persons may be both charged jointly and tried jointly only under Rule 48(A), even without leave in the case of an original indictment, but with leave and in combination with Rule 73 and either Rule 50 or Rule 51 both of these latter rules where two or more separate indictments already lie against two or more persons. It is equally clear from the same transaction of the relevant of the relevant rules, that Rule 48(B) does not (and is designed to not) entertain or accommodate any request foe or grant of leave by any person or organ whatsoever. Therefore, when the

[19] A good example of the operation of the Rule 48(B), see the ICTR case of Prosecutor v. Ntakirutimana et al: 'Decision on the Prosecutor's Motion to Join the Indictments' ICTR 96-10-1 and 96-17-T,' 22nd February 2001

[20] See prosecution v. Milosevic: 'Decision on Prosecution Motion for Joinder" 13th December 2001.

prosecution asked for leave to consolidate the three previous separate individual indictments already lying severally against three indictees separately, it had no authority to make such a request in pursuance of the provisions in Rule 48(B) of the Rules. Indeed, the only options open to the prosecution in all the circumstances at the time for achieving the objective he sought was to apply for leave pursuant to Rule 73 and Rule 48(A) in combination with either Rule 50 or Rule 51 or both of combination with either Rule 50 or 51 or both of the latter Rules. As it happened, the prosecution invoked substantive Rule which it had no authority to invoke and which it had every reason of law not invoke and it thereby almost studiously avoided just those provisions of the Rules which alone had the authority for seeking or granting such leave.

30. Such oversights are easily, encouraged by bland references to joinder generally as distinct from a true and proper recognition of the particular kind of joinder that may be required in a particular case. International criminal tribunal joinder jurisprudence has itself tended to give an un international filling to this trend by its own tendency so far to concentrate on the analysis of the common legal criteria and conditions for any and all of the available kinds of joinder in the relevant Rules.[21] A clear perception of the particular kind(s) of joinder that may be required on any one occasion, together with an honest apprehension of its or their own operational conditions and vehicular purveyance within the relevant law and applicable Rules can be a great asset for the proper administration of criminal justice. It is submitted that prosecution and Trial Chamber alike could have acquitted themselves a little better in their respective handlings of joinder issues in the current trial.

31. It is fair to attempt to divine any reason or explanation for the relative poverty of performance with joinder issues throughout the operation of the current consolidated indictment in this trial, at any rate with reference to the prosecution? Some of the mandatory Rules of relevance and/or materiality may at least be said to contain what may be called inherent anathemas and disincentives that may be

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

pursuit of a consolidation of several indictments could well provoke further resort to the Rule 47 review and approval process, which may be perceived as a set back after the original indictments had already been subjected to the said process. A similar fear may obtain with respect to the renewed requirement that may be triggered by Rule 50(B) on extensive amendments, not to talk of withdrawal by dint of Rule 51 and the possible impact of procedures under Rules 48(A) and 50(A) separately or in combination. The Trial Chamber, on its part, may well have been unintentionally or unwittingly more sympathetic of favourable to the prosecution when issues of joinder, potential amendment, the consolidation and/or withdrawal of indictments, arraignment and the like have had to be determined in this trial so far. A similar scenario may have re-opened with the present prosecution challenge for leave to amend some indictment or the other affecting the First Accused.

Conclusion

33.With the greatest respect, the First Accused submits that, in view of the foregoing analysis and submissions the current consolidated indictment is substantially and logically unamenable in the manner and respects so far proposed. To require or request that the said indictment be amended in the way and manner proposed in exquisite Orwellian double-speak, in which even a concept like equality betrays a predacious appetite to mutate into variety, diversity, difference, unevenness and gradation ('all animals are equal. But some are more equal than others').

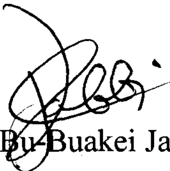
34.The First Accused further submits that in view of the foregoing procedural background history of the said consolidated indictment, it has practically been chechmated into a stance or posture teetering upon invalidity or nullity. The current consolidated indictment is now, surely, hard put to it present itself as a valid or plausible candidate for any meaningful amendment as a continuing basis for such serious criminal prosecutor.

35. And even if such logical impossibility and legal invalidity could or were to be ignored, a true and proper consideration of the various protected rights of the Accused, the wider interests of justice, and the integrity of the entire judicial process, would dictate that the Prosecution's request for leave to amend the current indictment, at any rate in respects and manner proposed, ought to be refused and dismissed in its entirety, especially as against the First Accused, who accordingly so submits.

32. In these circumstances and upon a consideration of the all interests of justice the First Accused submits that the request for leave to amend the consolidated indictment as requested by the Prosecution ought to be refused as against the interests of justice in the circumstances of this case.

Date the 17th of December 2004.

Court Appointed Counsel for the First Accused



Dr. Bu-Buakei Jabbi