SCSL-2004-15-PT
(378 - 395)

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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson
Judge Itoe
Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 24 February, 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY

MORRIS KALLON

AUGUSTINE GBAO

Case No. SCSL – 2004 – 15 – PT

CONSOLIDATED REPLY TO DEFENCE (SESAY AND GBAO) RESPONSE TO PROSECUTION'S "REQUEST FOR LEAVE TO AMEND THE INDICTMENT"

Office of the Prosecutor:
Luc Côté
Robert Petit
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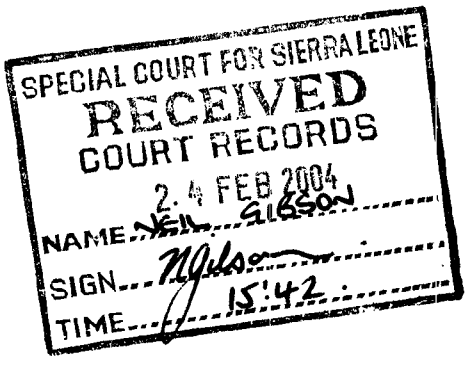

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I. BACKGROUND

1. On 9 February 2004, the Prosecution filed a "Request for Leave to Amend the Indictment" adding a new count of "other inhumane acts" a crime against humanity, punishable under Article 2(g) of the Special Court Statute for the act of "forced marriage" committed by the accused persons and/or his subordinates and making modifications to other areas of the Indictment. Counsel for Sesay and Gbao (the "**Accused**"") filed two responses (the "**Responses**") on 19 February 2004 asking the Court to reject the Prosecution's "Request for Leave to Amend the Indictment" (the "**Request**"). The Prosecution files this reply to the Defence Responses.

II. DEFENCE' SUBMISSIONS

2. The Defence Responses object to the Prosecution Request for Leave to Amend the Indictment for the following reasons:

a. The Accused Gbao states that the Prosecution offers no factual and legal basis and produces no supporting material or fresh evidence to justify its request for an amendment.
b. Both Responses contend that the Prosecution failed to seek leave to amend the Indictment to add the proposed new charge and other modifications in a timely fashion.
c. Both Responses contend that the proposed amendment will unduly delay the trial because the Defence is entitled to file preliminary objections under Rule 72 and the Defence needs time for further investigations to counter the new charge.
d. Both Responses contend that the modification requested in paragraph E of the Prosecution's Request lacks specificity and places undue burden on the defence at a late stage in the proceedings.
e. Both Responses contend that the Prosecution, in seeking to amend paragraph 71 of the Indictment, fails to establish that this amendment is made with "undue delay" and fails to provide sufficient proof that this amendment is in the interests of justice.
f. In addition, the Accused Sesay states that his Response adopts paragraphs 2-12 of theResponse filed by the Accused Kanu on 17 February 2004.

3. For the reasons stated below, the Prosecution submits that the Defence Responses should be dismissed and the motion granted.

III. ARGUMENTS

A. There exists a factual and legal basis for amendment

4. The Defence Responses argue that the Prosecution does not offer a proper factual and legal basis for its request. The Prosecution submits that that there is sufficient legal and factual basis to justify the proposed new count in the proposed amended indictment and reiterates paragraphs 6 – 12 of its request. The Prosecution especially emphasizes that, as regards the factual basis for its application, the materials have already been disclosed to

the Accused.' The additional count occurs in the same exact factual context as charges relating to sexual violence and forced labour that exist in the consolidated Indictment.

5. Further, the Prosecution argues that it has provided sufficient legal basis to support its application. Rule 50(A) provides for requests for amendments to be made after initial appearance and the new count, "other inhumane acts" is clearly provided for in Article 2(i) of the Statute.
6. The Prosecution submits that the only consideration for the Trial Chamber at this stage is whether the Prosecution has provided sufficient legal and factual basis to justify the amendment. The Prosecution most respectfully submits that contrary to the arguments advanced by the Defence, it has discharged the onus in this case and as such leave should therefore be granted.

B. The proposed amendment is timely and will not prejudice the Accused

7. Contrary to the Defence' contention that the Request is not timely, the Prosecution submits that the request to add an additional charge, even though it is not based on new information, is nonetheless timely. The Accused' offer no support to their assertion that new charges are not timely simply because they are not based on new evidence. To the contrary, the ICTY Trial Chamber, in construing Rule 50 (B) and (C), stated that "the rule does not specify that new charges can only be based on new facts. In contemplating that the accused may require additional time to prepare for trial as a result of an amendment that involved adding a further count, the rule is simply concerned to ensure that the accused is not prejudiced in the conduct of his or her defence."[1] The Prosecution submits that this charge based on factual allegations of which the Accused' are already on notice and that therefore there is no prejudice to the Accused' in the conduct of their defence.
8. The Prosecution submits that the addition of the new count is based on the legal characterisation of the conduct of the Accused'. The statements supportive of the Prosecution's allegations of that conduct were already disclosed to the Accused' in a timely manner with due diligence and the Accused' suffer no unfair prejudice. The Prosecutions submits that the legal characterisation which led to the addition of the new

[1] *The Prosecutor v. Martinovic, IT-98-34,* "Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment," 14 February 2001.

count was done to truly reflect the culpability of the Accused' and not to surprise the Accused' during the trial.

9. The further amendments requested regarding the time periods and places are based on additional evidence acquired by the Prosecution in the course of its continuing investigations. The substance of the allegations against the Accused' in respect of these counts is unchanged as a result of these amendments. The Prosecution submits that request to amend regarding the same was done promptly and timely so as not to surprise the Accused' at the trial and the Accused' has been informed of the new charge at the earliest opportunity and has been given ample time to investigate the same.

C. The proposed amendment will not unduly delay the proceedings

10. Contrary to the Defence' contentions, the Prosecution submits that granting the amendment will not delay the proceedings. The Defence' contention that the application of Rule 72 will unduly delay proceedings is misplaced. The allegation of "other inhumane acts" as a crime against humanity falls within the jurisdiction of the Special Court. The Count itself is drafted in a fashion that is consistent with the precision of the other 17 counts in the Indictment in terms of time frame and location. These Indictments have already been subject to preliminary challenges and decisions and the Prosecution respectfully submits that the additional count would not give rise to any sustainable preliminary challenges. Furthermore, the Prosecution submits that the fact that an amendment might result in a challenge under Rule 72 is not a basis to refuse the Request. Should the additional count result in any motions under Rule 72, the Prosecution respectfully submits that the Trial Chamber is fully competent to expeditiously resolve any matters, especially with the benefit of existing jurisprudence.

11. The additional count does not give rise to any new need for factual investigations. As stated, the additional count concerns the legal characterization of the conduct and is based on existing allegations already disclosed to the Defence. For example, the Prosecution has already disclosed numerous statements where the "bush wife" phenomenon is mentioned. These statements already underpin the charges of sexual slavery and forced labour and thus there should be no change to any factual portion of the defence

investigations. Moreover, the focus for the Defence will likely involve the Prosecution's legal characterization of the conduct which requires no additional factual investigation.

12. The Prosecution submits that at this stage of the proceeding, the addition of a new charge should not present an unfair surprise, and the investigation of such charges by the Defence' should not present unreasonable or impracticable delays. The Prosecutor also submits that any prejudice to the Accused must be assessed in the context of the overall interest of justice in a full and final determination of the guilt of the Accused.
13. The Prosecution reiterates its position that no undue delay will be caused if the amendments sought are granted. The Prosecution further submits that in determining whether a delay in the criminal proceedings against the accused is 'undue,' it is essential for the Trial Chamber to consider the length of the delay, the gravity, nature and complexity of the case, as well as any prejudice that the accused may suffer. The Prosecution submits that the amendments sought would not cause undue delay that would prejudice the Accused; considering the seriousness of the crimes involved, the Prosecution submits that to grant the amendments requested will be in the overall the interests of justice and would not, or not adversely, affect the Accused' right to a fair trial.

D. Time period modifications are timely, do not prejudice the Accused' and are in the interests of justice

14. With regards to the addition of the word "about" as referred to in paragraph 5 (E) of the Request, the Prosecution reiterates the arguments found in the Request to justify such request. The Prosecution further submits that this change does not cause any prejudice to the Defence due to the timeliness of the Request and the fact that it conforms to the evidence already disclosed.
15. The Prosecution also notes that contrary to the Accused Sesay's contention in paragraph 12 of his Reply, the phrasing "*between about*" was never held to be ambiguous by the Trial Chamber in *Sesay*. The Trial Chamber's characterization of "pleading by ambush" in *Sesay* was clearly in reference to the phrase "*but not limited to these events.*"[2] In fact

[2] *See The Prosecutor Issa Hasan Sesay*, SCSL-2003-05-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 33.

and directly in apposite to the Defence's assertion, the phrase "between about" was already held to be acceptable by the Trial Chamber.[3]

16. The Prosecution submits that the modification sought in paragraph 5 (G) of its Request, which requests a change in the time frame for the charge of forced labour in the Kono district, is warranted for the reasons canvassed in its Request which are reasserted herein. Furthermore this modification simply seeks to extend the time period of a Count already alleged and is based on evidence already disclosed. Therefore, the Prosecution submits that the timeliness of the modification and the familiarity of the general factual basis of the charge give sufficient notice to the Accused' to prepare to respond.
17. The Prosecution additionally submits that failure to grant this modification will prevent the Trial Chamber from considering the full scope of the Accused' criminal conduct. The additional evidence, which has been disclosed to the Accused' since their confirmation, overwhelmingly supports the allegation that the Accused' are liable for this charge in Kono for this extended time period, particularly in relation to used of forced labour for the mining of diamonds. Since the Accused' confirmation, the Prosecution has obtained additional evidence from sources that were in a position to possess precise knowledge of the Accused' roles and of the exact timeframe with relation to this charge. Accordingly, the Prosecution has continually put all of the Accused' on notice of this evidence through disclosure. In this instance, the interest of justice in having the full conduct of the Accused' considered by the Trial Chamber outweighs any possible prejudice to the Accused.'

E. The Adoption of Paragraphs 2-12 of the Accused Kanu Response

18. Finally, the Prosecution takes strong exception to the Response filed on behalf of the Accused Sesay which, in paragraph 10 attempts to adopt "of all of the submissions paragraph's 2-12 of the Defence Response (dated 17th February 2004) to the Request made on behalf of the accused Mr Kanu." This practice is unacceptable in any international or national jurisdiction and the Defence should submit its arguments in its

[3] *See The Prosecutor Against Kondewa*, SCSL-2003-12-PT, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 27 November 2003, para. 12. The Trial Chamber, in examining the use of the word "about" reviewed the phrase "between about" in paragraphs 20 (a), (e), (f), 21 (a), and 22 and stated that this phrasing was "not problematic." *Ibid.*

own pleading, not refer or adopt another Accused' pleading. To demonstrate how unreasonable this practice is, the Prosecution notes that it would take nearly 5 pages to respond accordingly to this paragraph, repeating the same arguments that the Prosecution has submitted in its reply to the response filed by the Accused Kanu on 24 February 2004.

F. CONCLUSION

19. The Prosecution submits that all the above mentioned objections by the Accused' are without any basis and are not valid legal arguments to oppose to the application to amend the current indictment. For the foregoing reasons the Prosecution submits that the Trial Chamber dismiss the Defence Responses in their entirety.

Freetown, 24 February 2004
For the Prosecution,

Luc Cote
Chief of Prosecutions

Robert Petit
Senior Trial Attorney

PROSECUTION INDEX OF AUTHORITIES

1. *Prosecutor v. Mladen Naletilic and Vinko Martinovic, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment*, IT-98-34, 14 February 2001

PROSECUTION INDEX OF AUTHORITIES

ANNEX I

Prosecutor v. Mladen Naletilic and Vinko Martinovic, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment, IT-98-34, 14 February 2001

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IN THE TRIAL CHAMBER

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

Registrar:
Mr. Hans Holthuis

Decision of:
14 February 2001

THE PROSECUTOR

v.

MLADEN NALETILIC aka "TUTA"
and
VINKO MARTINOVIC aka "ŠTELA"

DECISION ON VINKO MARTINOVIC'S OBJECTION TO THE AMENDED INDICTMENT AND MLADEN NALETILIC'S PRELIMINARY MOTION TO THE AMENDED INDICTMENT

The Office of the Prosecutor:

Mr. Kenneth Scott

Counsel for the Accused:

Mr. Kresimir Krsnik, for Mladen NALETILIC
Mr. Branko Seric, for Vinko MARTINOVIC

TRIAL CHAMBER I (hereafter "Chamber") of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereafter "Tribunal") is seised of Vinko Martinovic's Objection to the Amended Indictment, dated 27 December 2000 (hereafter "Martinovic's Objections"), and the Defence's Preliminary Motion, dated 3 January 2001, filed by the accused Mladen Naletilic (hereafter "Naletilic's Objections"). Both Martinovic's Objections, and Naletilic's Objections are timely filed pursuant to Rule 72 of the Rules of Procedure and Evidence of the Tribunal (hereafter "Rules").

The indictment originally filed against Martinovic and Naletilic is dated 18 December 1998 (hereafter "Original Indictment"). By decision dated 28 November 2000 (hereafter "November Decision"),[1] the

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Trial Chamber granted leave for the Prosecution to amend Count 5 of the Original Indictment to add a further charge relating to Article 52 of Geneva Convention III, concerning dangerous or humiliating labour. The original Count 5 referred only to Articles 49 and 50 of Geneva Convention III, and Article 51 of Geneva Convention IV. Accordingly, the Prosecutor filed an amended indictment dated 4 December 2000 (hereafter "Amended Indictment"), and each of the accused entered a plea of "not guilty" to the new charge on 7 December 2000. In accordance with Rule 50 (C), each of the accused had a period of 30 days to file preliminary motions pursuant to Rule 72 in respect of the new charge.

I. Preliminary Objections Made by the Accused

The points raised in Martinovic's Objections, and Naletilic's Objections are as follows:

1. An indictment cannot be amended in the absence of new factual allegations or new evidence, unless it is advantageous for the accused. The quantity of criminal charges facing the accused cannot be increased at this late stage of the proceedings. It is argued that the criminal laws of ex-Yugoslavia, as well as those of Bosnia and Herzegovina and the Republic of Croatia only allow an amendment of the indictment to include a new offence if supported by new evidence adduced in the course of the proceedings. Furthermore, it is argued that the accused cannot properly prepare his defence if the indictment is subject to amendment at any moment. Similar objections were raised by the accused to the Prosecutor's Motion to Amend Count 5.[2]

2. The charges are cumulative, in that multiple charges (including charges under Articles 2, 3 and 5 of the Statute) are levied on the basis of the same conduct.

3. The accused Naletilic also argues that it is not clear which acts in Count 5 are alleged to be violations of Article 49, 50 and 52.

II. Arguments of the Prosecutor

The Prosecutor filed a response to these objections dated 18 January 2001, arguing that:

1. The objections raised merely repeat those raised by each of the accused in their replies to the Prosecutor's motion to amend Count 5. In its November Decision the Trial Chamber found that no prejudice was caused to the accused by allowing the amendment. Therefore, the issue cannot be reconsidered now under the guise of an objection to the form of the indictment.

2. The issue of cumulative charges was raised earlier in the proceedings, and the Trial Chamber held that the matter should be deferred to the end of the trial.

III. Discussion

A. Circumstances in which amendment of the indictment is warranted

Rule 50 of the Rules of Procedure and Evidence governs the amendment of indictments, and provides as follows:

Amendment of Indictment

(A) (i) The Prosecutor may amend an indictment:
(ii) at any time before its confirmation, without leave;

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(iii) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and

(a) 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.
(b) After the assignment of the case to a Trial Chamber it shall not be necessary for the amended indictment to be confirmed.
(c) 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.

After the assignment of the case to a Trial Chamber, Rule 50 A (i)(c) simply directs that the indictment can be amended "with the leave of [the] Trial Chamber or a Judge of [the] Chamber, after having heard the parties." Therefore, pursuant to Rule 50, the discretion as to whether to allow an amendment is left to the Judge or Trial Chamber in question.

There is nothing in the Rules to suggest that an indictment can only be amended if new factual allegations are added. Furthermore, while Rules 50 (B) and (C) expressly address the issue of new charges, the rule does not specify that new charges can only be based upon new facts. In contemplating that the accused may require additional time to prepare for trial as a result of an amendment that involves adding a further count, the rule is simply concerned to ensure that the accused is not prejudiced in the conduct of his or her defence.

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, it is obvious that it 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 to an expeditious trial, to be promptly informed of the charges against him or her, and to have adequate time and facilities for the preparation of his or her defence, potentially arise when considering objections to an amended indictment.[3]
Virtually every indictment filed by the Prosecutor in matters before the ICTY and the International Criminal Tribunal for Rwanda (ICTR) has been amended at least once. The resulting jurisprudence does not support the limitation on the exercise of the discretion in Rule 50 advocated by the accused in this case. Rather, the question to be decided is whether the amendment results in any prejudice to the accused.[4]

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. For example, in the case of *Prosecutor* v *Kovacevic*, the Appeals Chamber decided that the Prosecutor should be given leave to add 14 new counts to the indictment, (which would turn the eight-page indictment into one of 18 pages), for which the defence would require an additional 7 months to prepare.[5] In its decision, the Appeals Chamber, *inter alia*, emphasised that the delay to the trial of the accused resulting from the amendment was not unreasonable in light of the complexity of the case. The Appeals Chamber also found that, where the accused has been told of the crimes contained in the existing indictment at the time of his arrest, his right to be promptly informed of the charges against him has not been violated. In his separate concurring opinion, Judge Shahabuddeen emphasised that, in light of the complexities inherent in war

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crimes prosecutions, a flexible approach to the question of amending indictments is particularly important.[6]

The addition of new charges in the absence of new factual or evidentiary material has been accepted in other cases before the ICTY and the ICTR. For example, in the case of *Prosecutor* v *Krstic* an amended indictment was filed by the Prosecutor in October 1999 charging the accused for the first time with deportation as a crime against humanity, or in the alternative, inhumane acts (forcible transfer) as a crime against humanity.[7] The original indictment contained facts upon which such a charge could be brought, and no substantive factual allegations were added to the amended indictment to support the new charge of deportation/forcible transfer.[8] In the case of *Prosecutor* v *Niyitegeka*, the Trial Chamber expressly accepted that new charges could be added to an indictment to "allege an additional legal theory of liability with no new acts".[9]

Civil law and common law jurisdictions have different principles governing the amendment of indictments. In civil law systems, indictments are scrutinised by the investigating judge and amendments tend to be less controversial.[10] While some common law jurisdictions take a restrictive approach to permitting amendments,[11] most of the jurisdictions surveyed recognise that the fundamental point of reference in determining whether an amendment will be permitted is whether there is any prejudice to the accused.[12]

The jurisprudence of the ICTY and the ICTR on the exercise of the discretion contained in Rule 50 thus demonstrates that a decision to accept an amendment will normally be forthcoming unless prejudice can be shown to the accused. This recognises the duty of the Prosecutor to prosecute the accused to the full extent of the law.[13] In the present case the amendment made was not substantial in scope,[14] there is no suggestion that the Prosecution has sought an improper tactical advantage,[15] and the amendment has certainly not delayed the trial of the accused, which is not yet scheduled to begin. Given that the facts upon which the new count is based were in the Original Indictment, there has been no need for the accused to conduct any new inquiries, approach new witnesses, or expend any additional resources. Accordingly, the accused have failed to establish that they have been prejudiced in the preparation of their defence following the amendment of Count 5.

B. Cumulative Charging

Objections to the cumulative nature of the charges have been previously raised in the present case. In a decision dated 15 February 2000, the Trial Chamber rejected the objections of Martinovic, based on cumulative charging.[16] The Trial Chamber noted that the Tribunal's jurisprudence on this matter was still evolving. Reference was made to the principles distilled in the Kupreskic Judgement of 14 January 2000,[17] namely that cumulative charges will be permitted where each offence requires proof of an element that the other does not (the "different elements" test), or alternatively, where each offence protects substantially different values (although this would seldom be used as an independent ground for permitting cumulative charges). Ultimately, however, the Trial Chamber saw no reason to depart from the practice of leaving the issue to be determined at the end of trial.

The accused have raised the issue of cumulative charges again as a preliminary objection on the form of Count 5 as amended. The Trial Chamber notes that the objection is framed in very general terms, and is not limited to arguments based on the amendment to Count 5. The issue of cumulative charging is only legitimately raised here as a preliminary objection insofar as it relates to the new charge, and the Trial Chamber will only consider it to that extent.

The Prosecutor has amended Count 5 of the Original Indictment by adding a charge based on Article 52 (humiliating and dangerous labour) of the Third Geneva Convention to the existing charges based on Article 49 (General Observations) of the Third Geneva Convention, Article 50 (Authorised Work) of the Third Geneva Convention, and Article 51 (Enlistment of Labour) of the Fourth Geneva Convention. The same facts are relied upon to support all of these charges. On the basis of the test set out by the Trial Chamber in the Kupreškic Judgement, Article 52 could be viewed as a genuinely separate offence that can be charged in addition to the existing charges in Count 5 of the Indictment. In particular, each offence requires proof of an element that the other does not. For example, in order to prove a violation of Article 50 of Geneva Convention III, it is necessary to prove that prisoners of war have been engaged in certain prohibited categories of work. It is not necessary to prove that this work is also dangerous or humiliating. By contrast, in order to prove a breach of Article 52 of the Geneva Convention III, it is necessary to prove that the work is dangerous or humiliating. It is not necessary to prove that it falls outside the categories of work specified in Article 50 of Geneva Convention III. Insofar as Article 51 of Geneva Convention IV is concerned, it is necessary to prove, *inter alia*, that the alleged victims of the offence were protected persons within the meaning of Geneva Convention IV, whereas for Article 52, it is necessary to prove, *inter alia*, that the alleged victims were prisoners of war within the meaning of Geneva Convention III. To this extent, each provision could be considered as requiring proof of an element that the other does not and, in addition, seeking to protect a different value: the treatment accorded to civilians in one case, and the treatment accorded to prisoners of war in the other. Article 49 of Geneva Convention III specifies that only prisoners of war who are physically fit may be required to work, and specifies the circumstances in which non-commissioned officers, and officers may work. Consequently, to prove a violation of this article it would be necessary to show that somebody who was not physically fit was compelled to work, or that the rules respecting the work of officers had been breached. None of these things are required to prove a breach of Article 52. Further, at least insofar as Article 49 relates to the work of officers, it seeks to protect quite a different value from Article 52, namely respect for the status of officers.

Nonetheless, the Tribunal's jurisprudence on cumulative charges is still far from clear, and we expect the matter will be considered in detail in the forthcoming judgement by the Appeals Chamber in the *Celebici* case. For instance a distinction may be drawn between cumulative charging on the one hand, and cumulative convictions and penalties on the other. Both of these issues were considered in the Kupreškic Judgement. As regards cumulative charging, the Trial Chamber stated that the Prosecutor:[18]

> (a) may make cumulative charges whenever it contends that the facts charged violate simultaneously two or more provisions of the Statute (in accordance with the criteria discussed by the Trial Chamber in the course of its judgement, and outlined above).
> (b) should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the crime the Prosecution is able to prove....
> (c) should refrain, as much as possible, from making charges based on the same facts but under excessive multiple heads, whenever it would not seem warranted to contend...that the same facts are simultaneously in breach of various provisions of the Statute.

However, bearing in mind that the fundamental harm to be guarded against by the prohibition of cumulative charges is to ensure that an accused is not punished more than once in respect of the same criminal act, there may be less reason for refusing to allow cumulative charging, as distinct from cumulative convictions or penalties. A strict prohibition on cumulative charging could impede the work of the Prosecutor. The Prosecutor may not always be in a position to select between charges prior to the evidence being presented during trial, and the crimes over which the Tribunal has jurisdiction are frequently broad and yet to be clarified in the jurisprudence of the Tribunal. This was highlighted in the Kupreškic Judgement where the Trial Chamber stated that "[u]nlike provisions of national criminal

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codes...each Article of the Statute does not confine itself to indicating a single category of well defined acts" but instead "embraces broad clusters of offences sharing certain *general* legal ingredients."[19] As the Tribunal's case law develops, and elements of each offence are clarified, it will become easier to identify overlap in particular charges prior to the trial, but at present, and certainly in this case, it is enough that permitting cumulative charging results in no substantial prejudice to an accused.

C. Relationship between the Facts and the Charges

The accused Naletilic has argued that it is not clear which acts in Count 5 are alleged to be violations of Article 49, 50 and 52. In the Amended Indictment the Prosecutor has included 10 paragraphs of factual allegations as the basis for counts 2-8, adopting the usual drafting practice employed throughout the indictments. In many cases it is obvious which factual allegations relate to each individual charge. Where the allegations involve civilians, they go to Article 51 of Geneva Convention IV. Where they relate to prisoners of war, they go the relevant articles of the Geneva Convention III. As between Articles 49, 50 and 52 of Geneva Convention III, there is some overlap. For example, allegations about forcing prisoners of war to march on combat lines carrying fake weapons relate to both Articles 50 (prohibiting work of a military character) and 52 (prohibiting humiliating or dangerous work). However, in accordance with our discussion on cumulative charges, the use of the same facts to support more than one offence charged is permissible under the circumstances, and, in this case, does not prejudice the accused in the preparation of his defence.

IV. DISPOSITION

FOR THE FOREGOING REASONS

TRIAL CHAMBER I

HEREBY REJECTS Martinovic's Objections and Naletilic's Objections.

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

Almiro Rodrigues
Presiding Judge

Dated this 14th day of February 2001,
At The Hague,
The Netherlands

(Seal of the Tribunal)

1. *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Prosecution Motion to Amend Count 5 of the Indictment", 28 November 2000.
2. See *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Prosecutor's Motion to Amend Count 5 of the Indictment", 11 October 2000; *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Statement of the Defence of Mladen Naletilic to the Prosecutor's Statement in Respect of Pre-Trial Filings of 11 October 2000", 24 October 2000; and *Prosecutor* v *Naletilic and Martinovic*, Case No. IT-98-34-PT, "Declaration of the Defence for the Accused Vinko

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Martinovic to the Pre-Trial Documents Submitted by the Prosecutor", 23 October 2000.
3. The right of the accused to a fair trial is guaranteed in Article 20 of the Statute of the Tribunal (hereafter "Statute"), which provides that a trial must be "fair and expeditious...". Article 21 (4) (a) of the Statute further provides that the accused must be " informed promptly and in detail in a language which he understands of the nature of and cause of the charge against him"; Article 21 (4)(b) provides that an accused must "have adequate time and facilities for the preparation of his defence"; and Article 21 (4) (c) provides that an accused must be "tried without undue delay". See also Rule 59 *bis* (B) which specifies that, "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." These guarantees are substantially based upon human rights standards enshrined in various international instruments. See for example, Article 9 (2) of the International Covenant on Civil and Political Rights (ICCPR), Article 14 (3) ICCPR, Article 5 (3) European Convention on Human Rights (ECHR), and Article 6 ECRH.
4. 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, where the Trial Chamber held that:

> ...Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file to amend the Indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether or not, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also 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.

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 at para.43, the Trial Chamber noted that Rule 50 "does not lay down any specific standard of proof for the amendment of an indictment. Therefore, on a strict interpretation of this Rule, it is a matter of the discretion of the Trial Chamber whether or not it allows an amendment of an indictment." See generally: *Prosecutor* v *Barayagwiza*, Case No. ICTR-97-19-I, "Decision on the Prosecutor's Request for Leave to File and Amended Indictment", 11 April 2000; *Prosecutor* V *Kajelijeli*, Case No. ICTR-98-44A-T, "Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave To File an Amended Indictment" 25 January 2001; and *Prosecutor* v *Niyitegeka*, Case No. ICTR-96-14-I, "Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000 (hereafter "*Niyitegeka* Decision").
5. The Appeals Chamber rendered an oral decision on 29 May 1998, and written reasons were given on 2 July 1998. See *Prosecutor* v *Kovacevic*, Case No. IT-97-24-PT, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998 (hereafter "*Kovacevic* Appeals Chamber Decision"). The Trial Chamber had refused to permit the amendment. See *Prosecutor* v *Kovacevic*, Case No. IT-97-24-PT, "Decision on Prosecutor's Request to File an Amended Indictment", 5 March 1998 (hereafter "*Kovacevic* Trial Chamber Decision")
6. *Prosecutor* v *Kovacevic*, Case No. IT-97-24-PT, "Separate Opinion of Judge Mohamed Shahabuddeen", 2 July 1998.
7. *Prosecutor* v *Krstic*, Case No. IT-98-33-PT, "Amended Indictment", 27 October 1999.
8. See also *Prosecutor* v *Musema*, Case No. ICTR-96-13-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 18 November 1998, granting leave for the Prosecutor to, *inter alia*, add a new charge of complicity in genocide. No new facts were introduced to support the charge, although the new charge was included as an alternative to the existing charge of genocide, rather than as an additional count.
9. See *Niyitegeka* Decision, *supra* note 4, at para 33 (1) (ii).
10. See the discussion in *Kovacevic* Trial Chamber Decision, *supra* note 5 at para 10. See also, Article 337 of the Yugoslav Law on Criminal Procedure Senacted by the Socialist Federal Republic of Yugoslavia Assembly, 24 December 1976C which stipulates that:

> (1) If during the trial the prosecutor finds that the evidence presented demonstrates a change in the state of the facts from that presented in the indictment or accusation, he may during the trial orally amend the indictment or accusation, and he may file a motion that the trial be adjourned so that a new indictment or accusation be prepared.
> (2) In such case the court may adjourn the trial for purposes of preparation of the defense.
> (3) If the panel allows adjournment of the trial for preparation of a new indictment or accusation, it shall set the date by which the prosecutor must file the indictment or accusation. A copy of the new indictment or accusation shall be served on the accused, but no traverse of that indictment or accusation is allowed. If the Prosecutor does not file the indictment or accusation by the date specified, the panel shall resume the trial on the basis of the previous indictment or accusation.

Article 332 of the Federation of Bosnian Herzegovina Criminal Procedure Code (1998) is in similar terms.

11. For example, US Federal Rule of Criminal Procedure 7 (e) provides that "[t]he court may permit an information to be

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amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." The question as to what will constitute an 'additional or different offense" has been controversial in the US. See LaFave and Israel, *Criminal Procedure*, 2nd Ed, at 19.5C

12. See for example, the English Indictments Act of 1915 s 5; New Zealand Crimes Act (1961) s. 335 (which has been interpreted to permit the addition of a new count "that is additional or cumulative with the real issue being whether there was prejudice to the accused." [See *Bristow* [1996] 2 NZLR 252]) The Criminal Procedure (Scotland) Act of 1995, s 96(3) states that amendments that change the "character of the offence charged" are not permitted. However, this provision has been interpreted as specifying that the character of the charge must not be changed "to such a degree as to prejudice the accused's defence on the merits". See *Criminal Procedure (Scotland) Act 1995*, 2nd Ed. Annotated by I. Bradley, and R. Shiels, (1999).

13. See for example, *Niyitegeka* Decision, *supra* note 4, at para. 27.

14. In the *Kovacevic* Appeals Chamber Decision, *supra* note 5, at para. 24, it was held that the size of the amendment may be taken into account but, of itself, is unlikely to afford a basis for refusing to allow an amendment.

15. See *Ibid*, at para.32, recognising that, if the Prosecutor has sought an improper tactical advantage, that is a matter determining whether there has been undue delay in violation of the right of the accused to a fair trial.

16. *Prosecutor v Naletilic and Martinovic*, Case No. IT-98-34-PT, "Decision on Defendant Vinko Martinovic's Objection to the Indictment, 15 February 2000.

17. *Prosecutor v Kupreskic*, Case No. IT-95-16-T, "Judgement" 14 January 2000, at paras. 681-682, 693.

18. *Ibid*, at para. 727

19. *Ibid*, at para 697.