7691 SCSL-03-01-T (24911 – 24922) 24911

THE SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding Judge
Justice Jon M. Kamanda
Justice George Gelaga King
Justice Emmanuel Ayoola

Registrar: Mr. Herman von Hebel

Date: 30 March 2009

Case No.: SCSL-03-01-T

THE PROSECUTOR

–v–

CHARLES GHANKAY TAYLOR

PUBLIC

CORRIGENDUM TO DEFENCE NOTICE OF APPEAL AND SUBMISSIONS REGARDING THE MAJORITY DECISION CONCERNING THE PLEADING OF JCE IN THE SECOND AMENDED INDICTMENT

Office of the Prosecutor:
Ms. Brenda J. Hollis
Mr. Nicholas Koumjian
Ms. Kathryn Howarth

Counsel for Charles G. Taylor:
Mr. Courtenay Griffiths, Q.C.
Mr. Terry Munyard
Mr. Andrew Cayley
Mr. Morris Anyah

I. INTRODUCTION

1. This is a Corrigendum to *Prosecutor v. Taylor*, SCSL-03-01-T-767, *Defence Notice of Appeal and Submissions regarding the Majority Decision concerning the Pleading of JCE in the Second Amended Indictment*, 26 March 2009 ("Notice of Appeal and Submissions").
2. The Defence files this Corrigendum to correct typographical errors that appear in its *Notice of Appeal and Submissions*, and also to set out more completely in its List of Authorities, relevant authorities that appear in footnotes within the *Notice of Appeal and Submissions*, as well as include links to Internet Website addresses for ICTY and ICTR cases that are cited therein. No cases or authorities not currently to be found in the *Notice of Appeal and Submissions* form any part of this Corrigendum.
3. Words, phrases, and punctuation marks which should be added to the text and which should now be viewed as being part of the *Notice of Appeal and Submissions* are highlighted in bold.
4. Words, phrases and/ or punctuation marks which should be deleted from the text and which no longer should be viewed as being part of the *Notice of Appeal and Submissions* have been stricken through.

II. CORRIGENDUM

5. The Defence respectfully requests that the following corrections be noted in respect of the following paragraphs of its *Notice of Appeal and Submissions*:

   (12) The relief that is respectfully being sought as a consequence of the alleged errors[1] in the Appealed Decision..."

   (16) A miscarriage of justice is defined as ~~a~~[2] "[a] grossly unfair outcome in judicial proceedings...

   (30) Drawing on the foregoing, the Defence maintains that nowhere is a "common purpose" for any purportedly alleged JCE ~~is~~[3] readily identifiable in the text of the Indictment. There exists[4] no objectively reasonable reason (nor has ~~nay~~[5] **any** been advanced in the Appealed Decision) for why Paragraph 33 should be read in conjunction with Paragraph 5... While acknowledging that the pleading of JCE is a material fact... the majority of the Trial

[1] The word "error" should be in the plural and should be read as "errors".
[2] The word "a" before the open quotation marks and the bracketed "a" should be stricken from the text.
[3] The word "is" should be stricken from the text.
[4] An "s" has been added to the word "exist" to make it in the plural.
[5] The word "nay" should be stricken from the text, and should instead be "any".

Chamber erroneously divined a "common purpose" which is **in**[6] no wise discernible in the Indictment…

(31) An indictment is sufficiently ~~plead~~ **pleaded**[7] if "the Accused is provided with sufficient information to adequately...

(35) (3) The fact that the secondary accusatory instruments and/ or pronouncements of the Prosecution in this case evidence a pleading regime of the objective or "common purpose" of the JCE that has be**en**[8] fluid…

6. The Defence respectfully requests that the following corrections be noted in respect of the following footnotes in its *Notice of Appeal and Submissions*:

30. Fofana Appeal Judgment, para. 36 (citing Norman Subpoena Decision, para. 5, citing **Prosecutor v. Milošević, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002**[9] [Milošević Decision] para. 4.

54. ~~Ibid.~~[10] **Appealed Decision, paras. 2, 8, 9 and 11, acknowledging the same.** See[11] also, Defence Pre-Trial Brief, para 45.

71 See, AFRC Appeals Judgement, paras. 84 and 82, in particular para. 76, stating that… "the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the ***means***[12] contemplated to achieve that objective [emphasis added]."

7. The Defence respectfully requests that the following corrections be noted to the List of Authorities in its *Notice of Appeal and Submissions*:

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[6] The word "in" should be added before "no".
[7] The word "pleaded" is to replace the deleted "plead".
[8] The word "be" should now be read as "been".
[9] The full citation for the "Milošević Decision" has been included.
[10] The word acronym "Ibid" should be deleted and replaced with the bolded text.
[11] The "s" has been capitalized.
[12] The word "means" should be italicized for added emphases.

List of Authorities

SCSL

CDF

***Prosecutor v. Norman et al.*, SCSL-04-14-688, Decision on Interlocutory Appeals Against Trial Chamber Decision Refusing to Subpoena the President of Sierra Leone, 11 September 2006.**

***Prosecutor v. Norman et al.*, SCSL-2004-14-AR73, Fofana – Decision on Appeal Against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence," 16 May 2005.**

ICTY

Prosecutor v. Blaskic, Case No. IT-95-14-A, Judgment, 29 July 2004.
http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf

Prosecutor v. Galić, IT-98-29-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 30 November 2006.
http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf

Prosecutor v. Stakić, IT-97-24-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 22 March 2006.
http://www.icty.org/x/cases/stakic/acjug/en/sta-aj060322e.pdf

Prosecutor v. Kupreškić et al., IT-95-16-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 23 October 2001.
http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf

Prosecutor v. Tadić, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Judgement, 15 July 1999.
http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf

Prosecutor v Furundzija, IT-95-17/1-A, Judgement, 21 July 2000.
http://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf

Prosecutor v. Krnojelac, Case No. IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000.
http://www.icty.org/x/cases/krnojelac/tdec/en/00511FI212948.htm

Prosecutor v. Hadžzihasanović, et al., Case No. IT-01-47-PT, Decision on Form of Indictment, 7 December 2001.
http://www.icty.org/x/cases/hadzihasanovic_kubura/tdec/en/11207FI216966.htm

***Prosecutor v. Milošević*, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 [Milošević Decision].**
http://www.icty.org/x/cases/slobodan_milosevic/acdec/en/020418.pdf

***Prosecutor v. Blaskić*, IT-95-14, Decision on Defense Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof, 4 April 1997.**
http://www.icty.org/x/cases/blaskic/tdec/en/70404DC113291.htm

ICTR

Serushago v Prosecutor, ICTR-98-39-A, Reasons for Judgement, 6 April 2000.
http://sim.law.uu.nl/sim/caselaw/tribunalen.nsf/2dffba7eb96617eec12571b5003d5f3f/c0cab2a067f8e4cdc12571fe004fa508?OpenDocument

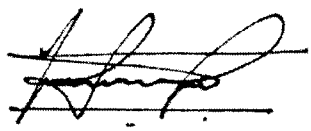
***Prosecutor v. Semanza*, ICTR-97-20-T, Judgment and Sentence, 15 May 2003.**
http://trim.unictr.org/webdrawer/rec/37512/

***Prosecutor v. Ntakirutimarna*, ICTR-96-10-A, Appeals Chamber, Judgment, 13 December 2004.**
http://www.unhcr.org/refworld/pdfid/48abd5a610.pdf

***Prosecutor v. Karemera*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment, 19 December 2003. (Document could not be found on the internet, hard copy is provided to the Court Management Section)**

***Prosecutor v. Aloys Simba*, ICTR-2001-76-T, Judgment, 13 December 2005.**
http://www.unhcr.org/refworld/pdfid/48abd57a0.pdf

Respectfully submitted,



For Courtenay Griffiths, Q.C.
Lead Counsel for Charles G. Taylor
Dated this 30th day of March 2009,
The Hague, The Netherlands

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

IN THE APPEALS CHAMBER

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

Registrar: Mr. Adama Dieng

Decision of: 19 December 2003

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

Case No. ICTR-98-44-AR73

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

Counsel for the Prosecution Counsel for the Defence

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

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994 ("Appeals Chamber" and "International Tribunal," respectively) is seised of the "Prosecutor's Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment," filed by the Prosecution on 28 October 2003 ("Appeal"). The Appeals Chamber hereby decides this interlocutory appeal on the basis of the written submissions of the parties.

Procedural History

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

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

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

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

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

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

8. The Trial Chamber subsequently certified the Decision for interlocutory appeal under Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), and the Prosecution filed this Appeal. The Appeal contends that the Trial Chamber erred in holding that allowing the amendment would cause undue delay to the prejudice of the Accused, in holding that the proposed Amended Indictment constituted a "new indictment," and in accepting the Prosecution's request to withdraw four

counts from the Current Indictment while refusing the remainder of the amendment. Responses to the Appeal were filed by the Accused Karemera, Ngirumpatse, and Rwamakuba. No response was received from the Accused Nzirorera and no reply was filed by the Prosecution.

Discussion

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

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

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

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

13. The third point considered by the Trial Chamber was delay. This factor arises from Article 20(4)(c) of the Statute of the International Tribunal, which entitles all accused before the International Tribunal to be "tried without undue delay," and is unquestionably an appropriate factor to consider in determining whether to grant leave to amend an indictment. Guidance in interpreting Article 20(4)(c) can be found in the ICTY case of Prosecutor v. Kovacevic, in which the Trial Chamber refused amendment of an

indictment on grounds that included undue delay. The ICTY Appeals Chamber framed the question as "whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in light of the right of the accused to a fair and expeditious trial." The ICTY Appeals Chamber noted that the requirement of trial without undue delay, which the Statute of the ICTY expresses in language identical to Article 20(4)(c) of the Statute of the International Tribunal, "must be interpreted according to the special features of each case." Additionally, the specific guarantee against undue delay is one of several guarantees that make up the general requirement of a fair hearing, which is expressed in Article 20(2) of the Statute of the International Tribunal and Article 21(2) of the ICTY Statute. "[T]he timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disposition

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

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

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