



ICTR-00-55A-AR73  
 12 May 2005  
 (68/H-46/H)

Tribunal Penal International pour le Rwanda  
 International Criminal Tribunal for Rwanda

68/H  
 RMM

**IN THE APPEALS CHAMBER**

**Before:**

Judge Theodor Meron, Presiding Judge  
 Judge Mohammed Shahabuddeen  
 Judge Florence Mumba  
 Judge Wolfgang Schomburg  
 Judge Inés Mónica Weinberg de Roca.

**Registrar:**

Mr. Adama Dieng

**Order of:**

12 May 2005

ICTR Appeals Chamber  
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**THE PROSECUTION**

v.

**Tharisse MUVUNYI**

Case No. ICTR-00-55A-AR73

**DECISION ON PROSECUTION INTERLOCUTORY APPEAL AGAINST TRIAL  
 CHAMBER II DECISION OF 23 FEBRUARY 2005**

**Counsel for the Prosecution**

Mr. Charles Adeogun-Phillips  
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 Mr. George Mugwanya  
 Ms. Renifa Madenga

**Counsel for the Defence**

Mr. William E. Taylor  
 Mr. Jean Flamme

Case No. ICTR-00-55A-AR73

International Criminal Tribunal for Rwanda  
 Tribunal pénal international pour le Rwanda  
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 NAME / NOM: ROSETTE MUZIGO-MORRISON  
 SIGNATURE: [Signature] DATE: 12 May 05

12 May 2005

1. On 23 February 2005, the Trial Chamber rendered its decision on the Prosecution's Motion for leave to amend the indictment against Tharcisse Muvunyi ("Accused").<sup>1</sup> In the Impugned Decision, the Trial Chamber refused the Prosecution's Motion, finding that to permit the amendments sought would be likely to prejudice the rights of the Accused and that this prejudice outweighed any considerations of judicial economy or expediency advanced by the Prosecution.<sup>2</sup> On 28 February 2005, the Prosecution filed an application before the Trial Chamber for certification, which was granted by the Trial Chamber on 16 March. Following that grant, on 23 March 2005, the Prosecution filed confidentially its appeal against the Impugned Decision,<sup>3</sup> and on 29 March 2005, the Accused filed his response to the Prosecution's Appeal.<sup>4</sup> No reply to that Response was filed by the Prosecution.

### Motion to Lift Confidentiality

2. In addition to his Response to the Prosecution's Appeal, the Accused filed a motion to remove the classification of confidentiality from the Prosecution's Appeal and from his Response to that Appeal.<sup>5</sup> In that Motion, the Accused argues that there is no reason for the Prosecution to have filed its Appeal confidentially other than to prevent the press and public from having access to it. He says that because the Prosecution filed its Appeal confidentially, he was made to file his Response confidentially, as he discusses the Prosecution's Appeal in detail in his Response.<sup>6</sup> The Accused argues that transparency is crucial to the legitimacy of the Tribunal and that the statutory obligation to protect victims and witnesses "is not a license to conduct the Tribunal's business behind closed doors and out of the public eye".<sup>7</sup> The Accused says that there is nothing in the Prosecution's Appeal which would identify any witness other than by pseudonym, and that each of the pseudonyms appearing in the Prosecution's Appeal is referred to by the Trial Chamber in paragraph 45 of the Impugned Decision.<sup>8</sup> He says the only information in the Prosecution's Appeal not referenced in the Impugned Decision is the general contents of the witness statements identified by pseudonym in the chart on pages 11-16 of the Prosecution's Appeal.<sup>9</sup> In light of the above, the

<sup>1</sup> Decision on Prosecution's Motion for Leave to File an Amended Indictment, 23 February 2005 ("Impugned Decision").

<sup>2</sup> Impugned Decision, para. 54.

<sup>3</sup> Prosecution's Appeal of Decision of Trial Chamber II of 23 February 2005 Denying Leave to File an Amended Indictment, 23 March 2005 ("Appeal").

<sup>4</sup> Appellee's Reply to the Prosecution's Brief on Appeal, of Decision of Trial Chamber II of 23 February 2005 Denying Leave to File an Amended Indictment, 29 March 2005, ("Response").

<sup>5</sup> Appellee's Motion to Remove Confidentiality from the Prosecution's Brief and His Reply to the Prosecution's Brief, 29 March 2005 ("Motion").

<sup>6</sup> Motion, para. 3.

<sup>7</sup> Motion, para.s 4-6.

<sup>8</sup> *Ibid.*, para. 7.

<sup>9</sup> *Ibid.*

Accused requests the Appeals Chamber to order that the Prosecution's Appeal and his Response be reclassified as public documents.<sup>10</sup>

3. On 23 March, the Prosecution filed a response to the Accused's Motion.<sup>11</sup> In that Response, the Prosecution claims that it filed its Appeal confidentially to protect the witnesses involved in this case as required by the Statute of the Tribunal.<sup>12</sup> It says that while the Prosecution's Appeal only identifies certain witnesses by pseudonym, on 19 January 2005, pursuant to an order of the Trial Chamber, the Prosecution disclosed both the pseudonyms and the full particulars of the witnesses. It says that this disclosure has exposed the witnesses and, as there is a possibility that some of the witnesses will be rescheduled, it considered it appropriate to take this additional measure of protection by keeping the documents inter-parties.<sup>13</sup> It requests that the Appeals Chamber dismiss the Accused's Motion.<sup>14</sup>

#### Analysis

4. The Prosecution is not permitted merely to label a document confidential for filing purposes. Proceedings at this Tribunal must be in public unless good cause is shown to the contrary.<sup>15</sup> The only good cause for a party filing a document confidentially is if the information in the filing is confidential and exposure would risk damaging the proceedings themselves.<sup>16</sup> The Appeal filed by the Prosecution does not reveal any confidential information. The witnesses are identified by pseudonym only, and the Prosecution has not shown that the general contents of these witnesses' statements constitute confidential evidence that should not be disclosed to the public. The Prosecution does not identify whom it disclosed the particulars of the witnesses to pursuant to the Trial Chamber order, but disclosure was to the Accused only. The fact that the Accused knows of the true identity of the witnesses is not good cause for a confidential filing by the Prosecution. Accordingly, there is no good cause for the Appeal or the Response to retain confidential status.

#### Applicable Law

5. The Impugned Decision of the Trial Chamber refusing the Prosecution's motion to amend the indictment is an exercise of judicial discretion. When reviewing a Trial Chamber's exercise of

<sup>10</sup> *Ibid.*, para. 9.

<sup>11</sup> Prosecution's Respond (sic) to the Appellee's (Sic) Motion to Remove Confidentiality From the Prosecution's Appeal's Brief Filed on 23 March, 2005 ("Prosecution's Response").

<sup>12</sup> Prosecution's Response, para.s 4-5.

<sup>13</sup> *Ibid.*, para. 6.

<sup>14</sup> *Ibid.*, para. 7.

<sup>15</sup> *Brđanin & Talić*, Case No: IT-99-36-PT, Decision on Motion by Prosecutor for Protective Measures, 3 July 2000, para. 53; *Prosecutor v Stakić*, Case No: IT-97-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 7.

judicial discretion, the issue is not whether the Appeals Chamber agrees with the decision of the Trial Chamber, but whether in reaching its decision the Trial Chamber has reasonably exercised its discretion. The Appeals Chamber will only interfere in the Trial Chamber's exercise of its discretion if the moving party identifies a discernable error on the part of the Trial Chamber. In this case the Prosecution must establish one of the following: that the Trial Chamber misdirected itself either as to the principle to be applied or as to the law relevant to the exercise of the discretion; took into account irrelevant considerations, or failed to take into account relevant considerations, or gave insufficient weight to relevant considerations; made an error to the facts upon which it exercised its discretion; or reached a decision that no reasonable Trial Chamber could have reached such that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.<sup>17</sup> It is only if the Prosecution is able to identify such an error on the part of the Trial Chamber that the Appeals Chamber may interfere with the decision of the Trial Chamber and, if appropriate, substitute its own discretion for that of the Trial Chamber.<sup>18</sup>

#### Grounds of Appeal

6. In its Appeal, the Prosecution advances several grounds on which it alleges the Trial Chamber erred in its consideration of the issues, misdirected itself as to the principle to be applied, or failed to give sufficient weight to relevant considerations.<sup>19</sup> The Prosecution argues that the Trial Chamber equated material facts with new charges; failed to consider that the material facts to be included were drawn from material already disclosed to the Accused; erroneously concluded that the amendments would cause delays and prejudice the Accused's ability to prepare his defence; erroneously concluded that amending the indictment would require the Accused to enter new pleas; misdirected itself with respect to the principles enunciated by the Appeals Chamber in relation to the perfecting of an indictment; and failed to give sufficient weight to the risk that denial of the amendments might result in the exclusion of evidence of the material allegations, notwithstanding that these material allegations had long been disclosed to the Accused.<sup>20</sup>

7. In addition, the Prosecution claims that the appeal raises significant issues regarding the amendment of indictments prior to the commencement of trial.<sup>21</sup> It argues that in this case it sought to ensure that known material facts were pleaded in the indictment. It states that these known material facts were drawn from material already disclosed to the Accused, and therefore their

<sup>16</sup> *Prosecutor v Stakić*, Case No: IT-97-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 7.

<sup>17</sup> *Prosecutor v Milošević*, Case No: IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel, 1 November 2004, para. 10; *Prosecutor v Krajišnik*, Case No: IT-00-39-AR73.1, Decision on Interlocutory Appeal, 25 April 2005, para. 8.

<sup>18</sup> *Ibid.*

<sup>19</sup> Appeal, para. 1.

<sup>20</sup> *Ibid.*

inclusion in the indictment "could cause no possible prejudice to the Accused – quite the contrary".<sup>22</sup> It argues that an amendment to an indictment derived from material facts disclosed to the Accused should be allowed unless such an amendment manifestly causes prejudice to the right of an accused to a fair trial.<sup>23</sup>

8. The Prosecution argues further that to refuse to allow an amendment to include known material facts in an indictment where the Prosecution seeks only to improve its pleading in an existing indictment and to conform its pleading "unequivocally to the applicable statutory provisions and jurisprudence" is contrary to the interests of justice.<sup>24</sup> It argues that while it is preferable that the indictment as judicially confirmed be drafted to comply fully with the law, where the Prosecution forms the view that an indictment may be deficient in its pleading, to deny an amendment in the absence of any "manifest prejudice to the Accused" does not serve justice.<sup>25</sup>

9. The Prosecution requests that the Appeals Chamber reverse the Impugned Decision and allow the proposed amendments, or in the alternative, rule that the evidence of the material allegations is admissible provided it relates to allegations previously communicated to the Accused in a timely, clear and consistent manner.<sup>26</sup>

10. In Response, the Accused claims that the Trial Chamber fully considered the arguments of the parties, weighed those arguments in light of the factual background of the case and determined that the granting of the Prosecution's motion would prejudice the Accused. The Accused argues that this was a proper exercise of the Trial Chamber's discretion.<sup>27</sup>

11. The Accused argues further that the Prosecution is partly responsible for the Trial Chamber's refusal. It waited until 19 January 2005, 40 days before trial commenced, to file its motion to file an amended indictment. Among the factors considered by the Trial Chamber was that nearly all the information the Prosecution relied upon to justify the requested amendment was in the Prosecution's possession in December 2003. While the Prosecution had sought to justify the lateness of the motion by claiming that it was necessitated by new jurisprudence, the Accused countered that this jurisprudence was merely a restatement of the long-standing jurisprudence of the Appeals Chamber. The Accused argues that the Trial Chamber also properly determined that to

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<sup>21</sup> *Ibid.*, para. 2.  
<sup>22</sup> *Ibid.*  
<sup>23</sup> *Ibid.*, para. 3.  
<sup>24</sup> *Ibid.*, para. 4.  
<sup>25</sup> *Ibid.*  
<sup>26</sup> *Ibid.*, para. 5.

allow the amendments would unduly delay the commencement of the trial and unduly prolong the Accused's pre-trial detention.<sup>28</sup>

**(i) Equating or Mischaracterising Material Allegations in the Proposed Amended Indictment as "New Charges".**

12. The Prosecution claims that the Trial Chamber erred in concluding that the material allegations in the proposed amendment amounted to new charges in terms of Rule 50(B) of the Rules of Evidence and Procedure ("Rules").<sup>29</sup> The Prosecution claims that as a result of this error, the Trial Chamber made the erroneous conclusion that the amendments would prejudice the Accused.<sup>30</sup> It argues that the material allegations in the proposed amendment are not new charges, but rather facts that underpin existing charges made in the indictment.<sup>31</sup> It claims that a number of those allegations also "particularise, clarify or elaborate already existing charges and do not add new charges"<sup>32</sup> and that "such particularisations or clarifications of pleadings in an indictment is encouraged by the Appeals Chamber because of their positive impact on the fairness of the trial".<sup>32</sup> The Prosecution argues that the Accused pleads to the counts of an indictment, not the material facts underpinning those counts, thus the Trial Chamber was incorrect in concluding that new pleas by the Accused would be required and a prejudicial delay would result.<sup>33</sup>

13. The Prosecution argues that, according to the law of the Tribunal, "charges" means counts or crimes, and the law draws a line between, counts or crimes and the material facts that underpin those counts or crimes.<sup>34</sup> It claims that the Impugned Decision erred by treating material allegations underpinning existing charges as new charges or counts.<sup>35</sup> The Prosecution says that Article 17(4) of the Statute directs the Prosecutor to prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged. Rule 47(C) of the Rules provides that "the indictment shall set forth [...] a concise statement of the facts of the case and of the crime with which the suspect is charged". The Prosecution argues that these provisions draw a line between material facts and crimes in an indictment. It claims, therefore, that the Accused pleads to the crimes and charges or counts and not to the individual material facts, and is convicted or acquitted of crimes or charges, not individual facts. As such, it says the Trial Chamber erred in

<sup>27</sup> Response, para. 1.

<sup>28</sup> *Ibid.*, para. 6.

<sup>29</sup> Appeal, para. 18.

<sup>30</sup> *Ibid.*, para. 19.

<sup>31</sup> *Ibid.*, para. 19.

<sup>32</sup> *Ibid.*, para. 20.

<sup>33</sup> *Ibid.*, para. 21.

<sup>34</sup> *Ibid.*, para. 24.

concluding “that the material facts that were brought to particularise, clarify or elaborate charges already existing in the current indictment would precipitate pleas, preliminary motions and occasion prejudice to the right of the accused to trial without reasonable delay”.<sup>36</sup>

14. The Prosecution refers to the Appeals Chamber Judgment in *Ntakirutimana*. It argues that in that decision the Appeals Chamber held that several material allegations supporting existing counts had not been pleaded in the indictment but found that “timely, clear and consistent communication of the material allegations supporting existing charges or counts had cured the defects in those existing counts or charges whereas absence of such communication had resulted in a failure to cure other defects”.<sup>37</sup> Based on this Appeals Chamber Judgment and the holdings in *Kupreškić*, the Prosecution argues that the communication of material facts in a timely and consistent manner may be allowed to cure a defect in an indictment by providing support to existing counts, but cannot be used to add new counts or charges. It argues that the amendments it sought to bring to the indictment fall into the same category, in that they sought to clarify, particularise or elaborate existing counts by incorporating material facts to support existing counts.<sup>38</sup>

15. In support of this argument, the Prosecution supplies a table that provides a comparison between the proposed amendments and the current indictment. It contends that according to the jurisprudence of the Appeals Chamber, the amendments are to be encouraged due to their positive impact on the fairness of the trial.<sup>39</sup>

16. In Response, the Accused argues that the Trial Chamber correctly drew the distinction between new charges and new factual allegations and that it is the Prosecution who confuses this distinction.<sup>40</sup> He argues that in order to charge a specific crime in the indictment the indictment must contain facts to distinguish that crime from other crimes. To fail to do so contravenes the requirements of the Statute and the Rules.<sup>41</sup> He argues that specificity is not just crucial in terms of adequate notice to an accused, but also in protecting the principle of *non bis in idem*, which is enshrined in Article 9 of the Tribunal’s Statute.<sup>42</sup> “[T]o protect an accused’s *non bis in idem* rights, the indictment must be specifically specific to identify the specific act...to the exclusion of all

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<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, para. 25.

<sup>37</sup> *Ibid.*, para. 29.

<sup>38</sup> *Ibid.*, para. 31.

<sup>39</sup> *Ibid.*, para.s 32-33.

<sup>40</sup> Response, para. 9.

<sup>41</sup> *Ibid.*, para. 10.

<sup>42</sup> *Ibid.*, para. 11.

other(s)".<sup>43</sup> Specificity in the indictment is also necessary to prevent multiple convictions for the same crime.<sup>44</sup>

17. The Accused argues that the Appeals Chamber's holdings in *Kupreškic*, *Krnjelac* and *Rutaganda* make clear that the Prosecution is required to plead specific facts in the indictment. The degree of specificity may vary based on what is practically and theoretically possible, but reasonable specificity is required,<sup>45</sup> and the Prosecutor must plead the material facts (but not the evidence intended to prove those facts) to support a charge.<sup>46</sup>

18. The Accused argues that a "count" or "charge" specifies a claim that the accused violated a specific criminal prohibition within the jurisdiction of the Tribunal. The material facts identify how the Prosecution alleges that the Accused violated that criminal prohibition.<sup>47</sup> The Accused claims that the Prosecution's claim that an accused "plead to counts in an indictment and not material facts" shows a misunderstanding of the Tribunal's jurisprudence. "An accused pleads to what the indictment charges: a specific violation of the law within the Tribunal's subject matter jurisdiction coupled with the facts supporting that allegation".<sup>48</sup> The Accused claims that in this case the Trial Chamber examined the existing indictment and the proposed amended indictment and identified eight instances by which the Prosecutor charged new criminal violations, changed existing factual allegations or expanded the criminal liability alleged.<sup>49</sup> The Accused argues that even a cursory review of the chart of proposed amendments filed by the Prosecution with its Appeal shows that several of the changed allegations constitute new charges or broaden existing charges.<sup>50</sup> The Accused claims that the Trial Chamber properly concluded that the proposed amended indictment did more than simply dismiss two charges and add specificity to others. It changed the acts of which the Accused was charged and did so at a time when the Accused would be unable to investigate and prepare a defence.<sup>51</sup> Accordingly, the Accused says that while the Trial Chamber may have used imprecise language, it did not misapply the law.<sup>52</sup>

## Analysis

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, para. 12.

<sup>45</sup> *Ibid.*, para. 13.

<sup>46</sup> *Ibid.*, para. 14.

<sup>47</sup> *Ibid.*, para.s 16-17.

<sup>48</sup> *Ibid.*, para. 18.

<sup>49</sup> *Ibid.*, para. 19.

<sup>50</sup> *Ibid.*, para. 20.

<sup>51</sup> *Ibid.*, para. 21.

<sup>52</sup> *Ibid.*, para. 22.



19. There is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts). The distinction between the two is one that is quite easily drawn.

20. However, what made that distinction a little more difficult to draw in this case is that the Prosecution has identified numerous material facts as underpinning charges of genocide (Count 1) or alternatively complicity in genocide (Count 2) incurring individual criminal responsibility pursuant to Article 6(1) and superior responsibility pursuant to Article 6(3) of the indictment. Additionally, it has identified much more specific material facts as underpinning charges of direct and public incitement to commit genocide (Count 3) incurring individual criminal responsibility pursuant to Article 6(1) of the Statute and rape as a crime against humanity (Count 4) incurring superior responsibility pursuant to Article 6(3) and other inhumane acts as a crime against humanity (Count 5) incurring superior responsibility pursuant to Article 6(3) of the indictment. Because the Prosecution chose to plead numerous material facts as supporting the charge of genocide, many of those material facts themselves actually support other counts or charges that have not been separately charged by the Prosecution. Thus, while the Prosecution sought to amend the indictment by the inclusion of further material facts without amending the counts or charges alleged against the Accused, some of those material facts could readily be characterised as new charges.

21. While the Prosecution is correct that the Appeals Chamber has held that the Prosecution must plead the material facts upon which it relies to establish its counts or charges in the indictment, and that a failure to plead those material facts may, in certain limited circumstances, be remedied by clear and timely notice to the Defence, that principle does not necessarily mean that a Trial Chamber must grant the Prosecution an application to amend an indictment to expand the material facts alleged. The risk of prejudice to the Accused from such expansions is high and must be carefully weighed.<sup>53</sup> Whether such an amendment will be permissible will turn upon a consideration of the prejudice to the Accused.

22. The Appeals Chamber decisions upon which the Prosecution relies were all concerned with whether the Prosecution's failure to plead material facts in the indictment resulted in prejudice to

<sup>53</sup> *Prosecutor v Bizimungu et al*, Case No. ICTR-99-50-AR5, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004, para. 19.

the accused during trial. While confirming the principle that to avoid prejudice to an accused in the preparation of the defence case the Prosecution must plead the material facts in the indictment, it does not follow that a Trial Chamber must allow a Prosecution application to amend an indictment to expand the material facts alleged pre-trial if in all the circumstances prejudice would accrue to the accused by those amendments. The fact that the expansion of counts charged may be derived from material already disclosed to the Accused also does not automatically nullify prejudice to the Accused. It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on the basis of all the material disclosed to him that may support any number of additional charges, or expand the scope of existing charges. In either circumstance, when a complaint is made on appeal about a failure to plead material facts, or objection is made to a Prosecution application to amend to add material facts or new charges, the issue is whether the accused has been or will be prejudiced.

23. The first issue to be considered by the Appeals Chamber is whether the Trial Chamber erred in its characterisation of the proposed amendments, and if so, whether this error led it to incorrectly conclude that allowing the amendments would prejudice the Accused.

(i) The proposed paragraph 15 alleges that the attacks on wounded Tutsi refugees in the vicinity of University Hospital in Butare occurred between April and May 2004. Previously, the Prosecutor alleged that these attacks occurred on or about 15 April 1994.<sup>54</sup>

24. The Trial Chamber considered that the proposed change broadened the time frame within which the Defence may need to conduct investigations and prepare its case and therefore constituted a new charge.<sup>55</sup> On Appeal, the Prosecution says that the proposed amendment, like the original indictment, alleges several attacks and the amendment merely clarifies the time frame of those attacks; it does not add new charges.<sup>56</sup> The Prosecution says the current indictments use of "on or about 15 April" does not restrict itself to a single day, and as such the proposed amendment does not excessively broaden the time frame to the prejudice of the Accused, and in any event, the clarification was drawn from materials long disclosed to the Accused.

25. The Appeals Chamber is not satisfied that the Trial Chamber was correct in interpreting the amendment as a new charge. The charge alleged in both the original and the amended indictment is "attacks on wounded Tutsi refugees". The proposed amendment does not allege a new attack, but

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<sup>54</sup> Impugned Decision, para. 41.

<sup>55</sup> *Ibid.*

<sup>56</sup> Prosecution, page 12.

amends the time at which that alleged attack occurred. The original indictment was quite specific in identifying "on or about 15 April 1994" as the time in which the alleged attacks occurred. The proposed amendment expands this time frame to "between April and May 2004". The proposed amendment may have required the Defence to carry out further investigations and is therefore a matter going to prejudice that may be accrued as a result of the amendment; but it does not change the nature of the proposed amendment from a material fact underpinning the charge alleged to a new charge. The Appeals Chamber notes that these material allegations are identified by the Prosecution as supporting a charge of genocide, Count 1, or alternatively complicity in genocide, Count 2. They are not pled therefore as being in support of additional charges.

(ii) The proposed Paragraph 16 alleges that the Accused mandated hospital staff to halt treatment of Tutsi refugee patients and later ordered their evacuation with no provision for their care. While the current indictment mentions an attack on wounded Tutsi at the hospital, it says nothing about orders or instructions that the Accused might have given to hospital staff.<sup>57</sup>

26. The Trial Chamber considered that the proposed amendment introduced a completely new element, broadened the scope of the legal responsibility of the Accused and may have also raised issues regarding the aggravation of the crime alleged. On appeal, the Prosecution says that the current indictment alleges that on 15 April Muvunyi, accompanied by soldiers, participated in an attack on wounded refugees at the University Hospital in Butare, separating the Tutsi from the Hutus and killing the Tutsi refugees. The proposed amendment alleges that sometime in May 1994, Muvunyi went to University Hospital and instructed that the hospital staff halt treatment of Tutsi refugees and concentrate on treating wounded Hutu soldiers. He also ordered the evacuation of Tutsi patients from the Hospital with no provision for treatment or care. The Prosecution argues that the proposed amendment simply gives details of how the denial of medical care and facilities to the refugees led to their death and clarifies the nature of the Accused's participation.<sup>58</sup>

27. The Appeals Chamber is not satisfied that the Trial Chamber's approach was correct. The original charge is that the Accused was involved in an attack on wounded Tutsi at the hospital. The amendment proposed is that the Accused ordered that hospital staff refuse treatment to Tutsi refugee patients and ordered their evacuation without the provision of care. This charge remains the same, an attack on Tutsi at the hospital, the proposed amendments merely provide the material facts

<sup>57</sup> Impugned Decision, para. 41.

<sup>58</sup> Prosecution, page 14.

of the Accused's involvement in that attack and do not constitute a new charge against the Accused. The Appeals Chamber notes that these material allegations are identified by the Prosecution as supporting a charge of genocide Count 1, or alternatively complicity in genocide, Count 2. They are not plead therefore as being in support of additional charges.

(iv) The proposed paragraph 18 alleges that the establishment of roadblocks was ordered by the Interim Government on or about 7 April 1994. The current indictment categorically states that the Interim Government ordered roadblocks to be created on 27 April 1994.<sup>59</sup>

28. The Trial Chamber considered that the proposed amendment expanded the period during which roadblocks were ordered and therefore may at least supply new material elements of one or more crimes.<sup>60</sup> On Appeal, the Prosecution says that the current indictment alleges that on 27 April 1994, the Interim Government ordered that roadblocks be placed in Rwanda for the purpose of identifying Tutsi and "accomplices" with an intention of exterminating them. The Prosecution says that this should be read with the following paragraph, which goes on to cite specific check-points at Rwasave, Rwabuye, Hotel Faucon, Ngoma Camp, Ibis Hotel, junction at the University Hospital, Chez Bihira and in front of ESO. The Prosecution claims that the amendment refers to the specific roadblocks set up and provides better and further particulars, especially in relation to the role played by Muvunyi. These particulars relate specifically to the participation of the Accused.

29. The Appeals Chamber is not satisfied that the Trial Chamber's interpretation is correct. The change of the date on which roadblocks were ordered is clearly a material fact and does not constitute a new charge against the Accused. The Appeals Chamber notes that these material allegations are identified by the Prosecution as supporting a charge of genocide, Count 1, or alternatively complicity in Genocide, Count 2. They are pled therefore as being in support of existing charges.

(v) The proposed Paragraph 25 alleges the Accused's involvement in the abduction of Tutsi civilians from various communes and their torture at the brigade cell or ESO Camp. The proposed Paragraph 26 alleges the Accused's involvement in the abduction of family members of Tutsi soldiers from ESO camp who were later on killed at an unknown location. The current indictment only indicates one abduction at the Beneberkia Convent.

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<sup>59</sup> Impugned Decision, para. 41.

<sup>60</sup> *Ibid.*

30. The Trial Chamber considered that the proposed amendment was a new allegation that multiplied the locations and the incidence of alleged abductions. On Appeal, the Prosecution observes that the current indictment alleges that on 30 April 1994 Muvunyi ordered soldiers of Ngoma to go to Benezikira Convent, where they kidnapped refugees and took them to an undisclosed destination. They have never been seen again. Additional paragraphs of the indictment allege that during the events referred to in the indictment, the Interahamwe with the help of soldiers participated in the massacres of the civilian population in Butare prefecture and elsewhere. The indictment generally alleges that soldiers and officers acting under Muvunyi participated in the massacres of the civilian population, some of whom were taken to Ngoma Camp or ESO and later killed. The Prosecution says that the proposed amendment alleges that during the months of April and May 1994, Muvunyi ordered or instigated the abduction of many Tutsi from various communes and took them to the brigade cell or ESO camp, where they were severely tortured. The proposed amendment to the following paragraph alleges that Muvunyi ordered or instigated the abduction of family members of Tutsi soldiers assembled at ESO, and they were taken by soldiers to unknown destinations where they were killed. The Prosecution claims that as the current indictment refers to kidnapping of Tutsi refugees, massacres of different categories of the refugees, and the fact that soldiers acted on Muvunyi's instructions to bring refugees to ESO and other places, the proposed amendment simply outlines specific locations and incidences of abductions and killings.

31. The proposed amendment, while not a new charge, does expand the scope of the allegations against the Accused from an initial pleading of ordering the soldiers of the Ngoma Camp to go to the Benezikira Convent and kidnap the refugees at the Convent to include other incidents. In the indictment, the Prosecution relies on these other incidents as supporting one charge of genocide, or alternatively complicity in genocide, and as such the additional incidents are supplementary material facts in support of an existing charge. They do not constitute new charges.

(vi) The proposed Paragraph 27 alleges that Jean Baptiste Habyalimana was detained at the brigade cell which was under the control of the Accused. It further alleges that Habyalimana was taken away from the cell and never seen again. The current indictment refers to Habyalimana's dismissal from his position as prefect of Butare, yet no mention is made of the Accused's involvement in his detention or disappearance.

32. The Trial Chamber considered that the proposed amendment was a new allegation not contained in the current indictment. On Appeal, the Prosecution says that the original indictment pleaded that on 17 April 1994 the Interim Government dismissed Habyalimana from office and

incited people to get involved in the massacres and that the army and interahamwe militiamen were sent to Butare as reinforcements to start the massacre. The proposed amendment alleges that on or about 17 April 1994 the former Préfet Habyalimana was detained at the brigade cell, which cell was under Muvunyi's control. Habyalimana was taken away by ESO soldiers and was never seen again. The Prosecution says that it concedes that the current indictment only mentions the dismissal of Habyalimana, and it is the proposed amended indictment which relates his detention and disappearance to occurring under the authority of Muvunyi. However, it says that the current indictment has already alleged in general terms what the proposed amendment clarifies in detail and thus provides more particulars as to the outcome of the dismissal. It argues that both the current indictment and the proposed amendment refer to the event on the same day, around 17 April 1994 and specifically about the same person, the former préfet. The Prosecution argues that the current indictment provides a clear account of the fate of Habyalimana and the role played by the Accused who commanded the Army. It says that provision of such specificity assists the Accused in preparing his defence.

33. The Appeals Chamber is satisfied that the allegation of the Accused's involvement in the detention and disappearance of Habyalimana could constitute a new charge against the Accused. In the current indictment, the relevant paragraph is contained in the section titled "Concise Statement of Facts" and not in the section of specific allegations against the Accused. Further, the Prosecution does not reference this paragraph of the current indictment as a material fact underpinning any of the charges made in the indictment. If the proposed amendment is allowed, it is presumed that the Prosecution would include this allegation under Counts 1 and 2 of the indictment, in support of the charges of genocide, or alternatively complicity to genocide. But this does not change the fact that this fresh allegation could support a separate charge against the Accused.

(vii) The proposed paragraphs 33 to 36 contain allegations of the Accused's involvement in the training and recruitment of Hutu civilians as militiamen at ESO and other locations in Butare prefecture. The current indictment, in paragraphs 3.11(i) and (ii), makes general allegations about the creation of *Interahamwe* committees at the prefectural level, and that the MRND Party and the Rwandan Armed Forces (FAR) provided support, military training and weapons to those members devoted to their extremist cause. The personal involvement of the Accused in any of these events is not alleged in any part of the current indictment.<sup>61</sup>

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<sup>61</sup> *Ibid.*  
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34. The Trial Chamber concluded that this new pleading constituted a material fact, "without which a charge in the existing indictment may not be supported, and does add specificity that radically transforms the existing pleading."<sup>62</sup> On appeal, the Prosecution argues that paragraphs 3.11(i) and (ii) of the current indictment allege in general terms that among others, members of the Rwandan Armed Forces (the Accused was a member of those forces) provided support, military training and weapons to those devoted to their extremist causes. The proposed amendments allege that the Accused participated in the training and recruitment of Hutu civilians as militiamen at ESO and other locations in Butare prefecture. The Prosecution claims that the proposed amendment provides clarifications and/or particularisations of the location of the Accused's criminal conduct in a manner encouraged by the Appeals Chamber.<sup>63</sup>

35. The Appeals Chamber agrees with the conclusion of the Trial Chamber that the material facts pleaded in the original indictment were not facts underpinning an alleged charge against the Accused and that the proposed amendment does plead new material facts underpinning a new charge against the Accused. As with the proposed amendment above, in the current indictment the relevant paragraph is contained in the section titled "Concise Statement of Facts" and not in the section of specific allegations against the Accused. Again, the Prosecution does not reference this paragraph of the current indictment as a material fact underpinning any of the charges made in the indictment. If the proposed amendment is allowed, it is presumed that the Prosecution would include this allegation under Counts 1 and 2 of the indictment in support of the charge of genocide or alternatively complicity in genocide; however, such an inclusion would not change the fact that the allegation is capable of supporting a separate charge.

(vii) The proposed Paragraph 41 alleges that the Accused himself "provided weapons for local militiamen" at the Nyakizu meeting in April 1994, and that these weapons were later used "to kill Tutsi civilians". Conversely, Paragraph 3.26 of the existing indictment alleges that "during the events referred to in this indictment" the Accused participated directly in the provision of weapons".<sup>64</sup>

36. The Trial Chamber considered that the proposed paragraph contained new charges in the sense that it specifically alleges that the Accused supplied weapons which were used to kill Tutsi civilians. The Trial Chamber found that there is a difference between this allegation and the version of it in the existing indictment, which merely accused him of participating in the provision of

<sup>62</sup> *Ibid.*

<sup>63</sup> Appeal, page 12.

<sup>64</sup> *Ibid.*



weapons. In the Appeal, the Prosecution argues that the current indictment alleges that during the events of the indictment, the Accused directly participated in the provision of weapons. The proposed amendment alleges that the Accused provided weapons for local militiamen at the Nyakizu meeting in April 1994 and that the weapons were used to kill Tutsi civilians. The Prosecution claims that the proposed amendment clarifies the allegation made in the current indictment that the Accused distributed weapons by providing the date and location at which he distributed them. It argues that this approach is supported by the Appeals Chamber as it increases the fairness of the trial and assists defence preparation.

37. The Appeals Chamber does not agree with the approach of the Trial Chamber. The charge in both versions of the indictment is the provision of weapons; this charge remains the same in both versions of the indictment. The change of the material facts supporting this charge does not change the nature of the charge such that it is a new charge. The Appeals Chamber notes that in the current indictment, the Prosecution relies on this incident as supporting one charge of genocide, or alternatively complicity in genocide, and as such the additional incidents are supplementary material facts in support of an existing charge and do not constitute new charges.

38. While the Appeals Chamber has determined that the Trial Chamber erred in classifying some of the proposed amendments as new charges, this does not necessarily mean that the Trial Chamber erred in the decision that it reached to reject the proposed amendments. As the Trial Chamber acknowledged in its decision, new charges do not prohibit a Chamber from granting the Prosecution leave to amend an indictment. Conversely, the fact that an amendment to an indictment does *not* amount to a new charge does not automatically obligate the Trial Chamber to permit it. Rule 50 (A), which governs the permissibility of amendments to indictments, does not distinguish between amendments that add new charges and those that merely add or clarify material facts. Rather, whether to permit either kind of indictment is a multi-factor discretionary decision for the Trial Chamber. In this case, the Trial Chamber's decision did not turn principally on the fact that new charges were involved, but rather on the prejudice to the Accused that would result from permitting the amendments and on the Prosecution's failure to request the amendments at a date consistent with due diligence. Thus, the Appeals Chamber's conclusion that the Trial Chamber incorrectly categorised some of the amendments as new charges does not require setting aside the Trial Chamber's decision; instead, the Appeals Chamber must assess the issues of prejudice and prosecutorial diligence.

**Ground 2 – Errors in Approach to Prejudice**



39. The Prosecution argues that by characterising the proposed amendments as new charges rather than as material facts clarifying existing charges, the Trial Chamber erred in concluding that the amendments would prejudice the right of the Accused to be tried in a reasonable time and the right to prepare his defence. The Prosecution argues that the first error in the Impugned Decision is the finding that delays would occur while the Accused entered pleas and prepared his defence to respond to the new charges.<sup>65</sup> It argues that as the material facts proposed did not amount to new charges, the amended indictment would not warrant new pleas or preliminary motions, and would therefore not prejudice the rights of the Accused.<sup>66</sup>

40. The Prosecution argues further that the Impugned Decision fails to take into account the fact that the material facts in the proposed amendments are drawn from materials long disclosed to the Accused, thus removing any possibility of prejudice to the Accused.<sup>67</sup> It argues that the Accused had due notice of the scope of the allegations through the Prosecution's timely disclosure, from which all the material allegations alleged in the proposed amendments have been drawn. It says that in this circumstance, the Defence cannot properly claim that it would now broaden its investigation.<sup>68</sup>

41. In Response, the Accused claims that the Prosecution's arguments are based on the fallacy that the indictment is the principal mechanism for informing the Accused of the case against him when it is actually the only method prescribed under the Rules of Evidence and Procedure.<sup>69</sup> The Accused argues that the Prosecution fails to comprehend that it is always an error when an indictment fails to properly plead the legal description of the charges and a concise summary of the facts the Prosecutor alleges show the charged criminal violation. In some cases, the error can be rendered harmless if that information has been provided by other means. The Accused claims that in the circumstances of this case, the Prosecution bears the burden of showing that he would not be prejudiced by allowing the amendments.<sup>70</sup> The Accused says that disclosure can never serve as a substitute for a properly drafted indictment and that an accused is entitled to rely upon the indictment to guide his case preparation. If an indictment does not charge with sufficient specificity, it is difficult for the accused to conduct meaningful investigations prior to trial.<sup>71</sup> The Accused says that disclosure of witness statements with identifying information redacted, as in this

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<sup>65</sup> Appeal, para. 35.

<sup>66</sup> *Ibid.*, para. 36.

<sup>67</sup> Appeal, para.s 37-38.

<sup>68</sup> *Ibid.*, para. 39.

<sup>69</sup> Response, para. 24.

<sup>70</sup> *Ibid.*

case, is insufficient to render errors in the indictment harmless for several reasons.<sup>72</sup> The Accused says that when faced with disclosure that may include information that could support allegations not charged in the indictment, the Accused “should be able to rely on the indictment and presume in the absence of other information that the Prosecution has exercised its discretion and decided not to pursue charges arguably supported by the disclosure”.<sup>73</sup> The Accused argues further that it is also possible that the Prosecution may have determined that information contained in the disclosure is unreliable, and as the Prosecutor is under no obligation to disclose its work product, if the Accused cannot rely on the indictment to determine which crimes are charged, he would have “to chase down every rabbit trail in every disclosed statement in order to prepare a defence”.<sup>74</sup> The Accused goes on to argue that viewing witness statements as substitute for a properly pled indictment, as the Prosecutor does in this case, would necessarily lead to wasted resources.<sup>75</sup>

42. Finally, the Accused says that the Trial Chamber considered the issue of prejudice in paragraphs 48-50 of the Impugned Decision and properly rejected the assertions made by the Prosecutor of no prejudice. The Accused argues that there was no abuse of the discretion by the Trial Chamber in finding that the Accused would be prejudiced by allowing the amendments.<sup>76</sup>

### Analysis

43. The Trial Chamber’s errors with respect to its characterisation of some of the proposed amendments as constituting new charges has already been addressed above. The Appeals Chamber has determined that only two of the proposed amendments were properly characterised as new charges. However, in its analysis of prejudice to the Accused, the Trial Chamber did not treat its characterisation of some of the proposed amendments as new charges as a decisive factor. Rather, the Trial Chamber considered whether to permit these amendments would result in undue prejudice to the Accused.

44. In order to determine whether prejudice would accrue to the Accused, the Trial Chamber considered whether the rights of the Accused under Article 20 would be prejudiced.<sup>77</sup> It found that it was reasonable to consider that throughout his pre-trial detention the Accused had expended time and resources preparing his defence on the basis of the indictments filed, and that the Prosecution

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, para. 26.

had been unable to give good reason for not seeking the amendments in December 2003, or throughout 2004. In these circumstances, the Trial Chamber found that to allow amendments to the indictment on the eve of the trial, which introduced “new material elements”, was likely to cause substantial prejudice to the right of the Accused to a trial without undue delay, as well as to his right to prepare his defence, and it was also likely to prolong further his pre-trial detention.<sup>78</sup> There was no abuse by the Trial Chamber of its discretion by this reasoning.

45. However, following this conclusion, the Trial Chamber stated that it was mindful of the procedural consequences that would result from permitting an amendment at this late stage of the proceedings by introducing new charges. “Under Rule 50(B) and (C), these include the requirement of a further appearance by the Accused, a period of thirty days to file the preliminary motions with respect to the new charges plead in the indictment, and the likelihood of the postponement of the trial to allow the Accused adequate time to prepare his defence”. The Appeals Chamber is satisfied that the only error made by the Trial Chamber was its view that the Accused would have to enter new pleas. Even with respect to those two proposed amendments which do constitute new charges, it is clear that the Prosecution was not going to allege new charges against the Accused, but include them as material facts underpinning existing charges. However, the proposed amendments, by their expansion of the material facts underpinning the charges against the Accused, would permit the Accused to file new challenges to the form of the indictment and would also require additional time being made available to the Defence to investigate the new and expanded allegations. Thus, even though no new pleas would need to be entered, the amendment to the indictment would very likely cause substantial delay in the proceedings. The Trial Chamber’s conclusion that delay would be likely- and that the Accused would thus be prejudiced – thus did not constitute an abuse of discretion, even though the Trial Chamber erred in identifying one of the contributing factors to that delay.

**Ground 3 – Error or misdirection with respect to pertinent principles as pronounced by the Appeals Chamber respecting the importance of relentlessly seeking the perfection of the main charging instrument, the Indictment.**

46. The Prosecution argues that the Appeals Chamber has stated that it should plead its indictments with as much specificity as possible and that it should seek amendments whenever new allegations come to its attention. It argues that in bringing the proposed amended indictment the

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<sup>77</sup> Impugned Decision, para. 43.

<sup>78</sup> *Ibid.*, para. 48.

Prosecution acted with diligence, "after reconfirming the veracity of the material allegations and it did not seek to obtain a tactical advantage".<sup>79</sup> It says even if the Prosecution should have sought to amend the indictment earlier, that in itself is not a sufficient reason to deny the amendment.<sup>80</sup>

47. In Response, the Accused says that the Prosecution identifies no error in the finding of the Trial Chamber that it failed to act with due diligence in seeking the proposed amendments. It does not advance any reasoned argument to show that the Trial Chamber abused its discretion and the issue should be rejected by the Appeals Chamber.

#### Analysis

48. The Trial Chamber noted that the Accused had been in detention since February 2000, the initial indictment was filed on 17 November 2000, and the current indictment on 23 December 2003. At a Status Conference held on 7 December 2004, the Chamber informed the parties that the trial would commence on 28 February 2005. The Prosecution filed a motion seeking to amend the indictment on 17 January 2005, which was revised and replaced on 4 February 2005.<sup>81</sup>

49. In determining whether the Prosecution had shown diligence in seeking to amend at such a late stage in the pre-trial stage, the Trial Chamber considered it to be of particular relevance that the Prosecution was in possession of most, if not all, the witness statements it relied upon in support of the amendments by December 2003, when the Prosecution last modified the indictment against the Accused.<sup>82</sup> The Trial Chamber considered that the Prosecution has an obligation to show that it had acted with due diligence in bringing the motion for amendment in a timely manner and that the Prosecution had failed to give reasons for not bringing the amendments in December 2003.<sup>83</sup>

50. The Trial Chamber further considered that, although the Rules did not require the Prosecution to amend an indictment as soon as new evidence is discovered, the Prosecution cannot delay giving notice of changes without providing reasons. It considered that the claim of reliance upon new jurisprudence advanced by the Prosecution, which obligated it to plead with sufficient particularity, was unpersuasive because the jurisprudence relied upon was not new, but an affirmation of the state of the law existing before December 2003, when the indictment was last

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<sup>79</sup> Appeal, para.s 40-41.

<sup>80</sup> *Ibid.*, para. 41.

<sup>81</sup> Impugned Decision, para. 44.

<sup>82</sup> *Ibid.*, para. 45.

<sup>83</sup> *Ibid.*, para. 46.

modified. The Trial Chamber concluded that the Prosecution has failed to establish that it acted with due diligence.<sup>84</sup>

51. The Appeals Chamber finds that the Trial Chamber's conclusion was reasonable and within the bounds of its discretion. The Prosecution has not put forward any convincing reason it could not have included the allegations it now wishes to add at the time of the previous amendments to the indictment in December 2003. It does not deny that it was in possession of evidence supporting those allegations at the time. As the Appeals Chamber held in the *Karemera* case, "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".<sup>85</sup> Under some circumstances, the Prosecution might justifiably wait to file an amendment while it continues its investigation so as to determine whether further evidence either strengthens its case or weakens it. But here the Prosecution has not demonstrated that such delay was justified by the circumstances; it has not provided any evidence that it acted with due diligence. Where the Prosecution has delayed unnecessarily in bringing particular allegations, and this delay has caused prejudice to the defendant, it is within the Trial Chamber's discretion to find that this delay constitutes sufficient ground to refuse an amendment to an indictment.<sup>86</sup>

**Ground 4 - Denial of an amendment may result in the exclusion of material allegations that would otherwise be admitted, since they were communicated to the defence in a timely, clear and consistent manner, thus prejudicing the interests of justice.**

52. The Prosecution argues that the Trial Chamber erred in law in failing to give weight or sufficient weight to the prejudice to the Prosecution's case of the risk that the refusal to allow the amendments could result in a ruling that the evidence be excluded.<sup>87</sup> It argues that it is prejudicial to the interests of justice that evidence disclosed to the Accused be excluded because an attempt to amend the indictment was denied. It argues that the prejudice to its case becomes more apparent when it is considered that the jurisprudence of the Tribunal is that defects in an indictment may be cured by timely disclosure. The Prosecution argues that it sought to include the material facts in the

<sup>84</sup> *Ibid.*, para. 47.

<sup>85</sup> *Prosecutor v Karemera*, No ICTR-98-44-AR73, *Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 December 2003 Denying Leave to File An Amended Indictment*, 19 December 2003, para. 20.

<sup>86</sup> The Trial Chamber may consider lack of prosecutorial diligence as a factor supporting denial of an amendment even if no bad faith is demonstrated on the part of the prosecution – that is, even if the prosecution did not deliberately delay the amendment in order to seek a strategic advantage. *See id.* at para. 23 (holding that in such circumstances, 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'").

<sup>87</sup> Prosecution's Appeal, para. 42.

indictment in conformity with decisions of the Appeals Chamber and that denial of the amendments “sets the stage for excluding evidence relating to allegations underpinning the counts that were communicated to the Accused in a timely, consistent and clear manner, and which would otherwise suffice to “cure” defects in an indictment, thereby perpetrating a severe prejudice to the interests of justice”.<sup>88</sup>

53. In Response, the Accused says the Prosecution fails to identify what otherwise admissible evidence could be excluded and that the argument is “amazing” in light of the Prosecution’s basic claim that the amended indictment did not add new charges or expand charges already in the indictment.<sup>89</sup> The Accused argues that if the proposed amendments make no material changes to the charges then the admissible evidence should remain the same.<sup>90</sup> It is only irrelevant evidence with no probative value which should be excluded.<sup>91</sup>

54. In <sup>the</sup> conclusion, the Accused says that the Prosecution has failed to show that the Trial Chamber abused its discretion because it did not do so.<sup>92</sup>

#### Analysis

55. The Appeals Chamber does not accept the Prosecution’s argument that the denial of the amendments will necessarily result in the exclusion of the evidence that relates to charges contained in the current indictment. If evidence is relevant to a charge in the current indictment and is probative of that charge, then subject to any other ground for exclusion that may be advanced by the Defence, that evidence should be admissible. In any event, the Appeals Chamber does not consider it appropriate for it to grant the relief sought by the Prosecution as the Prosecution has not demonstrated any abuse of discretion.

#### Conclusion

56. In conclusion, while the Appeals Chamber has found that the Trial Chamber erred in its characterisation of most of the proposed amendments as constituting new charges, it is not satisfied that this error had the effect of invalidating the overall decision of the Trial Chamber. The impact of that error led the Trial Chamber to consider that there would be additional delay while the Accused entered new pleas to the new charges. Even with respect to those amendments that could

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<sup>88</sup> *Ibid.*, para. 43.

<sup>89</sup> Response, para.s 31-32.

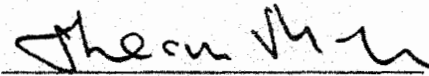
<sup>90</sup> *Ibid.*, para. 32.

<sup>91</sup> *Ibid.*, para. 33.

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be characterised as new charges, the Prosecution was not seeking to add additional charges to the indictment, but to add them to the material facts already pled in the indictment. With respect to the main issue, whether prejudice would accrue to the Accused, the Appeals Chamber is satisfied that there was no abuse of discretion by the Trial Chamber, and that its reference to delays caused by the Accused's entering of new pleas did not invalidate the overall reasonable exercise of discretion by the Trial Chamber. The Prosecution Appeal is therefore dismissed.

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



Theodor Meron

Presiding Judge of the Appeals Chamber

Done this 12<sup>th</sup> day of May 2005,  
At The Hague,  
The Netherlands.



[Seal of the International Tribunal]