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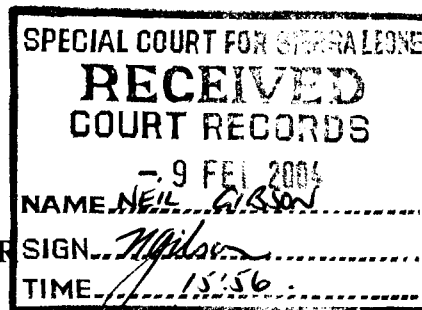
SCSL - 2004 - 14 - PT
(102 - 218)
SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR
FREETOWN - SIERRA LEONE

Before: Judge Bankole Thompson
Judge Itoe
Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 9 February 2004



THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

Also known as (aka) King Dr Allieu Kondewa, (aka) Dr Allieu Kondewa

CASE NO. SCSL - 2004 - 14 - PT

**REQUEST FOR LEAVE TO AMEND THE INDICTMENT AGAINST SAMUEL HINGA
NORMAN, MOININA FOFANA AND ALLIEU KONDEWA**

Office of the Prosecutor:

Luc Côté
James C. Johnson
Adwoa Wiafe

Defence Counsel:

Jenkins-Johnston for Hinga Norman
Michiel Pestman for Moinina Fofana
Charles Margai for Allieu Kondewa

SPECIAL COURT FOR SIERRA LEONE

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**REQUEST FOR LEAVE TO AMEND THE INDICTMENT AGAINST SAMUEL HINGA
NORMAN, ALLIEU KONDEWA AND MOININA FOFANA**

I. INTRODUCTION

1. The Prosecution files this “Request for Leave to Amend the Indictment Against Samuel Hinga Norman, Allieu Kondewa and Moinina Fofana” (“**Request**”) pursuant to Rules 50(A) and 73(A) of the Special Court Rules of Procedure and Evidence (“**the Rules**”) seeking leave to file amended indictments against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa (“**the Accused**”).

II. BACKGROUND

2. On 7 March 2003 Judge Bankole Thompson approved the indictment against Accused Samuel Hinga Norman. On 26 June 2003 Judge Bankole Thompson approved the indictment against Accused Allieu Kondewa and Moinina Fofana. The indictments were joined by Decision dated 27 January 2004 and a consolidated Indictment was filed on 5 February 2004 (“**the Indictment**”). The Accused are charged with murder, inhumane

acts, violence to life, health and physical or mental well-being of persons, pillage, acts of terrorism, collective punishments, and child conscription.

3. On 15, 17 and 21 March 2003 Accused Samuel Hinga Norman made an initial appearance before Judge Benjamin M. Itoe. Accused Moinina Fofana and Allieu Kondewa made their initial appearance before Judge Pierre Boutet on 30 June 2003.

III. SUMMARY

4. The Prosecution submits that the proposed amended indictment (“**the Amended Indictment**”), a copy of which is annexed hereto (Annex 1), is justified both in law and on the evidence and should be granted since:

- (a) The Amended Indictment incorporates new and additional evidence which was not available at the time the Current Indictments were submitted for approval;

- (b) There has been no undue delay in bringing the amendment; and

- (c) That the filing of the Amended Indictment will not prejudice the rights of the accused to a fair and expeditious trial.

5. The Amended Indictment makes the following changes to the Indictment:

- A. On the basis of newly discovered evidence, the Prosecutor introduces new and additional charges based on various acts of sexual violence committed against women in paragraphs 24 and 31 of the Amended Indictment. [As a result of the enclosure of the new paragraph 24, paragraphs 24 through 29 of the Indictment are renumbered paragraphs 25 through 30 of the Amended Indictment] For these acts of sexual violence, the Prosecutor charges the accused persons in the Amended Indictment with (i) Rape, a crime against humanity, punishable under Article 2.g. of the Statute of the Special Court for Sierra Leone (“the Statute”) (count 9); (ii) Sexual slavery and any other form of sexual violence, a crime against humanity, punishable under Article 2.g. of the Statute (count 10); (iii) Other inhumane acts, punishable under Article 2.i. of the Statute (count 11); (iv) Outrages upon personal dignity, punishable under Article 3.e. of the Statute (count 12). The Accused

persons are responsible for the commission of these additional offences pursuant to Article 6.1. and 6.3. of the Statute.

B. Based on new evidence, the Amended Indictment extends the time frames contained in paragraphs 25.d, 26.a and 27 of the Indictment [see paras. 26.d, 27.a and 28 of the Amended Indictment], and adds new locations, Bo town and Mabang to Paragraph 26.a [see, para. 27.a of Amended Indictment] and Freetown to paragraph 27 [see, paragraph 28 of Amended Indictment].

C. As a result of the inclusion of the new paragraphs 24 and 31 and the new counts 9 through 12 in the Amended Indictment, paragraph 28 of the Indictment [see para. 29 of Amended Indictment] should also be amended to reflect the new paragraphs and new counts.

6. The Prosecution has also attached to the motion a Prosecutor's Case Summary in the form of an Investigator's Summary briefly setting out the allegations which form the basis of the proposed new charges. (Annex 2)

III. LEGAL BASIS

7. Rule 50(A) of the Rules provides that after the initial appearance of the accused, an amendment of the indictment may be granted only with leave of the Trial Chamber. If leave to amend is granted, Rules 47(G) and 52 apply to the amended indictment. The SCSL Rule 50(A) is similar to Rule 50(A) of the ICTR Rules of Procedure and Evidence and Rule 50(A)(i) the Rules of Procedure and Evidence of the ICTY concerning amendment of the indictment.
8. In granting the request to amend an indictment, existing jurisprudence of the ICTR requires the Prosecutor to demonstrate sufficient legal and factual grounds for the amendment.¹

¹ *Prosecutor v. Gratién Kabiligi & Aloys Ntabakuze*, Case No. ICTR-97-34-I and ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999, para. 42. Also, *Prosecutor v. Kanyabashi*, ICTR-96-1-T, The Decision on Prosecution's Request for Leave to Amend the Indictment, 12 August 1999, para. 19.

9. The decision to grant a request to amend the indictment is discretionary and must be considered against the overall interest of justice,² having particular regard to the specific circumstances of the case and the accused's right to an expeditious trial.³ Article 20(4)(c) of the ICTR Statute which enshrines the accused right to be tried without undue delay is the equivalent of Article 17.4.c of the Statute of the Special Court for Sierra Leone (“**the Statute**”).

IV. FACTUAL BASIS

10. The proposed Amended Indictment contains new factual allegations based on new evidence uncovered by the Prosecutor from on-going investigations.
11. The evidence substantiates the commission of various acts of sexual violence against civilian women by members of the Civil Defence Forces (CDF). As indicated in paragraphs 24 and 31 of the Amended Indictment, these acts of sexual violence consisted of rape, sexual slavery, and forced “marriages” committed by Kamajors against women abducted from various parts of the southern and eastern provinces of Sierra Leone.
12. The Prosecution submits that the new factual allegations give rise to crimes within the jurisdiction of this court namely, crimes against humanity, in particular rape, sexual slavery⁴ and any other form of sexual violence, other inhumane acts, and war crimes, in particular, outrages on personal dignity,⁵ violations of Articles 2 and 3 of the Statute as reflected in counts 9 through 12 of the Amended Indictment.
13. Further, investigations since the confirmation of the indictments against the Accused reveal the commission of crimes by the Accused and their subordinates far outside the time limits as set out in paragraphs 25.d, 26.a. and 27 of the Indictment but within the temporal jurisdiction of the Special Court. The time frames stated in these paragraphs have thus been expanded in the Amended Indictment to reflect this new evidence. Additionally, new locations have been added to Paragraphs 26.a and 27 of the Indictment

² *Prosecutor v. Graitien Kabiligi & Aloys Ntabakuze, supra note 1, para.43.*

³ *Prosecutor v. Bizimungu, Mugenzi, Bicamumpaka & Mugiraneza, Case No. ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003, para. 27.*

⁴ See, ICC Elements of Crimes, UN Doc. PCNICC/2000/1/Add.2 (2000), article 7(1)(g) – 2.

⁵ *Prosecutor v. Akayesu, ICTR-96-4-T, Trial Judgement, 2 September 1998, para. 688.*

to reflect additional locations to the crime base that have been identified since the Bill of Particulars was filed in the case of Prosecutor Against Kondewa.

14. For the reasons set out in the preceding paragraph, the Prosecution seeks to amend the Indictment in the following paragraphs:

- (i) paragraph 25.d – time frame amended from “in or about January and December 1998” to “between about January 1998 and about April 1999”; [para. 26.d of the Amended Indictment].
- (ii) paragraph 26.a – time frame amended from “between about 1 November 1997 and 30 April 1998” to “between about 1 November 1997 and about 31 December 1998” and adding the locations Bo town and Mabang; [para. 27.a of the Amended Indictment].
- (iii) paragraph 27 – time frame amended from “between about 1 November 1997 and about 1 April 1998” to “between about 1 November 1997 and about 1 August 2000” and adding the location of Freetown. [para. 28 of the Amended Indictment].

15. Finally, to reflect the inclusion of the new paragraphs 24 and 31 and the new counts 9 through 12 of the Amended Indictment, the Prosecution seeks to amend paragraph 28 of the Indictment [para. 29 of the Amended Indictment] by amending “in paragraphs 22 through 27, and charged in counts 1 through 5” to “in paragraphs 22 through 28 and 31, and charged in counts 1 through 5 and 9 through 12”.

V. AMENDMENT DOES NOT PREJUDICE THE RIGHTS OF THE ACCUSED

16. In deciding whether the Prosecution’s Request would prejudice fundamental rights of the Accused, the court must establish (1) whether the prosecutor acted with undue delay in submitting the Request; and (2) whether the amendments, if approved, will cause undue delay to the trial of the Accused.⁶

⁶*Prosecutor v. Kanyabashi*, *supra* note 1, para. 23.

A. Request for leave to amend is timely

17. The Prosecution submits that the filing of this motion is timely given the complexity of the crimes alleged and the inevitable challenges involved in carrying out investigations of this magnitude.
18. In the *Karemera* decision⁷, the Appeals Chamber of the ICTR held that in assessing whether delay resulting from the motion would be “undue”, the tribunal must consider factors such as the diligence of the Prosecutor in advancing the case and the timeliness of the motion. Moreover, the question of undue delay is dependent on all the circumstances of the case.
19. In carrying out investigations into the conduct of the Accused, the Prosecutor submits that he exercised all due diligence, being mindful of the need to expedite the trial of the Accused. Hence, the efforts made to file the Request prior to the commencement of trial.
20. Fears expressed by potential witnesses if they came forward to testify meant that the Prosecutor could not have easy access to the newly acquired evidence at the time that the Indictments were approved. In some instances, it was the existence of the Indictment and subsequent incarceration of the Accused that created the conditions for these potential witnesses to come forward and give evidence whereas before they were unwilling to do so. Additionally, the very serious nature of these crimes require that the evidence is critically evaluated and the credibility of the witnesses verified before charges are preferred; a process which takes time.
21. In the interest of judicial economy, the Prosecution filed this Request after the decision in the Prosecution Motion for Joinder had been rendered to avoid filing separate motions for each accused as would have been the case if the application had been made earlier.

⁷ 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, 12 December 2003, para. 15.

B. Amendment will not unduly delay trial of the Accused

22. In the absence of an express indication in Rule 50(A) as to the time frame within which to file a request for leave to amend an indictment, the court has to consider the extent to which leave to amend, if granted, would affect the Accused's right to a fair trial.⁸ The Prosecutor submits that the amendment of the Indictment against the Accused at this stage of the proceedings will not prejudice their right to have adequate time to prepare a defence or their right to be tried without undue delay.
23. The determination of whether the Request would result in undue delay must be made in light of the gravity, nature and complexity of the case as well as the particular circumstances of the case.⁹ The Accused are charged with crimes against humanity and war crimes. The seriousness of these charges necessitates thorough investigations to determine the precise scope of the Accused' guilt.
24. Since proceedings before the court are still at the pre-trial stage with no date having been set for trial, allowing an amendment of the Indictment, at this stage, will not require an adjournment of proceedings, a major cause of delays in most trials. Hence, the issue of the amendments delaying trial does not arise.
25. Even if amending the Indictment at this pre-trial stage would result in some delay in the trial of the Accused, the resulting delay will not be unreasonable in the circumstances. The reasonableness of any delay flowing from the proposed amendments to the Indictments ought to be evaluated in the context of the overall effect of the proposed amendment on proceedings.¹⁰ In this regard, the *Karemera* decision held as follows:

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

⁸ *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999, para. 17. See also, *Prosecutor v. Kovacevic*, No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998, para. 28.

⁹ *Prosecutor v. Kovacevic*, *supra* note 8, para. 30.

¹⁰ *Id.*, para. 31.

challenges to the indictment or the evidence presented at trial.¹¹
[Emphasis added].

26. The Prosecutor submits that incorporating the crimes of sexual violence as well as the extended time frames into the Indictment not only ensures a better understanding of the case against the Accused, but it also reflects the totality of the crimes committed by them - evidence that would have inevitably come out at trial, charged or not. The Prosecution has a duty to charge these additional crimes.
27. The new factual allegations includes evidence which shows that women and girls were often abducted by the Kamajors on the accusation that they were rebels or rebel collaborators and subjected to multiple rapes, used as sex slaves and/or forced into "marriages". In paragraph 28 of the Indictment, the Prosecutor alleges that the crimes committed by the Accused and their subordinates were aimed at terrorizing the civilian population for failing to actively resist the AFRC/RUF forces. In line with this theory of the Prosecution and as indicated in the Amended Indictment, the crimes of sexual violence were also committed as part of the overall campaign of terror.
28. Granting leave to amend the indictments against the accused at this time will avoid unfair surprise and ensure that the accused persons are fully informed of the case against them in advance of trial, giving them ample opportunity to conduct their investigations.

VI. AMENDMENT IS IN THE OVERALL INTEREST OF JUSTICE

29. The importance of continuous investigations in the trial preparation process is reflected in the jurisprudence of the ICTR.¹² The cases recognize that investigations do not, and indeed should not, end after the approval of the indictment or the initial appearance of the accused as it is in the overall interest of justice that the best evidence is presented to the court.
30. For the above reasons, the right of the accused to a fair trial has to be balanced against the need for the Prosecutor to prosecute accused persons to the full extent of the law and to

¹¹ *Prosecutor v. Karemera, supra* note 7, para. 15

¹² *Prosecutor v. Baryagwiza*, Case No. ICTR-97-19-I, Decision on the Prosecutor's Request for Leave to File An Amended Indictment, 1 April 2000 at page 3.

present all relevant evidence before the court.¹³ It is of utmost importance, therefore, that the Prosecutor amends the indictment when he obtains new evidence that goes to show the full nature of the Accused conduct. In this case, having regard to the efforts made by the Prosecutor to amend the Indictment within a reasonable time after the discovery of the evidence, and in any case, before the commencement of trial, no serious prejudice will be caused to the Accused if the Indictment is amended to reflect the newly discovered evidence.

31. Finally, in certain circumstances the interest of justice dictates that an amendment is made even in the course of trial. Such an amendment was allowed by the Trial Chamber in the *Akayesu* Case.¹⁴ Given the nature of the new charges against the Accused, the timeliness of the Request and the importance of the evidence to the proceedings as a whole, it is the Prosecution's submission that it is in the overall interest of justice to approve the Amended Indictment.

VIII. CONCLUSION

32. The Prosecution submits that the instant request for leave to amend the Indictment is essential in order to put forth new evidence that has recently come into its possession.

33. This new evidence will assist the court in fulfilling its mandate provided in the Statute of the Special Court – to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law committed in the territory of Sierra Leone – in that it reflects the full criminal culpability of the Accused.

34. Based on the arguments above, the Prosecution submits that it has established sufficient justification for the amendment both in law and on the evidence.

¹³ *Id.*

¹⁴ "Decision on the Prosecutor's Request for Leave to Amend the Indictment, ICTR-96-4-T, 17 June 1997.

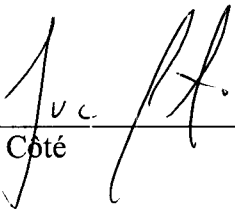
RELIEF SOUGHT

For the foregoing reasons, the Prosecutor prays that the Trial Chamber:

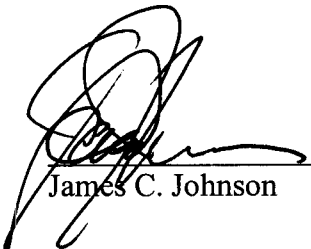
- i) Grant the Prosecutor leave to amend the Indictment as amended in the Amended Indictment attached to the Request as Annex I;
- ii) Issue an order approving the Amended Indictment;
- iii) Issue an order directing that the Amended Indictment to be filed with the Registry;
- iv) Issue an order that the Amended Indictment be served on each Accused and his counsel immediately.

Freetown, 9 February 2004

For the Prosecution



Luc Côté



James C. Johnson

PROSECUTION INDEX OF ATTACHMENTS

- I. Amended Indictment
- II. Prosecutors Case Summary in the form of an Investigators Statement

PROSECUTION INDEX OF ATTACHMENTS

I. Amended Indictment

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL – 2004 – 14 – PT

THE PROSECUTOR

Against

SAMUEL HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

Also known as (aka) King Dr Allieu Kondewa, (aka) Dr Allieu Kondewa

AMENDED INDICTMENT

The Prosecutor, Special Court for Sierra Leone, under Article 15 of the Statute of the Special Court for Sierra Leone (the Statute), charges:

SAM HINGA NORMAN

MOININA FOFANA

ALLIEU KONDEWA

with **CRIMES AGAINST HUMANITY, VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, and OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW in violation of Articles 2, 3 and 4 of the Statute**, as set forth below:

THE ACCUSED

1. **SAMUEL HINGA NORMAN**, was born on 1 January 1940, in Ngolala Village, Mongeri (or Monghere), Valunia Chiefdom, Bo District, in the Southern Province of the Republic of Sierra Leone. He served in the Armed Forces of the Republic of Sierra Leone from about 1959 to 1972 rising to the rank of Captain. In 1966 he

graduated from the Mons Officer Cadet School in Aldershot, United Kingdom. He has served as the Liaison Representative and Chiefdom Spokesman, Mongeri, Valunia Chiefdom, as Regent Chief of Jaiama Bongor Chiefdom, and as Deputy Minister of Defence for Sierra Leone. He is currently serving as the Minister of the Interior for Sierra Leone.

2. **MOININA FOFANA**, is believed to have been born in 1950, in Nongoba Bullom Chiefdom, Bonthe District, in the Republic of Sierra Leone. He currently resides in the town of Gbap, Nongoba Bullom Chiefdom, Bonthe District and is the Chiefdom Speaker for the Nongoba Bullom Chiefdom.
3. **ALLIEU KONDEWA, also known as (aka) King Dr Allieu Kondewa, (aka) Dr Allieu Kondewa**, is believed to have been born in the Bo District, in the Republic of Sierra Leone. He currently resides in the Bumpeh Chiefdom, Bo District, and his occupation is that of a farmer and herbalist.

GENERAL ALLEGATIONS

4. At all times relevant to this Indictment, a state of armed conflict existed in Sierra Leone. For the purposes of this Indictment the organized armed factions involved in this conflict included the Civil Defence Forces (CDF) fighting against the combined forces of the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).
5. A nexus existed between the armed conflict and all acts or omissions charged herein as Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and as Other Serious Violations of International Humanitarian Law.
6. The CDF was an organized armed force comprising various tribally-based traditional hunters. The Kamajors were comprised mainly of persons from the Mende tribe resident in the South and East of Sierra Leone, and were the predominant group within the CDF. Other groups playing a less dominant role were the Gbethis and the Kapras, both comprising mainly of Temnes from the north; the Tamaboros,

comprising mainly of Korankos also from the north; and the Donsos, comprising mainly of Konos from the east.

7. The RUF was founded about 1988 or 1989 in Libya and began organized armed operations in Sierra Leone in or about March 1991. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of Sierra Leone via a coup d'état on 25 May 1997. Soldiers of the Sierra Leone Army comprised the majority of the AFRC membership. Shortly after the AFRC seized power, the RUF joined with the AFRC.
8. The **ACCUSED** and all members of the CDF were required to abide by International Humanitarian Law and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.
9. All offences charged herein were committed within the territory of Sierra Leone after 30 November 1996.
10. All acts or omissions charged herein as Crimes Against Humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone.
11. The words civilian or civilian population used in this indictment refer to persons who took no active part in the hostilities, or were no longer taking an active part in the hostilities.

INDIVIDUAL CRIMINAL RESPONSIBILITY

12. Paragraphs 4 through 11 are incorporated by reference.
13. At all times relevant to this Indictment, **SAMUEL HINGA NORMAN** was the National Coordinator of the CDF. As such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of the Kamajors.

14. At all times relevant to this Indictment, **MOININA FOFANA** was the National Director of War of the CDF and **ALLIEU KONDEWA** was the High Priest of the CDF. As such, together with **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA** were seen and known as the top leaders of the CDF. **MOININA FOFANA** and **ALLIEU KONDEWA** took directions from and were directly answerable to **SAMUEL HINGA NORMAN**. They took part in policy, planning and operational decisions of the CDF.
15. **MOININA FOFANA** acted as leader of the CDF in the absence of **SAMUEL HINGA NORMAN** and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, **MOININA FOFANA** commanded one battalion of Kamajors.
16. **ALLIEU KONDEWA**, as High Priest had supervision and control over all initiators within the CDF and was responsible for all initiations within the CDF, including the initiation of children under the age of 15 years. Furthermore, he frequently led or directed operations and had direct command authority over units within the CDF responsible for carrying out special missions.
17. **SAMUEL HINGA NORMAN**, as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation, and training of Kamajors, including children below the age of 15 years. **SAMUEL HINGA NORMAN; MOININA FOFANA**, as the National Director of War of the CDF; and **ALLIEU KONDEWA**, as the High Priest of the CDF, knew and approved the use of children to participate actively in hostilities.
18. In the positions referred to in the aforementioned paragraphs, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, individually or in concert, exercised authority, command and control over all subordinate members of the CDF.

19. The plan, purpose or design of **SAMUEL HINGA NORMAN, MOININA FOFANA, ALLIEU KONDEWA** and subordinate members of the CDF was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone. Each **Accused** acted individually and in concert with subordinates, to carry out the said plan, purpose or design.
20. **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, by their acts or omissions are individually criminally responsible pursuant to Article 6.1. of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each **Accused** otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which each **Accused** participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each **Accused** participated.
21. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **SAMUEL HINGA NORMAN, MOININA FOFANA** and **ALLIEU KONDEWA**, while holding positions of superior responsibility and exercising command and control over their subordinates, are individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute. Each **Accused** is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each **Accused** failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

CHARGES

22. Paragraphs 4 through 21 are incorporated by reference.
23. The CDF, largely Kamajors, engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone – to include the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas and the Districts of Moyamba and

Bonthe. Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed “**Collaborators**” and specifically targeted by the CDF. Once so identified, these “Collaborators” and any captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism.

24. The CDF forces, committed various acts of sexual violence against civilian women and girls who were abducted during a series of raids and invasions on villages in the southern and eastern provinces of Sierra Leone particularly in Bonthe and Kenema Districts. These women and girls were often repeatedly raped, used as sex slaves and/or taken as “wives” in forced “marriages” by members of the Kamajors forces and forced to perform a range of conjugal duties, including sex, domestic services and other forms of forced labour. These women and girls were often accused of being rebels and threatened with death if they refused to become Kamajor “wives”. The women and girls had to endure various acts of physical and mental abuse from their “captors/husbands”.
25. These actions by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were intended to threaten and terrorize the civilian population. Many civilians saw these crimes committed; others returned to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property. Typical CDF actions and the resulting crimes included:
 - a. Between 1 November 1997 and about 1 April 1998, multiple attacks on Tongo Field and surrounding areas and towns during which Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors screened the civilians and those identified as “**Collaborators,**” along with any captured enemy combatants, were unlawfully killed.
 - b. On or about 15 February 1998 Kamajors attacked and took control of the town of Kenema. In conjunction with the attack and following the attack, both at and near Kenema and at a nearby location known as SS Camp, Kamajors continued to

identify suspected “**Collaborators**,” unlawfully killing or inflicting serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors also entered the police barracks in Kenema and unlawfully killed an unknown number of Sierra Leone Police Officers.

- c. In or about January and February 1998, the Kamajors attacked and took control of the towns of Bo, Koribondo, and the surrounding areas. Thereafter, the practice of killing captured enemy combatants and suspected “**Collaborators**” continued and as a result, Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and enemy combatants. Also, as part of these attacks in and around Bo and Koribondo, Kamajors unlawfully destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses.
- d. Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembehun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected “**Collaborators**” and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.
- e. Between about October 1997 and December 1999, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bombay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected “**Collaborators**” and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.
- f. In an operation called “Black December,” the CDF blocked all major highways and roads leading to and from major towns mainly in the southern and eastern Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants.

COUNTS 1 – 2: UNLAWFUL KILLINGS

26. Unlawful killings included the following:
- a. between about 1 November 1997 and about 30 April 1998, at or near Tongo Field, and at or near the towns of Lalehun, Kamboma, Konia, Talama, Panguma and Sembahun, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;
 - b. on or about 15 February 1998, at or near the District Headquarters town of Kenema and at the nearby locations of SS Camp, and Blama, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;
 - c. on or about 15 February 1998, at or near Kenema, Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers;
 - d. between about January 1998 and April 1999, in locations in Bo District including the District Headquarters town of Bo, Kebi Town, Koribondo, Kpeyama, Fengehun and Mongere, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants;
 - e. between about October 1997 and December 1999 in locations in Moyamba District, including Sembahun, Taiama, Bylago, Ribbi and Gbangbatoke, Kamajors unlawfully killed an unknown number of civilians;
 - f. between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians;
 - g. between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of Sierra Leone, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants in road ambushes at Gumahun, Gerihun, Jembeh and the Bo-Matotoka Highway.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 1: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute of the Court;

In addition, or in the alternative:

Count 2: Violence to life, health and physical or mental well-being of persons, in particular murder, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of the Statute.

COUNTS 3 – 4: PHYSICAL VIOLENCE AND MENTAL SUFFERING

27. Acts of physical violence and infliction of mental harm or suffering included the following:

- a. between about 1 November 1997 and 31 August 2000, at various locations, including Tongo Field, Kenema Town, Bo Town, Blama, Kamboma, Mabang and the surrounding areas, the CDF, largely Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilians;
- b. between November 1997 and December 1999, in the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas, and the Districts of Moyamba and Bonthe, the intentional infliction of serious mental harm and serious mental suffering on an unknown number of civilians by the actions of the CDF, largely Kamajors, including screening for “**Collaborators**,” unlawfully killing of suspected “**Collaborators**,” often in plain view of friends and relatives, illegal arrest and unlawful imprisonment of “**Collaborators**”, the destruction of homes and other buildings, looting and threats to unlawfully kill, destroy or loot.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or

alternatively, Article 6.3.of the Statute, are individually criminally responsible for the crimes alleged below:

Count 3: Inhumane Acts, a **CRIME AGAINST HUMANITY**, punishable under Article 2.i. of the Statute;

In addition, or in the alternative:

Count 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.a. of Statute.

COUNT 5: LOOTING AND BURNING

28. Looting and burning included, between about 1 November 1997 and about 1 August 2000, at various locations including in Kenema District, the towns of Kenema, Tongo Field and surrounding areas, in Bo District, the towns of Bo, Koribondo, and the surrounding areas, in Moyamba district, the towns of Sembehun, Gbangbatoke and surrounding areas, in Bonthe District, the towns of Talia (Base Zero), Bonthe Town, Mobayeh, and surrounding areas, and in Freetown and the surrounding areas, the unlawful taking and destruction by burning of civilian owned property.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN**, **MOININA FOFANA** and **ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3.of the Statute, are individually criminally responsible for the crime alleged below:

Count 5: Pillage, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.f. of the Statute.

COUNTS 6 – 7: TERRORIZING THE CIVILIAN POPULATION and COLLECTIVE PUNISHMENTS

29. At all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 28 and 31, and charged in counts 1 through 5 and 9 through 12, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations. The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA**, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 6: Acts of Terrorism, a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, punishable under Article 3.d. of the Statute;

And:

Count 7: Collective Punishments, a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, punishable under Article 3.b. of the Statute.

COUNT 8: USE OF CHILD SOLDIERS

30. At all times relevant to this Indictment, the Civil Defence Forces did, throughout the Republic of Sierra Leone, initiate or enlist children under the age of 15 years into armed forces or groups, and in addition, or in the alternative, use them to participate actively in hostilities.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA**, pursuant to Article 6.1. and, or

alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crime alleged below:

Count 8: Enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW**, punishable under Article 4.c. of the Statute.

Counts 9 – 12: Sexual Violence

31. Widespread sexual violence committed against civilian women and girls included brutal rapes, often by multiple rapists, and forced “marriages”. Acts of sexual violence included the following:
- a. between about January 1997 and December 1998, at various locations in the Bonthe District, particularly, Talia (also known as Base Zero), Matru Jong, Gambia, Nyandehun, Gbap, Kabati, York Island, Bayama, Bauma, Luawa, Mosavi, Blama, Mokosi and Tihun, CDF forces, notably the Kamajors, abducted a number of young girls and women who were taken to various Kamajor locations in and around Talia and raped, used as sex slaves and/or forced into “marriages” with members of the Kamajor forces. The “wives” were forced to perform a number of conjugal duties under coercion by their “husbands”.
 - b. between January 1997 and December 1998, the Kamajors abducted an unknown number of women and girls from villages in the Pujehun District such as Solegbema and Madina Shebureh, where they were raped or forced into “marriages” or taken to villages in the Bonthe District such as Talia. The “wives” were forced to perform a number of conjugal duties under coercion by their “husbands”.

By their acts or omissions in relation to these events, **SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA** pursuant to Article 6.1. and, or alternatively Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 9: Rape, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

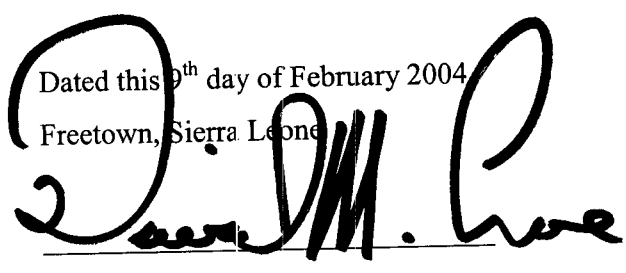
Count 10: Sexual Slavery and any other form of sexual violence, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

Count 11: Other inhumane acts, a **CRIME AGAINST HUMANITY**, punishable under article 2.i. of the Statute;

In addition, or in the alternative:

Count 12: Outrages upon personal dignity, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.e. of the Statute.

Dated this 9th day of February 2004
Freetown, Sierra Leone


David M. Crane
The Prosecutor

PROSECUTION INDEX OF ATTACHMENTS

- II. Prosecutors Case Summary in the form of an Investigators Statement

Investigators Statement

9 February 2004

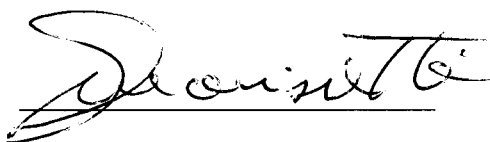
I, Gilbert Morissette, Deputy Chief of Investigations in the Office of the Prosecutor (OTP), Special Court for Sierra Leone make the following statement this 9th day of February 2004:

1. I have been working in the Office of the Prosecutor, Special Court for Sierra Leone since October 2002, investigating crimes under the Statute of the Special Court of Sierra Leone.
2. I am a professionally trained policeman with considerable experience investigating international crimes.
3. As Deputy Chief of Investigations, I am in charge of leading and supervising investigations conducted by the Investigations Section of the OTP.
4. The mandate of the investigations, as set forth in the Statute of the Special Court for Sierra Leone, is to investigate and prosecute those who bear the greatest responsibility for the crimes within the jurisdiction of the Court.
5. From their on-going investigations, the investigations section of the Office of the Prosecutor, has uncovered additional evidence of crimes falling within the jurisdiction of the Special Court committed by members of the Civil Defence Forces (CDF), which has been gathered by the investigations section since the confirmation of the Indictments against Sam Hinga Norman, Moinina Fofana and Allieu Kondewa.
6. The facts narrated in the witness statements and investigator's notes of interviews obtained generally reveal the widespread commission of the crimes of murder and looting by the Kamajors in locations in the Bo and Kenema Districts as well as various forms of sexual violence against women and girls in locations in the Bonthe District.
7. I have produced below a summary of facts from witness statements, interview notes and other evidence collected by investigators of the Office of the Prosecutor.

8. The evidence indicates that between January 1998 and April 1999, members of the CDF, notably the Kamajors, killed a number of civilians and captured enemy combatants, and looted civilian property in Bo town and surrounding areas. The victims were often accused of being rebel collaborators and thus targeted and killed or seriously injured.
9. Furthermore, the evidence suggests that between November 1998 and August 2000, Kamajors engaged in looting in Gbangbatoke and in Freetown.
10. The evidence also indicates that on or around August 2000, in Mabang, Moyamba District, the CDF, in particular Kamajors, intentionally inflicted serious bodily harm and serious physical suffering on an unknown number of civilians;
11. The evidence further reveals that between about 1 January 1997 and about December 1998, the Kamajors conducted a series of armed invasions in the Bonthe District during which they abducted civilian girls and women in and around the villages of Talia (also known as Base Zero), Matru Jong, Gambia, Nyandehun, Gbap, Kabati, York Island, Bayama, Bauma, Luawa, Mosavi, Blama, Mokosi and Tihun. These young women were taken to various locations within the Bonthe District, including Talia, where they were confined and subjected to acts of sexual violence such as multiple rapes, sexual slavery and/or confining them into or forced “marriages” or conjugal-like situations. The Kamajors continued abducting and raping young girls in villages in the Bonthe District after they took control of Bonthe District sometime around March 1998.
12. The practice of abducting young women and girls and forcing them into forced “marriages” or conjugal-like situations by members of the CDF occurred in locations such as Solegbema and Madina Shebureh in the Pujehun District where they were raped or forced into “marriages” or taken to locations in and around Talia in the Bonthe District where they were subjected to the same form of sexual violence.
13. Investigations since the confirmation of the indictments against the Accused have clarified the nature of this conjugal-like relationship or forced “marriage” and further substantiated the fact that this phenomenon was both consistent and widespread in the Bonthe District.
14. While some women and girls were subjected to multiple rapes, others were taken as “wives” by the Kamajors and made to perform a range of conjugal duties in addition to providing

domestic services for their Kamajor “husbands”. These acts of sexual violence were often accompanied by threats of serious bodily harm or death.

15. The evidence further indicates that the civilian women and girls were often accused of being rebels or rebel collaborators and threatened with death or serious bodily harm if they refused to become Kamajor “wives” or resisted the Kamajors in any way.
16. Based on the evidence gathered, the Accused participated in the commission of these offences in that they condoned or encouraged them or knew, or had reason to know, but failed to prevent or punish the perpetrators of the crimes.
17. I, Gilbert Morissette, affirm that the information in this statement is true and correct to the best of my knowledge and belief. I understand that wilfully and knowingly making false statements in this statement could result in proceedings before the Special Court for giving false testimony. I have not wilfully or knowingly made any false statements in this statement.



Gilbert Morissette

OFFICE OF THE PROSECUTOR

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1. Rule 50(A) of the ICTR Rules of Procedure and Evidence as amended on 27 May 2003.
2. Rule 50(A(i)) of the ICTY Rules of Procedure and Evidence as amended on 17 July 2003.
3. *Prosecutor v. Gratién Kabiligi & Aloys Ntabakuze*, Case No. ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999.
4. *Prosecutor v Kanyabashi*, ICTR-96-15-T, The Decision on Prosecution's Request for Leave to Amend the Indictment, 12 August 1999.
5. *Prosecutor v Bizimungu, Mugenzi, Bicamumpaka & Mugiraneza*, ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003.
6. *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, 12 December 2003.
7. *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999.
8. *Prosecutor v. Kovacevic*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998.
9. *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000.
10. *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 17 June 1997.

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1. Rule 50(A) of the ICTR Rules of Procedure and Evidence as amended on 27 May 2003.

RULES OF PROCEDURE AND EVIDENCE - I CTR**RÈGLEMENT DE PROCÉDURE ET DE PREUVE**

Adopted on 29 June 1995; as amended on

12 January 1996

15 May 1996

4 July 1996

5 June 1997

8 June 1998

1 July 1999

21 February 2000

26 June 2000

3 November 2000

31 May 2001

6 July 2002 and

27 May 2003

Adopté le 29 juin 1995 et modifié successivement les

12 janvier 1996

15 mai 1996

4 juillet 1996

5 juin 1997

8 juin 1998

1 juillet 1999

21 février 2000

26 juin 2000

3 novembre 2000

31 mai 2001

6 juillet 2002 et

27 mai 2003

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(ii) The suspect shall have the status of an accused.

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence.

Rule 48: Joinder of Accused

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 48 bis: Joinder of Trials

Persons who are separately indicted, accused of the same or different crimes committed in the course of the same transaction, may be tried together, with leave granted by a Trial Chamber pursuant to Rule 73.

Rule 49: Joinder of Crimes

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 50: Amendment of Indictment

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

PROSECUTION INDEX OF AUTHORITIES

2. Rule 50(A(i)) of the ICTY Rules of Procedure and Evidence as amended on 17 July 2003.

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RULES OF PROCEDURE AND EVIDENCE

(ADOPTED 11 FEBRUARY 1994)
 (AS AMENDED 5 MAY 1994)
 (AS FURTHER AMENDED 4 OCTOBER 1994)
 (AS AMENDED 30 JANUARY 1995)
 (AS AMENDED 3 MAY 1995)
 (AS FURTHER AMENDED 15 JUNE 1995)
 (AS AMENDED 6 OCTOBER 1995)
 (AS FURTHER AMENDED 18 JANUARY 1996)
 (AS AMENDED 23 APRIL 1996)
 (AS AMENDED 25 JUNE AND 5 JULY 1996)
 (AS AMENDED 3 DECEMBER 1996)
 (AS FURTHER AMENDED 25 JULY 1997)
 (AS REVISED 20 OCTOBER AND 12 NOVEMBER 1997)
 (AS AMENDED 9 & 10 JULY 1998)
 (AS AMENDED 4 DECEMBER 1998)
 (AS AMENDED 23 FEBRUARY 1999)
 (AS AMENDED 2 JULY 1999)
 (AS AMENDED 17 NOVEMBER 1999)
 (AS AMENDED 14 JULY 2000)
 (AS AMENDED 1 AND 13 DECEMBER 2000)
 (AS AMENDED 12 APRIL 2001)
 (AS AMENDED 12 JULY 2001)
 (AS AMENDED 13 DECEMBER 2001)
 (INCORPORATING IT/32/REV. 22/CORR.1)
 (AS AMENDED 23 APRIL 2002)
 (AS AMENDED 11 AND 12 JULY 2002)
 (AS AMENDED 10 OCTOBER 2002)
 (AS AMENDED 12 DECEMBER 2002)
 (AS AMENDED 24 JUNE 2003)
 (AS AMENDED 17 JULY 2003)

(IT/32/REV.28)

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 Rule 11 *bis* Referral of the Indictment to Another Court
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Rule 50
Amendment of Indictment

(A) (i) The Prosecutor may amend an indictment:

(a) at any time before its confirmation, without leave;

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

(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.

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

(iii) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

PROSECUTION INDEX OF AUTHORITIES

3. *Prosecutor v. Gratién Kabiligi & Aloys Ntabakuze*, Case No. ICTR-97-34-I & ICTR-97-30-I, Decision on the Prosecutor's Motion to Amend the Indictment, 8 October 1999.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR: ENG

Before:

Judge William H. Sekule, Presiding
Judge Lloyd George Williams
Judge Pavel Dolenc

Registry: John Kiyeyeu

Decision of: 8 October 1999

THE PROSECUTOR

v.

**GRATIEN KABILIGI &
ALOYS NTABAKUZE**

Case No. ICTR-97-34-I

Case No. ICTR-97-30-I

DECISION ON THE PROSECUTOR'S MOTION TO AMEND THE INDICTMENT

The Office of the Prosecutor:

David Spencer
Frédéric Ossogo
Holo Makwaia

Counsel for Gratién Kabiligi:

Jean Yaovi Degli

Counsel for Aloys Ntabakuze:

Clemente Monterosso

INTRODUCTION

1. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (Tribunal),

SITTING as Trial Chamber II, composed of William H. Sekule, Presiding, Judge Lloyd George Williams and Judge Pavel Dolenc, as specially designated by the President of the Tribunal;

BEING SEIZED OF the "Prosecutor's Request for Leave to File an Amended Indictment" (Motion) filed 31 July 1998 in the case of *The Prosecutor v. Gratien Kabiligi and Aloys Ntabakuze* (Case No. ICTR-97-34-I and ICTR-97-30-I), and the "proposed amended indictment;"

BEING SEIZED OF the other related motions of the parties, including:

- a. The "Prosecution Motion for a Temporary Stay of Execution of the Decision of 5 October 1998 Relating to the Defects in the Form of the Indictment" (Prosecution Motion for Stay) filed 21 June 1999;
- b. Ntabakuze's "Motion for the Inadmissibility of Prosecutor's Request for Leave to File an Amended Indictment" (Reply) filed in English on 24 September 1998;
- c. Kabiligi's "Motion Challenging the Composition of the Trial Chamber and its Jurisdiction" (Motion Challenging Composition) filed in English on 9 July 1999;
- d. Kabiligi's "Request Filed by the Defence Counsel for Disclosure of Materials" (Disclosure Motion) filed in English on 25 November 1998;
- e. Kabiligi's "Additional Defence Brief in Reply to the Prosecutor's Motion and Brief to Amend the Indictment and for Joinder, as well as an Objection Based on Lack of Jurisdiction" (Objection to Jurisdiction) filed in English on 11 June 1999.

CONSIDERS the written submissions of the parties, including:

- a. Kabiligi's "Submissions in Reply to the Prosecutor's Motions for Joinder and Amendment of the Indictment" filed in English on 22 July 1999, regarding the submissions relating to amendment;
- b. Ntabakuze's "Defence Response to the Prosecutor's Motion Requesting Leave to Amend the Indictment" (one of two translations) filed in English on 12 August 1999;
- c. Kabiligi's "Defence Brief on the Merits, in Response to the Prosecutor's Request for Leave to Amend the Indictment" (Brief on the Merits) filed in English on 12 August 1999;
- d. The "Defence Brief in Reply to the Prosecutor's Motion Seeking a Stay in the Execution of the Decision of 5 October 1998 on Defects in the Form of the Indictment" filed in English on 6 August 1999;
- e. The "Prosecutor's Reply to the Defence Motion for an Order Ruling Inadmissible the Prosecutor's Motion for Joinder of Accused" (one of two translations) filed in English on 29 September 1998;
- f. Kabiligi's "Brief in Reply to the Prosecutor's Response to Defence Motion for Disclosure of Annexure 'B'" filed in English on 11 August 1999.
- g. The "Prosecutor's Brief in Response to the Request by the Defence for Disclosure of Annex B to the Motion to Amend the Indictment" filed in English on 21 December 1998;
- h. The "Prosecutor's Brief in Reply to the Response by Counsel for the Accused Gratien

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Kabiligi to the Prosecutor's Request for Leave to File an Amended Indictment and Motion for Joinder of Trials" filed in English on 15 March 1999, regarding the submissions relating to amendment;

2. The Trial Chamber has considered all of the written and oral submissions of each of the parties on the issues raised.
3. The Trial Chamber notes particularly Rules 50, 66, and 69 of the Rules of Procedure and Evidence (Rules) and the Statute of the International Criminal Tribunal for Rwanda (Statute).
4. The Trial Chamber heard the parties at an *inter partes* hearing on 11 August 1999.
5. The Trial Chamber, in an oral decision, granted the Motion on 13 August 1999.
6. The Trial Chamber now files its written decision on the Motion.

SUBMISSIONS OF THE PROSECUTION

Amendment of the Indictment

7. The Prosecution submits that the bases for the Motion include: incorporating new evidence gathered after the confirmation of the indictment; to represent the full culpability of the accused, and; bringing the indictment in line with current jurisprudence and internal charging policies.
8. The Prosecution submits that this Trial Chamber need not review supporting material to grant the Motion, relying on the decision of Trial Chamber I in *Prosecutor v. Nyiramasuhuko and Ntahobali*, at para. 13 (Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material, 30 Sept. 1998).
9. In response to the defence contention, the Prosecution submits that Rule 50 governs this Motion and Rule 47 does not apply. The Prosecution submits that discussion here is not to verify if the counts are supported by factual evidence, whose probative value should be examined by the Trial Chamber. Accordingly, the Trial Chamber will have an opportunity to review the evidence at trial. The Prosecution asserts that the massive amounts of documentation in her possession impede presenting supporting material for the Motion.
10. The Prosecution notes that it filed under seal the supporting material for the proposed amended indictment with the Registry.
11. At the hearing, the Prosecution withdrew its prayer of paragraph 7(b) (paragraph 8(b) in the French version) of the Motion. This particular prayer sought to have a single judge review the supporting material for the Motion. The Prosecution withdrew this prayer based on the contention that the Trial Chamber, not a single judge, had jurisdiction over the Motion, relying on the decisions in *Prosecutor v. Musema*, ICTR-96-13-T, at paras. 3, 4 (Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1998) and *Prosecutor v. Akayesu*, ICTR-96-4-T, at p. 2 (Leave to Amend the Indictment, 17 June 1997).

Delay and Prejudice

12. The Prosecution submits that the proposed amended indictment will not prejudice or infringe the

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rights of the accused to a fair trial. *See* Brief in Support of the Prosecutor's Request for Leave to File an Amended Indictment, at paras. 17-45. At the hearing, the Prosecution conceded that granting the amendment would delay the trial of Kabiligi and Ntabakuze.

Substitution of the Indictment

13. At the hearing, the Prosecution submitted that the proposed amended indictment does not amount to a "substitution" of the indictment. The charges in the proposed amended indictment are substantially similar and it contains nothing "new or unusual." English Transcript at p. 108.

Annex B

14. The Prosecution submits that the interests of witness protection are paramount and seeks to prevent the disclosure of Annex B. At the hearing, the Prosecution orally moved for the non-disclosure of Annex B. The Prosecution submitted that the Trial Chamber should postpone disclosure of Annex B, which contains the supporting material for the proposed amended indictment, and deny the defence motions for disclosure.

15. The Prosecution filed Annex B, the supporting materials, with the Registry under seal on 31 July 1998.

Identification of "Others"

16. At the hearing, with respect to Count 1, the Prosecution orally moved to add the names Théoneste Bagosora and Anatole Nsengiyumva to the proposed amended indictment after the words "conspired with."

Cumulative or Alternative Charges

17. The Prosecution submits that the proposed amended indictment does not charge the accused with crimes in a cumulative manner.

Form of the Indictment--Historical Background

18. The Prosecution submits that the historical background section of the proposed amended indictment is necessary and provides context. Further, the decision in *Akayesu* is precedent for the historical background.

Rule 53bis

19. The Prosecution submits that Rule 53bis applies in the case at bench. Further, the Prosecution submits that the Tribunal adopted Rule 53bis at the June 1998 Plenary of the Tribunal, but due to an administrative oversight it failed to incorporate it into the amended version of the Rules which was distributed. In the alternative, Rule 50 alone provides a sufficient basis for this Trial Chamber to rule.

Compliance with Decision of 5 October 1998

20. The Prosecution submits that the filing of this Motion on 31 July 1998 constitutes compliance with the Decision of 5 October 1998. Namely paragraphs 5.5 through 5.8 and 5.10 through 5.12 of the proposed amended indictment provide the ordered clarification. The Prosecution submits that there is

"no violation of the court's order," but apologized to the Trial Chamber merely for not having filed in a timely manner the Prosecution Motion for Stay. English Transcript, at p. 112.

SUBMISSIONS OF THE DEFENCE

Amendment of the Indictment

21. Ntabakuze, in his Reply, first objected to the amendment of the indictment and moved that the Trial Chamber rule the Prosecution's Motion inadmissible on the grounds that it "runs foul of the requirement to dispose of preliminary motions *in limine litis* and would render it more difficult for the Trial Chamber to hear the case of the accused." See Reply, at p. 3.

22. Kabiligi, in his Motion Challenging Composition, objected to the previous composition of the former Trial Chamber II. See also Defence Objection to Jurisdiction.

23. The Defence submits that the Trial Chamber cannot authorise amendments to indictments without first being satisfied that there is evidence not in relation to the culpability of the accused but sufficient to support a case against the accused. The Defence submits that the Trial Chamber should have to apply this same standard of proof to the Prosecution both at the stage of confirmation of an indictment (under Rule 47), and under the Rule 50 procedure pertaining to amendment of indictments. The Defence submits that any other approach as regards the standards of proof required would be illogical considering Articles 19 and 20 of the Statute.

24. The Defence submits that Rule 50 implicitly requires the Trial Chamber to review the supporting material or other evidence for the Motion.

25. The Defence submits that the Trial Chamber must deny the Motion for several reasons. The Defence asserts that there exists no factual or legal basis for the Motion and that it relies on mere allegation, not proof. The Defence submits that granting the Motion would violate the presumption of innocence and Articles 19 and 20 of the Statute.

26. The Defence submits that the new charge of conspiracy to commit genocide has different elements and requires new evidence.

27. The Defence submits that the decision relied upon by the Prosecution (*Prosecutor v. Nyiramasuhuko, supra*), for the proposition that the Trial Chamber need not review supporting material, is not valid legal authority because the Appeals Chamber on 3 June 1999 in effect overturned that decision. See *Kanyabashi v. Prosecutor*, ICTR-96-15-A, at para. 15 (Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1998).

28. The Defence submits that the Prosecution, in its original prayer, sought "confirmation" of the amended indictment in paragraph 7(b) of the Motion (paragraph 8(b) of the French version), but withdrew it, and thus deprived the Defence of the procedural safeguard of a review of the supporting materials.

29. The Defence submits that the supporting material for the Motion is not new. The Defence further asserts, based on the information available to it to date, that there is no factual basis for the Motion, particularly the conspiracy and rape charges.

Delay and Prejudice

30. The Defence submits that granting the Motion will prejudice the accused, including causing undue delay in their preparations and trial. The Defence submits that the Trial Chamber should not grant a motion to amend two years after the filing of the original indictment. In other words, there is no justification for the delay and the Prosecution has not diligently prosecuted this case.

31. The Defence also submits that the proposed amended indictment names individuals that are still at large. Thus, if authorities apprehend these individuals and bring them to the Tribunal, joining such individuals to this case will cause further delay.

Substitution of the Indictment

32. The Defence submits that the proposed amended indictment amounts to a substitution of indictments, thereby circumventing the confirmation procedure. In other words, the Motion amounts to the filing of a wholly new indictment and the Prosecution should have sought confirmation of this new indictment and should have sought to withdraw the previous indictment under Rule 51.

33. The Defence objects to the increased size of the proposed amended indictment, asserting that the indictment has quintupled in size or increased from ten to fifty-five pages.

Annex B

34. The Defence submits that the Trial Chamber has a duty to review the evidence that supports the Motion, namely Annex B, and allow the Defence to see Annex B for a full, adversarial or *inter partes* hearing on the merits of the Motion. The Defence moves for disclosure of Annex B and whatever supporting material that serves as the basis of the Motion. *See* Disclosure Motion.

35. At the hearing, the Defence submitted that it would be "fully satisfied" if it had a redacted version of Annex B, and that the Prosecution has had more than one year to make such redactions. English Transcript, at pp. 34, 117, 120.

Cumulative or Alternative Charges

36. The Defence submits that the proposed amended indictment includes concurrent or overlapping charges. The Defence objects to Counts 2 and 3 being charged cumulatively rather than alternatively.

Form of the Indictment--Historical Background

37. The Defence submits that sixty percent of the proposed amended indictment, particularly the historical background portion, is irrelevant, not related to either accused, and prejudicial. The Defence, objecting to the form of the proposed amended indictment, moved to have the irrelevant portions deleted, including on the grounds that the irrelevant portions violate the Rule 47(C) requirement for a concise statement of facts.

Rule 53bis

38. The Defence submits that Rule 53bis does not apply because it was not in force at the time of the filing of the Motion. Further, Rule 50 is baseless because it made reference to Rule 53bis which was non-existent.

Compliance with Decision of 5 October 1998

39. The Defence submits that the Prosecution has failed to comply with the oral decision of May 1998 and the written Decision of 5 October 1998 in which the Trial Chamber ordered the Prosecution to clarify paragraphs 2.11. and 2.12. of the original indictment.

DELIBERATIONS

Admissibility of the Motion and Composition of the Trial Chamber

40. With regard to the issue of the admissibility of the Motion raised by the Defence Reply, the Trial Chamber finds that the written decision of 5 October 1998 negates the defence claim that the Trial Chamber cannot rule on the Motion because of the lack of an earlier decision (*litispendence*). Thus, the Trial Chamber finds that this defence motion is moot.

41. The composition of the Trial Chamber is not an issue in this Motion because the Appeals Chamber decided this matter on 3 June 1999. The Defence conceded this point and did not object to the present composition of the Trial Chamber at the hearing on 11 August 1999. The Trial Chamber, therefore, finds that the Defence Motion Challenging Composition and, the Defence Objection to Jurisdiction are no longer live issues.

Amendment of the Indictment

42. With regard to the standard of proof for amendment under Rule 50, the Trial Chamber finds that it need not be satisfied that a *prima facie* case exists against the accused for the new charges, however, the Prosecutor does need to demonstrate that there are sufficient grounds both in fact and law to allow the amendments. Consequently, the Trial Chamber has considered the Prosecutor's request, the brief thereto and the submissions developed by the Prosecutor during the hearing. *See Prosecutor v. Kanyabashi*, ICTR-06-15-T, at para. 19 (Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, dated 12 August 1999).

43. However, it is abundantly clear from a reading of Rule 50 that, apart from the procedure to be followed after the confirming process with respect to the amendment of an indictment, this Rule does not lay down any specific standard of proof for the amendment of an indictment. Therefore, on a strict interpretation of this Rule, it is a matter of the discretion of the Trial Chamber whether or not it allows an amendment of an indictment.

44. The case of *Kanyabashi v. Prosecutor*, ICTR-96-15-A (Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, 3 June 1999) mentioned above, merely decided the issue of the composition of the Trial Chamber and did not consider the merits of the case, with respect to leave to amend the indictment.

45. The Trial Chamber, having considered the Prosecution's submissions, the request and supporting brief, the written and oral submissions of both parties, is satisfied that the Prosecution has shown sufficient grounds, both in fact and in law, to justify the amendments to the indictment against the accused.

Delay and Prejudice

46. The Trial Chamber is of course at all times mindful to ensure full respect of the right of the accused to be tried without undue delay as stipulated in Article 20(4)(c) of the Statute. In considering the question of undue delay, the Tribunal cannot be held responsible for delays occurring before the accused

is brought under its jurisdiction. The issue which presently concerns the Chamber is twofold, whether the Prosecution acted with undue delay in submitting the request and whether the amendments if so granted will cause any resulting undue delay in the trial of the accused. *See Prosecutor v. Kanyabashi*, ICTR-06-15-T, at para. 23 (Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, dated 12 August 1999).

47. The Appeals Chamber found that consideration of the issue of delay must include the "special features of each case." *Prosecutor v. Kovacevic*, IT-97-24-AR73, at para. 30 (Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998).

48. In *Barker v. Wingo*, 407 U.S. 514, 530 (22 June 1972), the United States Supreme Court, dealing with the issue of delay and speedy trial found that a "balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

49. In *O'Flaherty v. Attorney General of St. Christopher and Nevis and Others*, 38 West Indian Reports 146 (1986), the High Court of Justice of the Federation of Saint Christopher and Nevis examined the issue of delay and held that "[t]here is no formula as to what constitutes unreasonable delay, there is no inflexible rule, each case has to be looked at in the light of its own circumstances and the balancing of the conduct of the applicant and that of the respondent and the existing facilities."

50. In the case at bench, the Trial Chamber finds that there has been no factual demonstration that the proposed amendments to the indictment will give rise to undue delay. The accused were arrested in July 1997. *See* Brief in Support of the Prosecutor's Request for Leave to File an Amended Indictment, at para. 42. In line with international jurisprudence, the length of this delay does not rise to the level that warrants denying the Motion. *See also Kovacevic, supra*, at para 31. The Trial Chamber finds justifiable the Prosecution's explanation that the delay of filing the Motion on 31 July 1998 included time required to sift through new evidence. Moreover, the additional time that the amendment will occasion and the time required to prepare for this complex case is not likely to prejudice the rights of the accused.

51. The Trial Chamber finds that the proposed amendments, if granted, will not cause any prejudice to the accused which cannot be cured by the provisions of the Rules.

Substitution of the Indictment

52. In *Kovacevic*, the Trial Chamber accepted the defence objection that the size of the amendment expanded the indictment from eight to eighteen pages and that the "proposed amendment . . . is so substantial as to amount to a substitution of a new indictment" *Prosecutor v. Kovacevic*, IT-97-24-AR73, at para. 22 (Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998). The Appeals Chamber, however, reversed the Trial Chamber's denial of the amendment and held that the increased size of the amendment is but one factor to be taken into account. *Ibid.* at para. 24.

53. The Trial Chamber finds that the amendments proposed by the Prosecution do not amount to a substitution of the indictment.

Annex B

54. The Trial Chamber finds that Annex B will be disclosed to the Defence, pursuant to Rule 66(A)(ii),

unless the Prosecution applies for relief from the obligation to disclose, pursuant to Rule 66(C), Rule 53 or Rule 69. The Trial Chamber has not reviewed Annex B. The Trial Chamber finds the Defence Disclosure Motion to be without merit.

Identification of "Others"

55. The Trial Chamber notes the submissions of the Defence with respect to the vagueness of the word "others" in Count 1 of the proposed amended indictment. The Trial Chamber orders that the Prosecution identify the "others" mentioned in the charge, if their identity is known, without prejudice to the right of the Prosecution to move for non-disclosure where permitted by the Rules. If the identity of the "others" is unknown, the Trial Chamber finds that the Prosecution must specify this fact in the indictment by using the term "other persons."

Cumulative or Alternative Charges

56. With respect to Count 2 and Count 3 of the proposed amended indictment, the Trial Chamber notes that Counts 2 and 3 rely on the exact same paragraphs of the concise statement of facts of the indictment.

57. The Trial Chamber holds that it is more appropriate to address the issue of cumulative or alternative counts at trial, when determining the relevant facts and law.

Form of the Indictment--Historical Background

58. The Trial Chamber notes that it is the practice of the Prosecution to provide a significant amount of contextual information. Though the Trial Chamber itself would prefer a more concise indictment, it does not find it necessary at this time to order large-scale deletions in the proposed amended indictment.

Rule 53bis

59. The Trial Chamber notes that the Tribunal adopted Rule 53bis at the June 1998 Plenary of the Tribunal, but due to an administrative oversight it was not incorporated in the amended Rules which were published.

60. The Trial Chamber finds that Rule 50 is valid and provides a sufficient basis for this decision. The Trial Chamber does not rely on Rule 53bis in deciding the Motion.

61. Any reference to Rule 53bis is not applicable to the Motion, as already indicated by the Trial Chamber. In any event, this would not affect the validity of Rule 50, but would only be applicable to such portion of Rule 50 in which reference to Rule 53bis is made.

Compliance with Decision of 5 October 1998

62. The Trial Chamber notes that to date it has not granted the Prosecution's stay, nor did the Prosecution comply with the decision of 5 October 1998. Here, the "Prosecution Motion for a Temporary Stay of Execution of the Decision of 5 October 1998 Relating to the Defects in the Form of the Indictment" was filed 21 June 1999, more than eight months after the decision.

63. As this Trial Chamber stated previously, "an order of the Tribunal must stand and have effect unless the Tribunal issues a superseding order. Here, the Prosecution for many months, has failed to comply

with this Chamber's decision [of 5 October 1998] . . . , which ordered relatively simple amendments." *Prosecutor v. Nsabimana and Nteziryayo*, ICTR-97-29-I, at para. 7 (Decision on the Prosecutor's Urgent Motion for Stay of Execution, 17 June 1999). "The Prosecution's inaction is tantamount to the assertion that the mere filing of its [motion for stay] . . . relieved them of any duty to comply. This is not so." *Ibid.* at para. 5.

64. The Trial Chamber expresses its serious concern about the Prosecution's non-compliance and apparent practice of not complying with decisions by merely filing a motion for stay of execution. An order, unless vacated, is binding and must be carried out. The Trial Chamber admonishes the Prosecution for its non-compliance.

65. The Trial Chamber, however, finds that the granting of the Motion and the proposed amended indictment now supersede the order of 5 October 1998. This is without prejudice to any possible defence motion on alleged defects in the form of the indictment.

CONCLUSION

66. **AFTER HAVING DELIBERATED**, the Trial Chamber **GRANTS** leave to the Prosecution to amend the indictment against Gratien Kabiligi and Aloys Ntabakuze as set out in the proposed amended indictment, including:

- a. the addition of Conspiracy to Commit Genocide proscribed by Article 2(3)(b) of the Statute;
- b. the addition of the words "Théoneste Bagosora, Anatole Nsengiyumva, and" to Count 1 of the proposed amended indictment, after the words "conspired with,"
- c. the clarification of the word "others" in Count 1 in the proposed amended indictment by replacing the word "others" with named individuals if they are known, or "other persons" if they are unknown, as stated above;
- d. the addition of a count of Crime Against Humanity (Extermination) proscribed by Article 3(b) of the Statute;
- e. the addition of a count of Crime Against Humanity (Rape) proscribed by Article 3(g) of the Statute;
- f. the addition of a count of Crime Against Humanity (Persecution) proscribed by Article 3 (h) of the Statute;
- g. the addition of a count of Serious Violation of Article 3 common to the Geneva Conventions and Additional Protocol II (Outrages Upon Personal Dignity) proscribed by Article 4(e) of the Statute;

67. The Trial Chamber **ORDERS** that the amended indictment, reflecting the amendments so ordered, be filed with the Registry and served on the accused forthwith.

68. The Trial Chamber **REMINDS** the Prosecutor of her obligations under Rule 66(A)(ii) of the Rules of Procedure and Evidence.

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69. The Trial Chamber **DISMISSES** the "Prosecution Motion for a Temporary Stay of Execution of the Decision of 5 October 1998 Relating to the Defects in the Form of the Indictment" as moot.
70. The Trial Chamber **DISMISSES** Ntabakuze's "Motion for the Inadmissibility of Prosecution's Request for Leave to File an Amended Indictment" as moot.
71. The Trial Chamber **DENIES** Kabiligi's "Motion Challenging the Composition of the Trial Chamber and its Jurisdiction."
72. The Trial Chamber **DENIES** Kabiligi's "Additional Defence Brief in Reply to the Prosecutor's Motion and Brief to Amend the Indictment and for Joinder, as well as an Objection Based on Lack of Jurisdiction."
73. The Trial Chamber **DENIES** Kabiligi's "Request Filed by the Defence Counsel for Disclosure of Materials."
74. The Trial Chamber **DENIES** the oral motion of the defence to strike the historical background section and other portions of the indictment.
75. Judge Dolenc attaches to this Decision, his Separate and Concurring Opinion.

Arusha, 8 October 1999.

William H. Sekule Lloyd George Williams
Judge, Presiding Judge

Seal of the Tribunal

PROSECUTION INDEX OF AUTHORITIES

4. *Prosecutor v Kanyabashi*, ICTR-96-15-T, The Decision on Prosecution's Request for Leave to Amend the Indictment, 12 August 1999.

Case No. ICTR-96-15-T



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER II

OR:ENG

Before: Judge Mehmet Güney, Presiding
Judge Lloyd George Williams
Judge Erik Møse

Registry: Mr. John Kiyeyu

Oral decision of: 12 August 1999

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THE PROSECUTOR
VERSUS
JOSEPH KANYABASHI

Case No. ICTR-96-15-T

REASONS FOR
THE DECISION ON THE PROSECUTOR'S REQUEST
FOR LEAVE TO AMEND THE INDICTMENT

The Office of the Prosecutor:

- Mr. Japhet Daniel Mono
- Mr. Robert Petit
- Ms Céline Teye
- Ms Sola Adeboyejo
- Ms Ibukunolu Alao Babajide
- Ms Nadira Bayat

Counsel for the Accused:

Mr. Michel Eoyer

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR NOUS

NAME / NOM: AMINATTA L.R. N'GUM

SIGNATURE: [Signature] DATE: 13/09/99

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

SITTING AS Trial Chamber II, composed of Judge Mehmet Güney, Presiding, Judge Lloyd George Williams and Judge Erik Møse;

HAVING RECEIVED a request on 17 August 1998 from the Prosecutor for leave to file an amended indictment, in the case "The Prosecutor v. Joseph Kanyabashi" (Case No. ICTR-96-15-T);

CONSIDERING the Response of the Defence dated 18 September 1998 and the Addendum thereto dated 23 July 1999;

CONSIDERING Rule 50 of the Rules of Procedure and Evidence (the "Rules");

NOTING the Decision rendered by Trial Chamber I on 30 September 1998 on the Status of the Hearings for the Amendment of Indictments and for Disclosure of Supporting Material in the cases of "The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali" (Case No. ICTR-97-21-I), "The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo" (Case No. ICTR-97-29A and B-I), "The Prosecutor v. Joseph Kanyabashi" (Case No. ICTR-96-15-T) and "The Prosecutor v. Elie Ndayambaje" (Case No. ICTR-96-8-T).

HAVING HEARD the parties on 10 August 1999;

WHEREAS on 12 August 1999 the Trial Chamber rendered an oral decision in this case on the Prosecutor's request for leave to amend the indictment, and the parties were notified that the written reasons for the decision would be communicated to them at a later date;

WHEREAS the Trial Chamber hereby renders its reasons for the oral decision on the Prosecutor's request for leave to amend the indictment.

The constitution of the Chamber

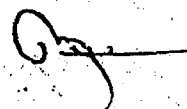
1. The Trial Chamber notes that by virtue of the powers entrusted by the Statute of the Tribunal (the "Statute") and Rules 15(E), 27(A), 27(B) and 27(C) of the Rules, the President of the Tribunal recomposed the Trial Chamber for the hearing of this request for leave to file an amended indictment. This reconstitution complies with the Appeals Chamber Decision of 3 June 1999 in this case, and is subject to the recusals in this matter of Judge Navanethem Pillay and Judge William Sekule.

The submissions of the Prosecutor

On the amendments to the Indictment

2. The Prosecutor submits her request on the basis of Rule 50 of the Rules and seeks to amend the indictment so as to:

- (i) add four new charges against Joseph Kanyabashi;



- (ii) expand certain existing counts;
- (iii) add in relevant counts the allegation that the accused is responsible pursuant to Article 6(3) of the Statute; and
- (iv) bring the current indictment in accord with the jurisprudence of the Tribunal and current charging practices.

3. The Prosecutor submits that the amendments as sought are based on new evidence uncovered by ongoing investigations. This new evidence, purports the Prosecutor, has brought to the fore the existence of a plan among several people, including the accused, to take over political power in Rwanda. The Prosecutor alleges that to achieve this plan the Tutsi population had to be exterminated.

4. The Prosecutor argues that the amendments to the indictment, if so granted, will in no way prejudice the right of the accused to be tried without undue delay. In support of this argument, the Prosecutor proffers a balancing test between, on the one hand, the rights of the accused to a fair and expeditious trial, and, on the other hand, the need for the prosecution to present all available and relevant evidence against the accused thereby reflecting the totality of the culpable conduct against the accused. The Prosecutor submits that the length of pre-trial detention served by the accused is not deemed unreasonable by international standards considering, *inter alia*, the seriousness of the charges against the accused and the difficulties for the Prosecutor to investigate complex matters involving serious crimes which were committed on a very large scale.

On Annex B

5. The Prosecutor requests that the Chamber order the Defence to return to the Prosecutor all non-redacted materials which are contained essentially in Annex B and which are subject to the non-disclosure order of 30 September 1998 rendered by Trial Chamber I. The Prosecutor contends that these materials reveal the identity of witnesses the use of which would moreover be contrary to a witness protection order previously rendered by the Tribunal. Further, the Prosecutor seeks an order from the Chamber restraining the Defence from making any reference to Annex B in any proceedings prior to its normal disclosure.

The Submissions of the Defence

On the amendment of the Indictment

6. The Defence contends that the Chamber cannot authorise amendments to indictments without first being satisfied that there is evidence not in relation to the culpability of the accused but sufficient to support a case against the accused. In the same line of reasoning, the Defence submits that the Chamber should have to apply this same standard of proof upon the Prosecutor both at the confirming stage of an indictment, and under the Rule 50 procedure pertaining to amendment of indictments. The Defence states that any other approach as regards the standards of proof required would be illogical in the purviews of Article 19 and 20 of the Statute.

7. The Defence contends that prejudice would be caused to the accused if the Prosecutor's motion to amend were granted on the grounds that by the sheer scope of the amendments the

Defence would have to examine more voluminous evidence and conduct new investigations, studies and analyses, let alone rethink its strategy. It is argued that evidence relied upon by the Prosecutor is not *per se* new, as in the opinion of the Defence, either it was already available to the Prosecutor at the time the indictment was initially confirmed, or it is evidence which has already been disclosed. Defence Counsel submits that in considering the request of the Prosecutor, the Chamber needs to ensure respect for the right of the accused to a fair and expeditious trial. It is argued by the Defence that the pertinent starting date for the evaluation of any delay which may result from the amendments being granted should be 28 June 1995, the date on which the accused was initially arrested.

8. Consequently, the Defence submits that the request of the Prosecutor should be dismissed.

On Annex B

9. The Defence contends that it lawfully came into possession of Annex B on 25 May 1999 in full conformity with the provisos of Rules 107, 108 and 109 of the Rules pertaining to the Appellate proceedings. In support of this contention, the Defence submits that the non-disclosure order of 30 September 1998 is null and void as a consequence of the Appeal Chamber declaring Trial Chamber I devoid of jurisdiction in the matter. Thus, Annex B was not subject to non-disclosure. Arguments on this basis have been developed in the 23 July 1999 addendum to the 18 September 1998 Defence Response. Furthermore, the Defence states that the Prosecutor has known since 25 May 1999 that the Defence was in possession of the Annex yet did not raise any objections until the hearing of 10 August 1999. This, says the Defence, necessarily weakens the arguments presented by the Prosecutor for the return of the Annex.

AFTER HAVING DELIBERATED,

10. The Trial Chamber has considered the submissions of the parties and in so doing sees that three issues emanate therefrom, first, whether the request of the Prosecutor is founded in law and fact, secondly, whether any prejudice would be caused to the accused if the request were granted, and thirdly, whether Annex B is subject to non-disclosure. As this third issue deals with materials which may be used in support of arguments for and against the requested amendments, the Chamber will deal with it first.

On Annex B

11. The Prosecutor requests the Trial Chamber to order the return of Annex B which, she argues, was mistakenly communicated to the Defence. The Defence, in retort, argues that it has received this document on 25 May 1999 in conformity with the Appellate procedure laid down in Rules 107, 108 and 109 of the Rules. Although the Trial Chamber does not doubt the good faith of the Defence, of importance in this matter is not the means by which the Defence obtained the Annex, but whether the Defence was entitled to receive the Annex on 25 May 1999 when it was subject to a non-disclosure order.

12. The pertinent text in Trial Chamber I's decision of 30 September 1998 reads as follows:

"10. The Tribunal notes that in terms of Rule 66(A)(i), material submitted in support of the indictment at confirmation shall only be disclosed after the accused has made an initial appearance.

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Therefore, disclosure of any material in support of the proposed amended indictment, at this stage of the proceedings may be construed as premature."

13. One could argue that this reasoning does not *per se* apply in this instant case as the initial appearance of the accused already took place on 29 November 1996. Hence, a textual interpretation of Rule 66(A)(i) might support the contention that, as the initial appearance of the accused has already occurred, Annex B in this instance falls outside the purview of Rule 66(A)(i). This approach, however, does not take due account of the procedure concerning the amendment of indictments. Rule 50(B) of the Rules clearly stipulates that in situations where new charges form part of the amended indictment, and where the accused has already made an initial appearance before a Trial Chamber, then a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges. In the instant case, if the amendments are authorized by the Trial Chamber, disclosure of supporting material in support of the new charges shall be made within thirty days of the further appearance of the accused to plead on the new charges. Consequently, the Chamber finds that disclosure of supporting material, which in this instance is Annex B, at this stage would be premature.

14. Moreover, the said decision of 30 September 1998, clearly ordered that the supporting material marked Annex B shall not be subject to disclosure to the Defence by the Prosecutor. The fact remains that at the time the material was communicated to the Defence, being 25 May 1999, the non-disclosure order was valid and binding. Although the disclosure of Annex B came from the Registry and not the Prosecutor, it is clear that the intent of the order was that the documents be not disclosed to the Defence. Therefore the Trial Chamber finds that the documents contained in Annex B were erroneously communicated to the Defence, in spite of the standing order of Trial Chamber I.

15. In view of the above, the Chamber therefore finds that it would be inappropriate for the Defence to make submissions on or use of the material and contents of Annex B in any proceedings prior to its disclosure pursuant to Rule 66(A)(i) of the Rules. Documents obtained contrary to a court order cannot form the basis of submissions to the Chamber.

16. The Trial Chamber finds that the Defence, its investigators, the accused, persons under the control of the Defence, or any other persons to whom the Defence may have transmitted all or part of Annex B, shall retrieve and return forthwith to the Registry all materials derived from Annex B communicated to it by the Registry, including all copies, extracts or documents mentioning any information derived from Annex B.

On the request to amend the indictment

17. The Prosecutor submits her request to amend the indictment on the basis of on-going investigations having unearthed evidence of a plan involving the accused to take over political power in Rwanda, and that to achieve this plan the Tutsi population had to be exterminated. The Defence argues that this request is not grounded in fact as the burden of proof for the Prosecutor in bringing amendments is the same as that required for the confirmation of the indictment, which, under Article 18 of the Statute and Rule 47 of the Rules, is whether there exists a *prima facie* case against the accused. The Trial Chamber does not agree with the argument of the Defence.

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18. Indeed, as was stated in the decision of 30 September 1998:

"13. The Tribunal distinguishes between the procedural requirements of Rules 47 and 50. In terms of Rule 47, a single judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with an application for leave to amend an indictment under Rule 50 against an accused who has already been indicted has no cause to enquire into the *prima facie* basis for the charge. Since such a finding has been made in respect of each of the accused, it is not necessary for the Tribunal to consider the supporting material marked Annexure 'B', which according to the Prosecutor is made up of witness statements and these witnesses have to be protected."

19. Even though the Trial Chamber need not be satisfied that a *prima facie* case exists against the accused for the new charges, the Prosecutor does need to demonstrate that there are sufficient grounds both in fact and law to allow the amendments. Consequently, the Trial Chamber has considered the Prosecutor's request, the brief thereto and the submissions developed by the Prosecutor during the hearing. The Tribunal notes that it follows from the Prosecutor's oral clarification that Count 2 (Genocide) of the Amended Indictment and Count 3 of the Amended Indictment (Complicity in Genocide) are meant to be charged alternatively.

20. With respect to the argument of the Defence that the evidence presented by the Prosecutor for the amendment needs to be put to the test of proof to establish a case against the accused, the Tribunal is of the opinion that this standard is outside the ambit of the procedure envisaged in Rule 50 of the Rules. Rather the relevant forum for such an extensive evaluation of the probative value of evidence presented by the Prosecutor is the trial stage, where the onus is on the Prosecutor to prove her case in fact and in law beyond reasonable doubt. Further, it goes without saying, that the Defence will have full opportunity, as guaranteed by Article 20 of the Statute and in the interests of justice, to put the Prosecutor's evidence to test during the trial. If the Prosecutor fails to adduce sufficient evidence to support a charge then the charge will fall.

21. The Trial Chamber, having considered the Prosecutor's submissions, request and supporting brief, the response and submissions of the Defence, is satisfied that the Prosecutor has shown sufficient grounds, both in fact and in law, to justify the amendments to the indictment against the accused.

On the right to be tried without undue delay

22. The Prosecutor submits that the amendments as sought are based on new evidence uncovered by ongoing investigations and that the length of pre-trial detention served by the accused is not deemed unreasonable by international standards considering, *inter alia*, the seriousness of the charges against the accused and the difficulties for the Prosecutor to investigate complex matters involving serious crimes which were committed on a very large scale. The Defence contends however that there has been undue delay in this case. Further, Counsel for the Defence stated that in considering whether the right of the accused to be tried without undue delay has been violated, the Trial Chamber should have as starting point the date of arrest, namely 28 June 1995 in Cameroon.

23. The Trial Chamber is of course at all times mindful to ensure full respect of the right of the accused to be tried without undue delay as stipulated in Article 20(4)(c) of the Statute. In considering the question of undue delay, the Tribunal cannot be held responsible for delays

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occurring before the accused is brought under its jurisdiction. The issue which presently concerns the Chamber is twofold, whether the Prosecutor acted with undue delay in submitting the request and whether the amendments if so granted will cause any resulting undue delay in the trial of the accused. Decisions rendered both by this Tribunal and the International Criminal Tribunal for the former Yugoslavia (the "ICTY") have already dealt with this matter.

24. Trial Chamber I of this Tribunal in its 'Decision on the Prosecutor's Request for Leave to Amend the Indictment' of 6 May 1999 in the case "The Prosecutor v. Alfred Musema" (Case No. ICTR-96-13-T), held that:

"17. Notwithstanding the above, the Tribunal notes that Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file a request to amend the indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber."

25. Furthermore, the Trial Chamber has noted that in the case of "The Prosecutor v. Milan Kovacevic" (Case No. IT-97-24-AR73) before the ICTY, Judge Mohamed Shahabuddeen in his separate opinion of 2 July 1998 to the Appeals Chamber 'Decision Stating the Reasons for Appeals Chamber's Order of 29 May 1998', stated:

"As to the second point, concerning the timing of the motion to amend, the Trial Chamber correctly understood the prosecution to be saying that it was, from the beginning of the case, in possession of enough material to support the making of the amendments. But I am not persuaded that this meant, as the Trial Chamber thought, that there was no justification for waiting. A prosecutor, though in possession of enough material to file charges, may be justified in holding his hand until the results of further investigations are in.

There is no need to furnish details in support of the proposition, often affirmed, that the investigative problems of the [International] Tribunal are more complex and difficult than those connected with the work of a national criminal court. [...]"

26. The Trial Chamber has considered the submissions of the parties in this regard, and is satisfied that the Prosecutor was acting within the ambit of her discretion, on the basis of the ongoing investigations and the uncovering of evidence, in filing the request to amend the indictment when she did. The Chamber, however, is not satisfied that the Defence has demonstrated that the amendment of the indictment will cause undue delay in the instant case.

27. The Trial Chamber therefore finds that the amendments so granted will not prejudice the rights of the accused to a fair trial without undue delay.

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THE ABOVE REASONS,

CHAMBER

Defence, its investigators, the accused, persons under the control of the Defence, persons to whom the Defence may have transmitted all or part of Annex B, to retrieve forthwith to the Registry all materials derived from Annex B communicated to it by including all copies, extracts or documents mentioning any information derived from

Defence not to make use of or reference to the material and contents of Annex B in its pleadings prior to its disclosure pursuant to the Rules of Procedure and Evidence.

Order the Prosecutor to amend the indictment against Joseph Kanyabashi;

That the indictment shall be amended by:

Addition of a count of Conspiracy to Commit Genocide pursuant to Article 2(3)(b) of the Statute;

Addition of a count of Crime Against Humanity (Murder) pursuant to Article 3(a) of the Statute;

Addition of a count of Crime Against Humanity (Extermination) pursuant to Article 3(b) of the Statute;

Addition of a count of Crime Against Humanity (Other Inhumane Acts) pursuant to Article 3(c) of the Statute;

Addition of the allegation that the accused is responsible pursuant to Article 6(3) of the Statute as to Count 1 (Conspiracy to commit Genocide), Count 2 (Genocide), Count 3 (Complicity to Commit Genocide), Count 5 (Crime Against Humanity), Count 6 (Crime Against Humanity), Count 7 (Crime Against Humanity), Count 8 (Crime Against Humanity) and Count 9 (Serious Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II);

That the new indictment, reflecting the amendments so ordered, shall be filed with the Registry and served on the accused forthwith;

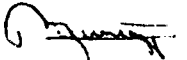
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Case No. ICTR-96-13-F

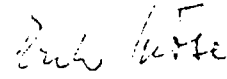
INSTRUCTS the Registrar to immediately schedule a hearing date for the initial appearance of the accused and to notify the parties thereof;

REMINDS the Prosecutor of her obligations under Rule 66(A)(i) of the Rules of Procedure and Evidence;

Oral Decision of 12 August 1999,
Reasons given on 10 September 1999


Mehmet Güney
Presiding Judge


Lloyd George Williams
Judge


Erik Møse
Judge

(Seal of the Tribunal)



PROSECUTION INDEX OF AUTHORITIES

5. *Prosecutor v Bizimungu, Mugenzi, Bicamumpaka & Mugiraneza*, ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 6 October 2003.



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before:

Judge William H. Sekule, Presiding
Judge Asoka de Zoysa Gunawardana
Judge Arlette Ramaroson

Registrar: Mr. Adama Dieng

Date: 6 October 2003

The PROSECUTOR
v.
Casimir BIZIMUNGU
Justin MUGENZI
Jerome BICAMUMPAKA
Prosper MUGIRANEZA

Case No. ICTR-99-50-I

**DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN AMENDED
INDICTMENT**

Office of the Prosecutor

Paul Ng'arua
Melinda Y. Pollard
Elvis Bazawule
George Mugwanya
Dennis Mabura (Case Manager)

Counsel for the Defence

Michelyne C. St. Laurent for Bizimungu
Howard Morrison and Ben Gumper for Mugenzi
Pierre Gaudreau for Bicamumpaka
Tom Moran for Mugiraneza

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

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SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Asoka de Zoysa Gunawardana and Arlette Ramarosan (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Request for Leave to File an Amended Indictment,” to which is attached Annexure A which is the proposed Amended Indictment, filed on 26 August 2003 (the “Motion”);

HAVING RECEIVED AND CONSIDERED “Prosper Mugiraneza’s and Jerome Bicomumpaka’s Brief in Opposition to the Prosecutor’s Request for Leave to File an Amended Indictment,” filed on 3 September 2003 (“Mugiraneza and Bicomumpaka’s joint Response”); **AND** the “Prosecutor’s Reply to Prosper Mugiraneza’s and Jerome Bicomumpaka’s Brief in Opposition to the Prosecutor’s Request for Leave to File an Amended Indictment,” filed on 5 September 2003 (the “Prosecutor’s Reply to Mugiraneza and Bicomumpaka’s joint Response”); **AND** “*Requete de la Defense afin d’obtenir une extension du delais dans lequel elle doit deposer une reponse a la [Prosecutor’s Request for Leave to File an Amended Indictment]*,” filed on 1 September 2003; **AND** “Reponse de la Defence de Casimir Bizimungu au [Prosecutor’s Request for Leave to File an Amended Indictment],” filed on 24 September 2003 (“Bizimungu’s Response”); **AND** “Prosecutor’s Reply to Casimir Bizimungu’s Response to the Prosecutor’s Request for Leave to Amend the Indictment,” filed on 2 October 2003, (the “Prosecutor’s Reply to the Bizimungu Response;”)

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rule 50 of the Rules;

NOW DECIDES the Motion on the basis of the written briefs as filed by the Parties pursuant to Rule 73 (A) of the Rules.

SUBMISSIONS OF THE PARTIES

Prosecution Submissions

1. The Prosecution requests leave pursuant to Rule 50 to file an Amended Indictment after the initial appearance of the Accused.
2. The Prosecution submits that the proposed Amended Indictment be admitted because it incorporates new and additional evidence which was not available at the time the current Indictment was submitted for confirmation. It further submits that there has not been any undue delay in bringing the proposed Amended Indictment so that the filing of it will not prejudice the rights of the Accused to a fair trial rather it will expedite the trial. The Prosecution argues that the new and additional evidence expands and elaborates each Accused’s participation and accountability for the crimes committed in Rwanda in 1994 by making it more clear and specific so that it is in the interest of international criminal justice. The proposed Amended Indictment pleads extensively and specifically to achieve the ends of establishing the individual responsibility of each Accused, thereby bringing the current Indictment in accord with the jurisprudence of the Tribunal and current charging practices of the Prosecution.
3. The Prosecution further submits that the proposed Amended Indictment will change the charges in the following manner;
 - a. the Count of Genocide and Complicity in Genocide will be pleaded alternatively but will be presented as a single Count;

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- b. the Count of Murder as a Crime Against Humanity as well as the charge of Outrage upon personal dignity as a Serious Violation of Article 3, Common to the Geneva Conventions and Additional Protocol II are removed;
- c. on the basis of new evidence, the proposed Amended Indictment expands the existing remaining counts to focus and clarify each Accused's participation in the crimes; and
- d. the removal of the section on "Historical Context."

4. The Prosecution relies on the jurisprudence of the Tribunal to the effect that before an amendment is granted, the Prosecution must demonstrate that there is sufficient ground both in law and on the evidence to allow the amendment.[1] It recalls that Rule 50 authorises amendments to Indictments resulting from its on-going investigations so that at trial it can present the totality of the Accused's participation in the crimes.[2]

5. In particular, the Prosecution submits the following as highlights of the proposed Amended Indictment;

- a. an expansion of all the Accused's participation in the conspiracy to kill or in the planning of the killing of Tutsi and their failure to halt the killings;
- b. an expansion on all the Accused participation in the ordering of rape and sexual violence and that this was an integral part of the process of destruction targeting the Tutsi;
- c. an expansion and focus of all the Accused participation in ordering/ inciting the killing or rape of the Tutsi on diverse dates and in various parts of Rwanda;
- d. an expansion on all the Accused's participation in committing or aiding and abetting the killing or raping of Tutsis on diverse dates in various parts of Rwanda;
- e. a clarification on all the Accused's participation in war crimes, including the Accused's direct participation in violence and killing of civilians in connection with the armed conflict, or their ordering or incitement of violence and killing of Tutsi civilians in connection with the armed conflict.

6. The Prosecution submits that there has not been an undue delay in bringing the proposed Amended Indictment given the realities of the case and the complexity of the crimes with which the Accused are indicted for and the complexities involved in carrying out investigations. The Prosecution argues that fears among potential witnesses to readily cooperate with the Tribunal meant that it could not easily access all the evidence for use in the current Indictment. At the December 2002 Status Conference, the Prosecution informed the Trial Chamber and the Defence that it would amend the current Indictment. The Prosecution submits that a determination as to whether there has been an undue delay should be done on a case to case basis taking into account the peculiar circumstances of each case and balancing them with the interests of justice. The Prosecution submits that she has made all efforts to submit the proposed Amended Indictment prior to the commencement of trial although in the *Akayesu* case the Trial Chamber allowed the Indictment to be amended during the trial in the interests of justice. [3]

7. The Prosecution submits that it has already disclosed all the new and additional evidence to the Defence in the interests of justice. It submits that the amendment will not be prejudicial to the Accused

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because it will not result in the delay of the trial given the amendments proposed in the current Indictment. Whereas the current Indictment is comprised of 80 pages, the proposed Amended Indictment is less than 30 pages.

8. The Prosecution thus prays that the Trial Chamber; (i) grants it leave to amend the Indictment as amended in the proposed Amended Indictment attached in Annexure A; (ii) Order that the proposed Amended Indictment be filed with the registry; and (iii) order that the proposed Amended Indictment be served on each of the Accused and his counsel immediately.

Joint Response of Mugiraneza and Bicamumpaka

9. Noting Mugiraneza's Motion to dismiss the Indictment for *inter alia* undue delay^[4], the Defence Counsel for Mugiraneza and Bicamumpaka submit a short joint response to the Motion.

10. The Defence argue that objective facts contradict the Prosecution submission that the Motion was not filed with undue delay, i.e.; the proposed Amended Indictment is dated 28 July 2003, the same date that the Prosecution informed the Trial Chamber in writing of its intention to amend the Indictment. The Defence wonders why the Prosecution delayed almost one month before filing its request to amend the Indictment. The Defence submits that contrary to the Prosecution submission, it did not undertake all efforts to file the proposed Amended Indictment in a timely manner because on the face of it, the record shows a 28-day delay between the signing of the proposed Amended Indictment and the filing of its Motion.

11. Defence argues further that if the Chamber grants the Motion, it will inevitably result in a delay of the trial because the Defence will be authorized to file Motions under Rule 72 challenging the proposed Amended Indictment. In this respect, Defence for Mugiraneza submits that it will file such a Motion challenging both the form of the Indictment and the subject-matter jurisdiction over certain allegations in the proposed Amended Indictment. The Defence argues that the proposed Amended Indictment includes allegations of crimes committed before 1 January 1994 and so a consideration of a Motion under Rule 72 will delay the proposed commencement of the trial which is set at 3 November 2003.

12. The Defence points out that that the Prosecution have had four years to complete investigations. The Defence submits that for the past four years the Prosecution has been indicating that it intends to amend the Indictment but instead, it files its Motion to amend the Indictment on the eve of trial. The Defence thus prays that the Chamber deny the Prosecution Request for leave to amend the Indictment.

Reply by the Prosecution to the Joint Response of Mugiraneza and Bicamumpaka

13. The Prosecution submits that the Response of Mugiraneza and Bicamumpaka is an attempt to bolster Mugiraneza's Motion for Dismissal of the Indictment.

14. The Prosecution submits that the Defence misstates its procedural rights in the event the Chamber permits the amendment. The Prosecution submits that the proposed Amended Indictment does not contain any new charges as contrasted with the current Indictment. In this respect, the Prosecution argues that under Rule 50, sub-Rule (C) the Defence is only permitted to file Preliminary Motions under Rule 72 only when the proposed Amended Indictment contains new charges.

15. In this respect, the Prosecution prays that the objections of the Defence for Mugiraneza and Bicamumpaka be denied and the Prosecutions request for leave to amend the Indictment should be granted.

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Bizimungu's Response

16. The Defence for Bizimungu objects to the Motion.
17. The Defence recalls the provisions of Articles 19(1) and 20(4)(a) – (c) of the Statute.
18. The Defence submits that in conformity with the jurisprudence of the Tribunal, the Motion should be considered by the Trial Chamber to which the Accused made his initial appearance,^[5] which in the instant case was composed of Judges Sekule, Maqutu and Ramarason. The Defence notes that the Chamber now includes Judge Gunawardana in place of Judge Maqutu whose mandate was not extended due to his non re-election. The Defence requests that the President definitively name pursuant to Article 15bis and Rule 27, the Judge who is replacing Judge Maqutu to make up the Trial Chamber.
19. The Defence argues that the proposed amendment is unfair to Bizimungu because it includes substantial new facts, yet the Prosecution requests the Chamber to consider it not as a new Indictment but as an amended Indictment. In view of the substantial proposed changes, the Defence requests the Chamber to order the Prosecution to provide a table comparing the elements of the current Indictment and proposed Amended Indictment, in order to understand the magnitude of the requested modifications.
20. In fact, the Defence points out that the proposed Amended Indictment has 28 new allegations in prefectures where Defense investigators have not made any investigations, i.e., the Prefectures of Ruhengeri, Butare, Gisenyi and Gitarama. It points to the following as substantial new changes made in the proposed Amended Indictment;
 - a. allegations with regard to Ruhengeri are new and contain new events, new individuals, new dates and new sites;^[6]
 - b. allegation at paragraph 21 are new as they refer to a speech given by the Prime Minister at the University of Butare between 1 and 31 May 1994, inciting the population to exterminate the enemies;
 - c. allegations of crimes committed in Gitarama in paragraphs 44 and 45 are new as they refer to murders that Bizimungu allegedly ordered and to which he was witness between 15 April and 15 May 1994;
 - d. allegation at paragraph 125 are new as they refer to a directive from the Interim Government in May 1994 requiring civil servants to report for their salaries; and this paragraph further alleges that Bizimungu knew that this directive was intended to exclude Tutsis and to put them at risk of being killed;
 - e. allegations at paras. 52, 53, 54, 124 and 126 are new because they refer to incitement by Bizimungu at Umuganda Stadium and the Meridien Hotel between the months of May and June 1994;
 - f. allegations at paragraphs 28, 29 and 47 are new as they refer to a speech made by Bizimungu in April 1994 and that the RTLM will be controlled by the Interim Government;
 - g. the allegations at para. 14 are new as they allege that Bizimungu made a radio broadcast on 11 April 1994.

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21. The Defence requests the Chamber not to grant the Prosecution request to withdraw the section on Historical Context in the current Indictment. The Defence argues that removing this section will cause prejudice to Bizimungu particularly as the Prosecution has indicated that Mr. André Gichaoua and Ms. Allison Desforges will testify as experts on this section and it has been provided with the reports of the two witnesses.

22. The Defence requests the Chamber to use its discretion under Rule 50 to consider the particular circumstances of its case in the interest of justice. It submits that in most cases at the Tribunal amendments under Rule 50 were made well in advance of commencement of trial and in some cases said requests were allowed on the eve of trial because the amendments were minor. The Defence notes that Bizimungu has been detained for more than four years and seven months. It argues that the Defence will be prejudiced if the Chamber grants the Motion to amend the Indictment after such a long time and only two months before commencement of the trial.

23. The Defence submits that the Prosecution disclosed to it some statements of witnesses on 24 August 2003 but it was surprised to see that most of those statements were signed more than four years prior to this date. It is the Defence's argument that the Motion for amendment should have been made earlier than this. It argues that it is ready to meet the Prosecution case on the basis of the current Indictment but that it is not ready to meet the Prosecution case on the basis of the proposed Amended Indictment.

Prosecutions reply to Bizimungu's Response

24. The Prosecution reiterates its request noting that contrary to the Defence argument, additions of new facts to the proposed Amended Indictment do not completely change the nature of the charges.

HAVING DELIBERATED

25. The Chamber notes that the Prosecution seeks leave to amend the current Indictment filed on 13 August 1999 pursuant to Rule 50. Said Rule provides:

Rule 50: Amendment of Indictment

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

26. The Chamber recalls its opinion in the *Niyitegeka* Decision that, “[o]nce the indictment is confirmed, the Prosecutor’s power to amend a confirmed indictment is not unlimited and must be considered against the overall interests of justice as envisioned by Rule 50(A).” In that Decision it was stated that, “[g]enerally amendments pursuant to Rule 50 are granted in order to; (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the

indictment.[7]

27. Essentially, the Trial Chamber balances the rights of the Accused as prescribed under Article 19 and 20 of the Statute, which *inter alia* provide for the Accused right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay. These rights are balanced with the complexity of the case. It is therefore the discretion of the Trial Chamber to consider requests under Rule 50 in the light of the particular circumstances of the case before it.
28. Under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of its Motion and it is for the Defence to respond to these arguments.[8]
29. In the instant case, the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment. The Prosecution submits that she seeks to remove two Counts and combine and charge alternatively the Counts of Genocide and Complicity in Genocide. She further seeks to expand the remaining Counts focusing on the Accused's participation in the crimes they are alleged to have committed in 1994. Finally the Prosecution submits that she seeks to remove the section on 'Historical Context,' thereby reducing the current Indictment from a total of 80 pages and substituting it with the proposed Amended Indictment which consists of a total of less than 30 pages.
30. The Chamber notes that it is only the Defence of Mugenzi who does not object to the Motion, rather it maintains that the Accused, "[v]igorously denies all of the allegations made against him, whether they are said to be supported by the original evidence or any new evidence obtained after the confirmation of the original indictment." [9] On the other hand the Defence Counsel for the Accused Bizimungu, Mugiraneza and Bicamumpaka object to the Motion mainly because of the Prosecution's delay in bringing the Motion particularly as the commencement of the trial in this case has been set to be 3 November 2003 – hardly two months from the date when the Motion was filed.
31. In regard to the Prosecution intention to remove certain Counts of the current Indictment and likewise the section on 'Historical Context,' the Chamber notes that the Prosecution may do so without necessarily requiring an amendment under Rule 50. With regard to the Prosecution intention to combine and charge alternatively the Counts of Genocide and Complicity in Genocide, the Chamber finds this procedure irregular and would render the count bad for duplicity and will pose problems particularly when it has to pronounce judgment and sentence on one or the other of the charges. The Chamber thus finds that it is not in the interests of judicial economy to allow the Prosecution to amend the current Indictment for the reasons she has provided above.
32. The Chamber considers the Prosecution further request to amend the current Indictment following its discovery of new evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts.
33. It is noted that the Prosecution submits that although the amendment she makes will result in the expansion of the Accused individual participation in the crimes they are alleged to have committed, the amendments themselves do not result in the addition of new charges. In fact, the Prosecution submits that the proposed Amended Indictment is clearer and more specific making it in accord with the jurisprudence of the Tribunal and the current charging practices of the Prosecution. The Defence on the other hand point to specific areas of the proposed Amended Indictment where in they allege that the factual allegations amount to new charges.

34. In the instant case, after having carefully analysed the proposed Amended Indictment and compared it to the current Indictment, the Chamber is of the opinion that the expansions, clarifications and specificity made in support of the remaining counts, do amount to substantial changes which would cause prejudice to the Accused. For example, the Chamber notes that although the current Indictment contains broad allegations in support of the Counts, the proposed Amended Indictment contains specific allegations detailing names, places, dates and times wherein the Accused are alleged to have participated in the commission of specific crimes. The Chamber finds that such substantial changes would necessitate that the Accused be given adequate time to prepare his defence.

35. The Chamber also notes that the trial date in this case has been set for 3 November 2003. It is the Chamber's opinion that granting the Prosecution leave to amend the current Indictment will not only cause prejudice to the Accused but would also result in a delay for the commencement of the trial for the reasons outlined above. The Chamber finds that in the particular circumstances of this case, it would not be in the interests of justice to grant the Motion. The Chamber thus denies the Motion in its entirety.

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 6 October 2003

William H. Sekule
Presiding Judge

Asoka de Zoysa Gunawardana
Judge

Arlette Ramaroson
Judge

Seal of the Tribunal

[1] *Prosecutor v. Kabiligi* "Decision on the Prosecutor's Request for Leave to File an Amended Indictment," filed on 8 October 1999

[2] *Prosecutor v. Ndayambaje*, "Decision on the Prosecutor's Request for leave to File an Amended Indictment," of 2 September 1999; *Prosecutor v. Barayagwiza*, "Decision on the Prosecutor's Request for Leave to File and Amended Indictment," filed on 11 April 2000

[3] *Prosecutor v. Akayesu*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment," filed on 17 June 1997

[4] "Prosper Mugiraneza's Motion to Dismiss the Indictment for Violation of Article 20(4)(c) of the Statute, Demand for Speedy Trial and for Appropriate Relief," filed on 17 July 2003.

[5] *Prosecutor v. Ndayambaje*, "Decision on the Prosecutor's Motion for modification of the indictment," filed on 2 September 1999 at para. 5 (the "*Ndayambaje* Decision")

[6] See paragraphs, 30 (a) through (f), 34 through 51, 101, 102, 104, 105, 106, 107, 112, 115, 122, and 123 of the proposed Amended Indictment

[7] *Prosecutor v. Nindabahizi*, "Decision on Prosecution Motion for Leave to amend indictment," filed on 20 August 2003 (the "*Nindabahizi* Decision"); *Prosecutor v. Niyitegeka*, "Decision on Prosecution Motion for Leave to amend indictment," filed on 21 June 2000 (the "*Niyitegeka* Decision")

[8] *Prosecutor v. Musema*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment," of 18 November

1998

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[9] See "Motion on Behalf of Justin Mugenzi for the Confirmation of the Trial Date and the Fixing of a Date for the Pre-trial Conference," filed on 22 September 2003, para. 2

PROSECUTION INDEX OF AUTHORITIES

6. *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, 12 December 2003.



Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for 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:

10 December 2003

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIÉE CONFORME À L'ORIGINAL PAR MOI
NAME / NOM: *RHT, R2, R24*
SIGNATURE: *[Signature]* DATE: *19 Dec 03*

ICTR Appeals Chamber
Date: *19 Dec 03*
Action: *PC*
Copied To: *Concerned*

THE PROSECUTOR

v.

**ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
ANDRÉ RWAMAKUBA**

Case No. ICTR-98-44-AR73

Judges;
ALOs / LOs;
Parties;
LSS;
Judicial Archives
[Signature]

**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

Mr. Don Webster
Ms. Dior Fall
Ms. Ifeoma Ojemeru
Ms. Simone Monasebian
Ms. Holo Makwaia
Ms. Tamara Cummings-John

Counsel for the Defence

Mr. Didier Skornicki
Mr. John Traversi
Mr. Charles Roach
Mr. Frédéric Weyl
Mr. Peter Robinson
Ms. Dior Diagne
Mr. David Hooper
Mr. 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."¹ 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

¹ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-I, Brief in Support of Prosecutor's Consolidated Motion (i) for Separate Trials Pursuant to Rules 72 and 82; and (ii) for Leave to File an Amended Indictment Pursuant to Rules 73 and 50, 29 August 2003 ("Brief in Support of Motion"), para. 16.
Case No. ICTR-98-44-AR73

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").² 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.³

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.⁴

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"),⁵ 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

² *Prosecutor v. Bizimana et al.*, No. ICTR-98-44-I, Décision relative à la requête du Procureur en disjonction d'instance et en autorisation de modification de l'acte d'accusation, 8 October 2003.

³ *Ibid.*, para. 12.

⁴ *Ibid.*, para. 13.

⁵ *Prosecutor v. Karemera et al.*, No. ICTR-98-44-I, Certification to Appeal the Decision of 8 October 2003 Dismissing the Prosecutor's Motion to Amend the Accused's Indictment, 21 October 2003.

remainder of the amendment. Responses to the Appeal were filed by the Accused Karemera, Ndirumpatse, 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.”⁶ If the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently.⁷ 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.”⁸

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.⁹) By contrast, it is not obvious what the Trial Chamber means by a “new

⁶ *Prosecutor v. Milosević*, Nos. IT-99-37-AR73, IT-01-50-AR73 & IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 (“*Milosević*”), para. 5 (footnotes omitted).

⁷ *Ibid.*, para. 4.

⁸ *Ibid.*, para. 6.

⁹ Brief in Support of Motion, para. 31.

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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].”¹⁰ 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. Kovačević*,¹¹ 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.”¹² 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,¹³ “must be interpreted according to the special features of each case.”¹⁴ 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.¹⁵ “[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.”¹⁶

¹⁰ Motion, para. 3(v).

¹¹ No. IT-97-24-AR/13, Decision Stating Reasons for Appeals Chamber’s Order of 29 May 1998, dated 2 July 1998 (“*Kovačević*”).

¹² *Ibid.*, para. 28.

¹³ Statute of the ICTY, Art. 21(4)(c).

¹⁴ *Kovačević*, para. 30.

¹⁵ *Ibid.*, para. 30.

¹⁶ *Ibid.*, para. 31.

14. *Kovačević* 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.”¹⁷ Trial Chambers of the International Tribunal have also used a case-specific analysis similar to that of *Kovačević* in determining whether proposed amendments to an indictment will cause “undue delay.”¹⁸

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.

¹⁷ *Prosecutor v. Nyiramasuhuko*, Joint Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15bis (D), 24 September 2003, para. 24.
¹⁸ *E.g.*, *Prosecutor v. Kanyabashi*, No. ICTR-96-15-T, Reasons for the Decision on the Prosecutor’s Request for Leave to Amend the Indictment, 10 September 1999, paras. 23-25; *Prosecutor v. Musema*, No. ICTR-96-13-T, Decision on the Prosecution’s Request for Leave to Amend the Indictment, 6 May 1999, para. 17.
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18. The fourth point considered by the Trial Chamber was “judicial economy.”¹⁹ 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.”²⁰ Likewise, the Trial Chamber “g[ave] weight to extraneous or irrelevant considerations”²¹ 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.”²² 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

¹⁹ Decision, para. 13.

²⁰ *Milosević*, para. 5.

²¹ *Ibid.*.

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,²³ 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."²⁴

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

²² *Kovačević*, para. 32.

²³ Defence [Rwamakuba] Response to Prosecutor's Motion on Appeal Dated 28 October for Leave to File an Amended Indictment, para. 2.

²⁴ *Kovačević*, para. 31.

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,²⁵ the Amended Indictment alleges the dates of several of those meetings as well as the specific matters discussed and the consequences of those meetings.²⁶ Similarly, where the Current Indictment states that the Accused Nzirorera "gave orders to militiamen to kill members of the Tutsi population,"²⁷ the Amended Indictment lists specific instances where Nzirorera allegedly incited attacks on Tutsi civilians.²⁸ Some of the expansions on general allegations are quite detailed, such as the new allegations in the Amended Indictment regarding activities in Ruhengeri prefecture²⁹ and Gikomero commune.³⁰ The Amended Indictment also expressly states the Prosecution's theory that the Accused participated in a joint criminal enterprise.³¹

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

²⁵ Current Indictment, para. 6.36; *see also ibid.*, paras. 6.37 to 6.39.

²⁶ Amended Indictment, paras. 31.7 to 31.23.

²⁷ Current Indictment, para. 6.79.

²⁸ Amended Indictment, paras. 24.1 to 24.6.

²⁹ Amended Indictment, paras. 32.1 to 32.12.

³⁰ Amended Indictment, paras. 33.1 to 33.2.

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.³² 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,"³³ 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

³¹ E.g., Amended Indictment, paras. 27, 32, 33, 34, 44.

³² Decision, para. 13 ("Par ailleurs, un tel amendement affecterait le droit des accusés à être jugés dans un délai raisonnable, en prolongeant leur détention préventive.")

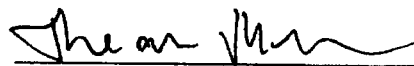
³³ Decision, para. 13.

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,³⁴ 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.



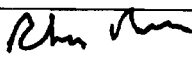
³⁴ Mémoire de la défense de M. Edouard Karemera sur le "Prosecutor's Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment," paras. 15-20.
Case No. ICTR-98-44-AR73



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

REGISTRY AT THE HAGUE
Churchillplein 1, 2517 JW The Hague, The Netherlands
Tel: + 31 (0) 70 512-8225 / 8237 Fax : + 31 (0) 70 512 -8932

**JUDICIAL DOCUMENTS TRANSMISSION SHEET – APPEALS CHAMBER
FICHE DE TRANSMISSION DE DOCUMENTS JUDICIAIRES-CHAMBRE D'APPEL**

Date: 19 December 2003	Case Name / Affaire: Edouard Karemera Mathieu Ngirumpatse Joseph Nzirorera André Rwamakuba Case No / no. de l'affaire: Joint Case no ICTR-98-44-A	THE PROSECUTOR V/ Edouard Karemera Mathieu Ngirumpatse Joseph Nzirorera André Rwamakuba
To: A:	<p>OTP, Trial Attorney in charge of case <input type="checkbox"/> Ms Mélanie WERRETT and Mr Don WEBSTER</p> <p><input type="checkbox"/> In The Hague <input checked="" type="checkbox"/> In Arusha <input type="checkbox"/> In Kigali</p> <p>APPEALS UNIT <input type="checkbox"/> Félicité Talon</p> <p>APPEALS CHAMBER <input checked="" type="checkbox"/> Judge: / Juge Theodor Meron, Président / <i>Président</i> <input checked="" type="checkbox"/> Judge: / Juge Mohamed Shahabuddeen <input type="checkbox"/> Judge: / Juge Mehmet Guney <input checked="" type="checkbox"/> Judge: / Juge Fausto Pocar <input checked="" type="checkbox"/> Judge: / Juge Inés Monica Weinberg de Roca</p> <p>DEFENSE <input checked="" type="checkbox"/> Accused / <i>accusé</i> : Mr Karemera, Mr Ngirumpatse, Mr Nzirorera and Mr Rwamakuba <input checked="" type="checkbox"/> Lead Counsel / <i>Conseil Principal</i>: Mr Skornicki, Mr Roach, Mr Robinson and Mr Hooper <input type="checkbox"/> In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number:</p> <p><input type="checkbox"/> Co-Counsel / <i>Conseil Adjoint</i>: _____ (name / nom) <input type="checkbox"/> In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number:</p>	
From: De:	<input type="checkbox"/> R. Barriss  <input type="checkbox"/> P. Galinier	
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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	43/h-33/h

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JUDICIAL DOCUMENTS TRANSMISSION SHEET – APPEALS CHAMBER
 FICHE DE TRANSMISSION DE DOCUMENTS JUDICIAIRES-CHAMBRE D'APPEL

Date:	19 December 2003	Case Name / Affaire: Edouard Karemera Mathieu Ngirumpatse Joseph Nzirorera André Rwamakuba Case No / no. de l'affaire: Joint Case no ICTR-98-44-A	THE PROSECUTOR V/ Edouard Karemera Mathieu Ngirumpatse Joseph Nzirorera André Rwamakuba
To: A:	<p>OTR, Trial Attorney in charge of case <input type="checkbox"/> Ms Melanie WERRETT and Mr Don WEBSTER</p> <p><input type="checkbox"/> In The Hague <input checked="" type="checkbox"/> In Arusha <input type="checkbox"/> In Kigali</p> <p>APPEALS UNIT <input checked="" type="checkbox"/> Félicité Talon</p> <p>APPEALS CHAMBER <input checked="" type="checkbox"/> Judge / Juge Theodor Meron, Président / Président <input checked="" type="checkbox"/> Judge / Juge Mohamed Shahabuddeen <input type="checkbox"/> Judge / Juge Mehmet Guncy <input checked="" type="checkbox"/> Judge / Juge Fausto Pocar <input checked="" type="checkbox"/> Judge / Juge Inés Monica Weinberg de Roca</p> <p>DEFENSE <input checked="" type="checkbox"/> Accused / accusé : Mr Karemera, Mr Ngirumpatse, Mr Nzirorera and Mr Rwamakuba <input checked="" type="checkbox"/> Lead Counsel / Conseil Principal: Mr Skornicki, Mr Roach, Mr Robinson and Mr Hooper <input type="checkbox"/> In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number:</p> <p><input type="checkbox"/> Co-Counsel / Conseil Adjoint: _____ (name / nom) <input type="checkbox"/> In Arusha (complete CMS 2) <input type="checkbox"/> Fax Number:</p>		
From: De:	<p><input type="checkbox"/> R. Burriess <i>R. Burriess</i> <input type="checkbox"/> P. Galinier</p>		

PROSECUTION INDEX OF AUTHORITIES

- 7. *Prosecutor v. Musema*, ICTR-96-13-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 May 1999.

Case No. ICTR-96-13-T



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER I

OR:ENG

Before: Judge Lennart Aspegren, Presiding
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Ms Marianne Ben Salimo

Decision of: 6 May 1999

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THE PROSECUTOR
VERSUS
ALFRED MUSEMA

Case No. ICTR-96-13-T

DECISION
ON THE PROSECUTOR'S REQUEST
FOR LEAVE TO AMEND THE INDICTMENT

The Office of the Prosecutor:

Ms Jane Anywar Adong
Mr. Charles Adeogun-Phillips
Ms Holo Makwaia

Counsel for the Accused:

Mr. Steven Kay QC
Prof. Michail Wladimiroff

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: *Dr. MINDUA K. M. Antoinette*
SIGNATURE: *[Signature]* DATE: *25.05.1999*

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

1. The Tribunal, sitting as Judge Lennart Aspegren, presiding, Judge Laïty Kama, and Judge Navanethem Pillay has received from the Prosecutor a request for leave to file an amended indictment, dated 29 April 1999, in the case of "The Prosecutor versus Alfred Musema". The Defence filed a response thereto on 4 May 1999.
2. The submissions of the parties were heard on 5 May 1999.

The Submissions

The Prosecutor

3. The Prosecutor is seeking, *inter alia*:
 - (a) in terms of Rule 50 of the Tribunal's Rules of Procedure and Evidence (the "Rules"), to amend the indictment to add one new charge against the accused;
 - (b) to expand upon the facts adduced in the existing indictment; and
 - (c) to amend count 7 of the indictment, as indicated in counts 8 and 9 of the proposed amended indictment.
4. The Prosecutor submitted that the proposed amended indictment reflects current jurisprudence by bringing it in line with jurisprudence of the Tribunal, *viz* the form of the indictment, and that it reflects the totality of the accused's alleged criminal conduct as presented by the evidence adduced during trial and as will be presented by anticipated witnesses. The Prosecutor cited extracts from witness testimony as well as witness statements in support of her submission that a *prima facie* case had been made in respect of the new charges. In support of her motion, the Prosecutor refers to the decision of the Tribunal granting leave to the Prosecutor to amend the indictment to admit the additional count of rape during the trial of 'The Prosecutor v. Jean-Paul Akayesu' (case no ICTR- 96-4-T).
5. It is argued by the Prosecutor that the amendment as sought is a mere technicality and therefore cannot be held to occasion prejudice or erode the rights of the Defence and will not fundamentally alter the on going trial against the accused, thus causing no additional delay to the trial. The Prosecutor contends that she had intimated at a status conference on 21 January 1999 that evidence of the alleged involvement of the accused in acts of sexual violence were uncovered in December 1998 and on that occasion she had indicated her intention to move for the amendment of the indictment against the accused, to include sexual offences. Subsequently, statements of the relevant witnesses were disclosed to the Defence on 25 January 1999. The Prosecutor submitted that the accused will therefore not suffer any prejudice, if the amendment to the indictment is granted, as he had been informed of these proposed charges, and the Defence has had ample opportunity to challenge the evidence presented by these witnesses.

6. The Prosecutor submitted that in the spirit of Rule 115 of the Rules, she should not be limited to any formalities and she added that where evidence relevant to the accused has come to light, which could contribute to justice being done, such evidence must be presented before the Trial Chamber.

7. In response to questions from the bench, pertaining to the delay in the filing of this motion for the amendment of the indictment, particularly in light of the fact that the relevant witness statements were disclosed to the Defence on 25 January 1999 and the motion for amendment was filed on 29 April 1999, the Prosecutor submitted *inter alia* that this delay was due to consultations being held among the various departments of the Office of the Prosecutor. These consultations, according to the Prosecutor, pertained to the investigation of the cases of sexual violence and further evaluation of the weight of the evidence and the credibility of these witnesses. Consultations were also held as to whether it would be prudent to file a motion to amend the indictment to include a separate charge of rape or alternatively to argue that these acts of sexual violence constitute acts of genocide, as charged in Count 1 of the indictment.

The Defence

8. In response, the Defence, on the basis of Rule 87 (B) of the Rules and Article 20 of the Statute of the Tribunal, submitted that the accused will only have to defend himself against acts as set out in a concise statement of facts culminating in charges as specified in the indictment against him. On the basis of the present indictment, the Defence argues that it has had no reason to conduct investigations or to prepare a defence for alleged but not indicted rapes.

9. On the same line, the Defence submitted that they should not be expected to act on the basis of the intention to amend the indictment as expressed by the Prosecutor during the status conference of 21 January 1999, but rather on allegations as specified in the indictment.

10. The Defence contends that the late filing of the motion is not justified, and that the Prosecutor has not shown any acceptable reason why the motion was not filed immediately after the taking of the witness statements. A further contention of the Defence is that the Trial Chamber is not empowered under the Rules to grant leave to amend the indictment, but rather that in terms of Rule 50 of the Rules this lies with the confirming judge.

11. In response to the Prosecutor's submission, the Defence submitted that Rule 115 of the Rules as cited by the Prosecutor is irrelevant to this case because this rule deals with issues arising at the level of appeal and not at the stage of trial. Referring to the Decision by the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, dated 15 October 1998, in the case of "Prosecutor versus Džsko Tadić", the Defence submitted that there is a substantial difference between additional evidence and additional charges.

12. In conclusion, the Defence submitted that the evidence as presented at trial relevant to the allegation of rape, does not provide reasonable grounds for believing that the accused committed rapes and therefore the request to amend the indictment does not meet the required standard of proof to allow the Prosecutor to present new charges.

AFTER HAVING DELIBERATED,

The Tribunal states the following

13. The Tribunal has considered the submissions of the parties. In response to the Defence submission that it is the confirming judge and not the Trial Chamber who is empowered to order the amendment of the indictment, the Tribunal notes that Rule 50 of the Rules, clearly stipulates that 'At or after such initial appearance, an amendment of an indictment may only be made by leave granted by [a] Trial Chamber'. It is on the basis of this provision that the Trial Chamber is competent to entertain the motion and rule thereon.

14. The Tribunal notes that Rule 115 of the Rules, as cited by the Prosecutor is pertinent to matters arising at the level of appeal and not at the level of trial. Further, this rule, allows for the presentation of additional evidence at the level of appeal, but does not under any circumstances allow for additional charges to be brought against the accused. This rule is therefore irrelevant to these proceedings.

15. As a point of order, the Tribunal notes that the delay between the discovery of the pertinent statements in this instance and the filing of the motion cannot be justified on the grounds of the need for consultation between departments of the Office of the Prosecutor, and the technicalities of drafting the amended indictment. In the opinion of the Tribunal such grounds are not tenable when the issue pertains to the right of the accused to a fair and expeditious trial, and thus shall not be entertained by the Tribunal in the present matter.

16. As such, the Tribunal reiterates its criticism of the Prosecutor for failing to keep the Trial Chamber and the Defence informed of the development with regard to her motion to amend the indictment against the accused.

17. Notwithstanding the above, the Tribunal notes that Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file a request to amend the indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.

18. The Tribunal is of the opinion that the filing of the motion, though coming at a late stage in the presentation of the Prosecutor's case, does not cause irreparable prejudice to the accused. Furthermore, the Tribunal is of the opinion that the amendments sought will not unduly delay the proceedings, considering firstly, that the Prosecutor has already disclosed all her witness statements supporting the additional allegations contained in the proposed amended indictment, and secondly, that all the witnesses she intended to rely on in respect of the proposed amendment, have already testified in this case.

19. The Tribunal has considered the evidence presented by the Prosecutor in support of her motion. On the basis of this, it finds that a *prima facie* case has been established by the

Case No. ICTR-96-13-T

Prosecutor with respect to the new counts and grants leave to file the amended indictment.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

GRANTS leave to the Prosecutor to amend the indictment by:

- (i) adding one new charge against the accused as indicated in Count 7 of the proposed amended indictment of 29 April 1999;
- (ii) expanding on the facts adduced in the existing indictment in support of the new charges, as indicated in paragraphs 4.7 to 4.11 of the proposed amended indictment; and
- (iii) amending Count 7 of the present indictment against the accused, as indicated in Counts 8 and 9 of the proposed amended indictment.

REMINDS the Prosecutor of her obligation to immediately serve on the accused and his Counsel the amended indictment in English and in French.

Arusha, 6 May 1999.

Signed on 24 May 1999.

Lennart Aspegren
 Lennart Aspegren
 Presiding Judge

Laity Kama
 Laity Kama
 Judge

Navanethem Pillay
 Navanethem Pillay
 Judge

(Seal of the Tribunal)



PROSECUTION INDEX OF AUTHORITIES

8. *Prosecutor v. Kovacevic*, IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, 2 July 1998.

**UNITED
NATIONS**

Case No: IT-97-24-AR73

Date: 2 July 1998

Original: English



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

IN THE APPEALS CHAMBER

Before: Judge Gabrielle Kirk McDonald (Presiding)

Judge Mohamed Shahabuddeen

Judge Wang Tieya

Judge Rafael Nieto-Navia

Judge Almiro Simões Rodrigues

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 2 July 1998

PROSECUTOR

v.

MILAN KOVACEVIC

**DECISION STATING REASONS FOR APPEALS CHAMBER'S ORDER OF
29 MAY 1998**

Office of the Prosecutor:

Ms. Brenda Hollis

Mr. Michael Keegan

Counsel for the Accused:

Mr. Dusan Vucicevic

Mr. Anthony D'Amato

I. INTRODUCTION

A. Background

1. The Prosecutor sought leave before the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") to appeal against a decision of Trial Chamber II refusing her leave to amend an indictment by the addition of fourteen counts to an original single count. By Order dated 29 May 1998, the appeal was allowed. The Order indicated that the reasons for allowing the appeal would be put in writing in due course. This Decision sets forth those reasons.

2. In the original Indictment ("Indictment") against the accused Milan Kovacevic, confirmed by Judge Odio-Benito on 13 March 1997, Mr. Kovacevic was charged with a single violation of Article 4, subparagraph (3)(e), of the Statute of the International Tribunal ("Statute"), complicity in genocide. At the confirmation hearing on the same date, the Deputy Prosecutor explained that, while the Indictment contained only one count, the Office of the Prosecutor ("prosecution") intended to amend the Indictment to include other charges in the event of an arrest. The accused was arrested and transferred to the custody of the International Tribunal on 10 July 1997. At the Initial Appearance held on 30 July 1997, the accused pleaded not guilty to the charge of complicity in genocide.

3. The defence was first notified of the prosecution's intention to amend the Indictment on 11 July 1997, during the first meeting between the defence and prosecution. The defence then filed a Motion to Clarify Standards Implicit in Rule 50 Regarding Amendment on Indictment on 10 September 1997, to which the prosecution responded on 24 September 1997. In its Decision on this Motion, the Trial Chamber, on 1 October 1997, held that the issues involved were to be considered in Plenary. Rule 50 of the Rules of Procedure and Evidence ("Rules") was subsequently amended in Plenary, and became effective on 12 November 1997.

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4. The matter of amendment of the Indictment was further addressed at a motions hearing before the Trial Chamber on 10 October 1997, where the Presiding Judge noted that the Indictment was to be amended "in due course, whatever that may mean". Pointing out that the composition of the Trial Chamber was to be altered, he observed that this was a matter that would be dealt with by the new Trial Chamber to be constituted in November. On this occasion the prosecution indicated that there was a possibility that the envisaged amendment would include "a more substantive charge" which would need to be supported by additional materials.
5. During a status conference before the Trial Chamber in its new composition, on 24 November 1997, the prosecution confirmed its intention to seek an amendment to the Indictment and declared that it would be in a position to do so on 19 December 1997. However, expressing concern that the medical condition of the accused might be such that going through the process of seeking leave to amend the Indictment would prove to be irrelevant, the prosecution expressed its preference for this matter be considered only after a decision had been reached on a pending application for provisional release filed by the defence. The prosecution further declared that, in its amendment, it would be seeking to include not only the genocide count, but also charges of grave breaches of the Geneva Conventions. Neither the Bench nor the defence responded to this latter statement. The Trial Chamber on this occasion decided not to timetable anything beyond the application for provisional release, and declared that depending on the outcome of that decision it would then go on to timetable the prosecution motion to amend the Indictment, if filed, in the new year. On 16 January 1998, the Trial Chamber rejected the defence's application for provisional release, and ordered the prosecution to file its motion to amend the Indictment by 28 January 1998.
6. The full scope of the amendment to the Indictment became apparent on 28 January 1998, when the prosecution filed its Request for Leave to file an Amended Indictment ("Request"). The draft Amended Indictment seeks to add fourteen additional counts to the single count of complicity in genocide. These new counts would cover Articles 2, 3, and 5 of the Statute and are based on expanded factual allegations. While the original Indictment is 8 pages in length, the proposed Amended Indictment is 18 pages.
7. On 5 March 1998, the Trial Chamber issued the Decision on Prosecution's Request to File an Amended Indictment ("Decision"), pursuant to Rules 50 and 73(A) of the Rules, refusing the prosecution's Request. The Trial Chamber found the amendments to be so substantial as to amount to a new indictment. In its view, to accept the Amended Indictment would be to substitute a new indictment for the confirmed Indictment at the stage of the proceedings when the trial was set to begin on 11 May 1998. The Trial Chamber found that the prosecution produced insufficient reasons that do not justify its delay in bringing the Request nearly one year after confirmation and seven months after the arrest of the accused. The Trial Chamber decided to deny the Request, in order to protect the rights of the accused to be informed promptly of the charges against him, and to be accorded a fair and expeditious trial, as well as in the interests of justice.
8. Noting that the defence had no objection to the prosecution's request for interlocutory review of the Trial Chamber's Decision, on 22 April 1998, a Bench of the Appeals Chamber, in the Decision on Application for Leave to Appeal by the Prosecution ("Decision on Application") granted leave to appeal. The Appeals Chamber decided to hear the appeal "expeditiously on the basis of the original record of the Trial Chamber and without the necessity of any written brief . . . and without oral hearing".
9. On 1 May 1998, the prosecution submitted a Brief in Support of Prosecutor's Application for Leave to Appeal From the Trial Chamber's Denial of the Prosecutor's Request for Leave to File an Amended Indictment. A Defence Reply to Prosecutor's Brief in Support of Leave to Appeal was filed on 5 May 1998.

B. Submissions of the Parties

Prosecution

10. The prosecution submits that the Decision is contrary to the standards set down by international human rights law with respect to reasonable delay. It contends that the pre-trial detention in the present case does not violate international standards under the International Covenant on Civil and Political Rights ("ICCPR") or regional standards under the European Convention on Human Rights ("ECHR").

11. In the view of the prosecution, Article 21, sub-paragraph (4)(c) of the Statute should be interpreted in the light of Article 14(3)(c) of the ICCPR because the former was based almost verbatim on the latter. The prosecution submits that a commentary to the ICCPR states that "undue delay" or "reasonable time" under Article 14(3)(c) "depends on the circumstances and complexity of the case".

12. The prosecution submits that the Trial Chamber erred in law by holding that the right of the accused to be informed promptly of the charges against him would be infringed by allowing leave to amend the Indictment. It asserts that the Trial Chamber misapplied Article 9 of the ICCPR in coming to this conclusion.

13. The prosecution submits that the decisions of the European Commission and of the European Court of Human Rights interpreting Articles 5(3) and 6(1) of the ECHR establish that the judiciary must determine the meaning and requirements of the phrase "within a reasonable time" according to the specific circumstances of the case at hand. With respect to Article 5(3), the prosecution finds in the jurisprudence the following essential factors that the court must consider: "the complexity and special characteristics of the investigation; the conduct of the accused; the manner in which the investigation was conducted; the actual length of detention; the length of detention on remand in relation to the nature of the offence; and the penalty prescribed and to be expected in the case of conviction". With respect to the interpretation of "within a reasonable time" in Article 6(1), the prosecution finds in the settled law the following criteria: the "complexity of the case, the manner in which the investigation was conducted, the conduct of the accused relating to his role in delaying the proceedings and his request for release, the conduct of judicial authorities, and the length of proceedings".

14. The prosecution submits that the Trial Chamber arrived at the Decision on the basis of expediency to maintain a starting date for trial of 11 May 1998, rather than by looking at the merits of the Prosecution's Request to File an Amended Indictment. The prosecution argues that Article 20 of the Statute guarantees both parties a fair and expeditious trial, and that the Trial Chamber did not consider the harm to the prosecution's case caused by the Decision. The prosecution claims that the Decision forces it "to proceed to trial on a single charge of complicity in genocide which does not accurately reflect the totality of the alleged conduct of the accused", and "without any options to account for the contingencies of proof at trial, despite the fact that the evidence submitted with the Amended Indictment establish[es] [what it considers to be] a *prima facie* case against the accused" for violations other than complicity in genocide.

15. The prosecution contends that the Trial Chamber erred by not affording it an opportunity to present additional material in support of the delay in submitting the request for leave to amend. The prosecution further claims that the Trial Chamber erred in failing to determine whether any of the proposed charges in the Amended Indictment could have been confirmed without resulting in undue delay of the scheduled trial date.

Defence

16. The defence submits that the prosecution should not be permitted to amend the Indictment by adding 14 new counts ten and a half months after confirmation of the Indictment. It is the position of the defence that the "Prosecution deliberately chose to withhold the addition of these counts until 28 January 1998". The defence claims that Article 9(2) of the ICCPR is applicable in this case and entitles Mr. Kovacevic to full disclosure of the reasons for his arrest and prompt disclosure of the charges against him. The defence argues that the accused was denied his right to be fully and promptly informed of the case against him because the prosecution did not reveal the 14 additional charges against the accused until six and a half months after his arrest. The defence contends that the prosecution behaved in an opportunistic fashion that is in clear violation of international human rights principles under the ICCPR.

17. The defence submits that the delay is *ipso facto* undue and unreasonable because the Trial Chamber found that the prosecution had no legitimate reason for the delay in amending the Indictment. It is the position of the defence that the delay by the prosecution in amending the Indictment is due to the prosecution's strategic manoeuvring. The defence alleges that not only did the prosecution purposely delay disclosing the new charges to the accused, but that it withheld these charges from the accused in an effort to obtain his co-operation against other persons. In its submissions to the Trial Chamber, the defence asserted that it would require seven months to prepare its case if the new charges were to be added. The Trial Chamber accepted this assertion. The defence submits that the resulting delay of trial would violate the accused's right to be tried without undue delay.

18. The defence asserts that the prosecution's supporting materials do not give rise to a *prima facie* case, given that certain elements of the prosecution's case have not been proved, including the intent on the part of the accused to participate in a plan to commit genocide, and the position of the accused as a civilian in the chain of command of the military and police forces.

C. Applicable Provisions

19. It is appropriate to set out in relevant parts the applicable provisions of the Statute and the Rules of the International Tribunal, as well as certain provisions of the International Covenant on Civil and Political Rights and the European Convention on Human Rights.

Statute

Article 20

Commencement and conduct of trial proceedings

1. The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused

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understands the indictment, and instruct the accused to enter a plea.
The Trial Chamber shall then set a date for trial.

[...]

Article 21

Rights of the accused

[...]

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute

[...]

4. In the determination of an charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(c) to be tried without undue delay;

[...]

Rules

Rule 50

Amendment of Indictment

(A) The Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. At or after such initial appearance amendment of an indictment may only be made by motion before that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of sixty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rule 59 bis

Transmission of Arrest Warrants

[...]

(B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal. Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language.

[...]

Rule 62

Initial Appearance of Accused

Upon the transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:

- (i) satisfy itself that the right of the accused to counsel is respected;
- (ii) read or have the indictment read to the accused in a language the accused speaks and understands, and satisfy itself that the accused understands the indictment;
- (iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on the accused's behalf;

[...]

ICCPR

Article 9

1. Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

[...]

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Article 14

[...]

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay.

[...]

ECHR

Article 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
[...]

[...]

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

[...]

II. DISCUSSION

20. In sum, the motion for leave to amend was refused on the general ground that to allow the amendments would prejudice the right of the accused to a fair and expeditious trial, and, more particularly, because of the following reasons:

21. First, the new counts involved an unacceptable increase in the size of the original Indictment. Secondly, they led to undue delay. Thirdly, the accused was not informed promptly of the additional charges. Before this Chamber, the defence raised the point whether the addition of the new counts was

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barred by the speciality principle of extradition law.

These four points are dealt with below.

i). Whether the size of the proposed amendments was objectionable

22. As to the first ground on which leave to amend was refused, the Trial Chamber found that the new "counts cover Articles 2, 3, and 4 of the Statute, and are based on substantially expanded factual allegations", and that "[t]he proposed amendment ... is so substantial as to amount to a substitution of a new indictment". It noted that the amendments would add fourteen counts to one original, and would increase the length of the Indictment from 8 pages to 18.

23. This Chamber sees no sufficient reason to reject the substance of the explanation of the Prosecutor that the "expansion of the indictment from 8 to 18 pages, referred to by the Trial Chamber, is merely due to the organisational layout of the document, which repeats many of the same facts in the prefatory paragraphs for each group of counts". But for that editorial approach, a shorter document would have been produced.

24. No doubt, size can be taken into account in considering whether any injustice would be caused to the accused; but, provided other relevant requirements are met, a court would be slow to deny the prosecution a right to amend on that ground only. The Trial Chamber did not consider whether any possible injustice arising from size could be remedied by disallowing only some of the amendments, in which case, the prosecution could have been asked to indicate its preferences: it rejected the whole.

25. In the circumstances of the case, this Chamber is not satisfied that the size of the amendments was objectionable.

ii). Whether the amendments would cause undue delay

26. The second ground of refusal was undue delay. Some domestic systems impose stricter limits than those enjoined by internationally recognised standards. It is the latter which apply to proceedings before the International Tribunal. Does any basis appear for saying that these latter standards would be violated by granting the requested amendments?

27. The accused spent six and a half months in detention before the prosecution filed its motion for leave to amend the Indictment. The trial was due to take place three and half months later. If the motion was granted, the defence would need seven months to prepare in respect of the new changes. How long the trial will take is not something to be considered at this stage.

28. The question faced by the Appeals Chamber is whether the additional time which the granting of the motion for leave to amend would occasion is reasonable in the light of the right of the accused to a fair and expeditious trial, as enshrined under Article 20, paragraph 1, and Article 21, sub-paragraph 4(c), of the Statute. These statutory provisions mirror the protections offered under Article 14(3) of the International Covenant on Civil and Political Rights. The jurisprudence of the United Nations Human Rights Committee shows that the question of what constitutes an undue delay turns on the circumstances of the particular case.

29. In the case at hand, although the details were not given and the exact size of the amendments was not conveyed, from the beginning of the proceedings the prosecution did indicate its intention to amend the Indictment, by adding new counts. In subsequent motion hearings, the prosecution raised the issue of

setting a suitable date for the Trial Chamber to hear the prosecution's motion for leave to amend. The prosecution submitted that it would be better to wait until after the Trial Chamber had disposed of the provisional release motion brought by the defence. The defence made no objection to this submission. The Trial Chamber agreed with the prosecution's submission and scheduled the motions accordingly.

30. The right of an accused to be informed promptly of the nature and cause of the charges against him, enshrined in similar terms in Article 6(3)(a) of the ECHR, Article 14(3)(a) of the ICCPR and Article 21, sub-paragraph 4(a) of the Statute of the International Tribunal, constitutes one element of the general requirement of fairness that is a fundamental aspect of a right to a fair trial. The following common general principles which may be derived from the practice of the European Court of Human Rights in relation to Article 6 of the ECHR provides some guidance as to how to interpret the requirements set out in Article 21, sub-paragraphs 4 (a) and (c) of the Tribunal's Statute: firstly, that the accused's right to be informed promptly of the charges against him has to be assessed in the light of the general requirement of fairness to the accused; secondly, that the information provided to the accused must enable him to prepare an effective defence; thirdly, that the accused must be tried without undue delay; and fourthly, that the requirement must be interpreted according to the special features of each case. This is consistent with the provisions of the Statute, which in Article 21, sub-paragraph 2 provides that all accused are entitled to a fair and public hearing, and thereafter in sub-paragraph 4 sets out the right of the accused to be informed promptly of the charge against him, and to be tried without undue delay, as part of the specific minimum guarantees necessary to ensure that this general requirement of fairness is met.

31. As it relates to the present Appeal, the timeliness of the Prosecutor's request for leave to amend the Indictment must thus be measured within the framework of the overall requirement of the fairness of the proceedings. Based upon the estimates of the defence, which were accepted by the Trial Chamber, it would take an additional seven months for the defence to prepare to defend against the charges in the Amended Indictment. Considering the complexity of the case, the omission of the defence to object to the prosecution's motion to schedule consideration of the request for leave to amend the Indictment until after the motion for provisional release had been decided, and the Trial Chamber's decision accepting the prosecution's proposal, the extension of the proceedings, even by a period of seven months, would not constitute undue delay and would afford the accused a fair trial.

32. There is one other aspect of this branch. Delay which is substantial would be undue if it occurred because of any improper tactical advantage sought by the prosecution. Was such advantage sought?

33. In replying to the prosecution's application for leave to appeal, the accused asserted that the prosecution had been deferring its request for the amendment in order to compel the accused to grant an interview to the prosecution, to obtain his co-operation against other persons, and to change his plea. The prosecution did not reply to that complaint. But the complaint had not been made before the Trial Chamber even though, before that Chamber, prosecuting counsel had volunteered, as one of the reasons for not earlier applying for leave to amend, that the prosecution "had a question of whether the accused was going to submit to an interrogation, which he ultimately chose not to do, which is his right, but that would also affect the question of when to bring forth an amendment". In its Decision, the Trial Chamber did not mention any complaint by the accused that the prosecution was seeking a tactical advantage, and did not found its holding on that point. In the circumstances, this Chamber would not give effect to the allegation of the defence that an improper advantage was being sought by the prosecution.

iii). Whether there was a failure to disclose the new charges promptly

34. As to the third ground of refusal, the defence argues that, where the prosecution brings an indictment for only some of the charges which it was then in a position to bring, the other charges are charges which it is required promptly then to disclose to the defence by reason of Article 9(2) of the

International Covenant on Civil and Political Rights, and that, not having done so, it is prohibited from later seeking an amendment of the Indictment for the purpose of including them. In contrast, the prosecution regards Article 9 of the ICCPR as having "absolutely no application to the issues at hand". In its view neither the Statute and Rules of the International Tribunal, nor Articles 9 and 14 of the ICCPR, require that an indicted person be promptly informed of charges for which he has not been indicted. Pointing out that the accused upon his arrest was immediately notified of the basis for the arrest and served with a copy of the confirmed Indictment, the prosecution asserts that the completion of that process satisfied the requirements of Article 9(2) and ended its application.

35. The authorities relied upon by the defence in support of its position that allowing the prosecution leave to amend the Indictment would contravene Article 9(2) are not applicable, for in each a violation was found because of the failure to charge a person with any crime at the time of their arrest. In *Moriana Hernández Valentini de Bazzano* (Communication No. 5/1977), Martha Valentini de Massera was arrested on 28 January 1976, but was charged only in September 1976, after spending nearly eight months in prison. In *Leopoldo Buffo Carballal* (Communication No. 33/1978), the complainant was arrested in Argentina on 4 January 1976, and was handed over to members of the Uruguayan Navy who later transferred him to Montevideo. He was not informed of any charges brought against him and remained detained until 26 January 1977. In *Alba Pietraroia* (Communication No. 44/1979), the Committee found that Rosario Pietraroia Zapala was arrested without an arrest warrant in early 1976 and held incommunicado for four to six months. He was not charged until his trial began on 10 August 1976. In *Monja Jaona* (Communication No. 132/1982), the Committee found that Monja Jaona was put under house arrest on 15 December 1982, without any explanation being given, and subsequently detained until 15 August 1983. In *Glenford Campbell v. Jamaica* (Communication No. 248/1987) a violation of Article 9(2) was found because of the failure to formally charge Mr. Campbell with any crime until over one month after he was arrested. None of these cases relied upon by the defence involved an arrest based on an indictment which was subsequently sought to be amended to add new charges.

36. Whatever the true meaning of "any" in Article 9(2) of the ICCPR, a point addressed by defence counsel, the Chamber does not accept that the requirement to inform an arrested person of any charges against him was breached in this case. Article 20, sub-paragraph 2 of the Statute of the International Tribunal is analogous to Article 9(2) of the ICCPR, requiring, however, that the person be "immediately informed of the charges against him". The Report of the Secretary-General submitting the draft Statute to the Security Council, referring to that Article, states that "[a] person against whom an indictment has been confirmed would ... be informed of the contents of the indictment and taken into custody". That is consistent with the view that what was visualised was that an arrested person would be promptly told of the charges contained in the indictment on the basis of which he was arrested. That was done in this case.

iv). *Whether the requested amendments would breach a principle of speciality*

37. The fourth and final point concerns the argument of the defence that there exists in customary international law a speciality principle which prohibits the prosecution of the accused on charges other than that on which he was arrested in Bosnia and Herzegovina and brought to The Netherlands. In the view of the Appeals Chamber, if there exists such a customary international law principle, it is associated with the institution of extradition as between states and does not apply in relation to the operations of the International Tribunal. That institution prohibits a state requesting extradition from prosecuting the extradited person on charges other than those alleged in the request for extradition. Obviously, any such additional prosecution could violate the normal sovereignty of the requested state. The fundamental relations between requested and requesting state have no counterpart in the arrangements relating to the International Tribunal.

III. CONCLUSION

For the reasons given, the Appeals Chamber considered that, in the circumstances of this case, the prosecution was entitled to leave to amend the Indictment by the addition of the new charges. The Appeals Chamber has not hereby determined whether a *prima facie* case has been established in relation to the charges added in the Amended Indictment, as required for its confirmation.

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

Gabrielle Kirk McDonald

President

Judge Shahabuddeen appends a Separate Opinion to this Decision.

Dated this second day of July 1998

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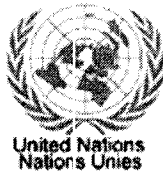
At The Hague,

The Netherlands.

[Seal of the Tribunal]

PROSECUTION INDEX OF AUTHORITIES

9. *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the Prosecutor's Request For Leave to File an Amended Indictment, 11 April 2000.



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Original: English

Before:

Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registrar: Ms Marianne Ben Salimo

Decision date: 11 April 2000

THE PROSECUTOR
vs.
JEAN BOSCO BARAYAGWIZA

Case No. ICTR-97-19-I

DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN AMENDED INDICTMENT

Office of the Prosecutor:

Mr N. Sankara Menon
Mr William Egbe

Counsel for the accused:

Mr J. P. L Nyaberi (Counsel at the hearing)
Ms Carmelle Marchessault (newly assigned Counsel)

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

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, Presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

CONSIDERING the motion from the Prosecutor Request for Leave to File an Amended Indictment, along with a Brief in Support, filed 28 June 1999, and the defence's brief in response, filed on 20 September 1999;

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NOTING that the Prosecution has previously filed a motion requesting leave to file an amended indictment, dated 18 December 1998. In the present motion the Prosecution request leave to formally withdraw its motion dated 18 December 1998;

HAVING heard the parties on 19 October 1999;

NOTING the Appeals Chamber Decision, dated 3 November 1999, and its subsequent review Decision, dated 31 March 2000, in the Barayagwiza case.

The Facts

The original indictment against the accused was confirmed on 23 October 1997. The accused made his initial appearance on 23 February 1998, pursuant to Rule 62 of the Rules of Procedure and Evidence (the "Rules"), and pleaded not guilty to all the counts put to him.

The present motion was heard on 19 October 1999. Following the Appeals Chamber decision, dated 3 November 1999, which ordered, *inter alia*, that the indictment against Barayagwiza be dismissed, all matters relating to Barayagwiza were put on hold, including the present decision of this Trial Chamber. Following a request by the Prosecutor for a review of the said Appeals Chamber decision on the basis of new facts, the Appeals Chamber held a review hearing. On 31 March 2000, the Appeals Chamber rendered its review decision, which allows the case against Barayagwiza to continue.

The Prosecutor's Motion

The Prosecution filed its Request for Leave to File an Amended Indictment, along with a Brief in Support on 28 June 1999, and has attached a proposed Amended Indictment (annex B) ("proposed Amended Indictment"). The Prosecution has also supplied the supporting materials (annex C), which the Trial Chamber has not considered.

The Prosecution Motion requests the following amendments:

- i. To add three new charges namely,
 - crimes against humanity for extermination
 - Article 3 Common to the Geneva Convention and Additional Protocol II thereto, for outrages upon personal dignity
 - Article 3 Common to the Geneva Convention and Additional Protocol II thereto, for pillage;
- i. To expand the count of conspiracy to commit genocide;
- ii. To bring the current indictment in line with current charging practices.

The Deliberations

The Applicable Rules

The Prosecution submitted that Rule 50 of the Rules allows it to amend the indictment at this stage of the proceedings, with leave of the Trial Chamber. The Defence submitted that the format of the proposed Amended Indictment does not conform to the requirements of the Rules, and in particular to Rule 47(C). The Chamber finds no merit in the Defence contention. In numerous cases before this

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Tribunal, the Trial Chambers have granted the Prosecution leave to amend indictments which used similar formats to the proposed Amended Indictment in the present case; see for example *The Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*; *The Prosecutor v. Ferdinand Nahimana*; *The Prosecutor v. Hassan Ngeze*. The Trial Chamber finds that the format of the proposed Amended Indictment meets the requirements of the Rules.

The Defence further submitted that to justify the proposed amendments, the Prosecution must show a *prima facie* case to support each new charge, and that the Trial Chamber should conduct a review of the supporting materials. The same issue was addressed by this Chamber in *Prosecutor v. Ferdinand Nahimana*, in its decision on Prosecutor's request for leave to file an amended indictment, filed on 10 November 1999. In that case the Chamber stated:

"The Trial Chamber wishes to draw a distinction between the procedural requirements of Rules 47 and 50. In the case of Rule 47, a single Judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with a motion requesting leave to amend an indictment, pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for the proposed amendments to the indictment. Since such a finding has already been made in respect of the accused, it is not necessary for the Trial Chamber to consider the supporting material contained in Annex C. The Trial Chamber has therefore not considered the supporting material marked Annex C, in its deliberation. The Trial Chamber finds that in considering the Prosecutor's request for leave to file an amended indictment pursuant to Rule 50, it is sufficient if the Prosecutor establishes the factual basis and the legal motivation in support of her motion." (see *ibid* at paras. 14 and 15).

In the present case, the Chamber concurs with this view.

The Factual Basis for the Motion

The Prosecution submitted that the proposed new counts and the reformulated count of conspiracy to commit genocide are based on new evidence, following the on-going investigations by the Office of the Prosecutor. It also argued that the proposed amendments accurately reflect the totality of the criminal conduct of the accused. The Defence submitted that there are no new facts to support the amendment, but only a new layout of the indictment.

The Trial Chamber is of the view that the Prosecution is not prevented by the Rules to conduct on-going investigations against the accused. Indeed, the Prosecution has the responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber. **A**

The Chamber finds that there are new facts to support the additional charges in the proposed Amended Indictment. In essence, the proposed Amended Indictment charges Barayagwiza for acts in relation to his role in 'the media' and in the Prefecture of Gisenyi, and the concise statement of facts indicates the specific paragraphs that support each of the proposed new counts. Proposed Count 5 charges the accused with crimes against humanity for extermination, which is the same charge that was not confirmed by the confirming judge. In the proposed Amended Indictment, the concise statement of facts supports this charge with new factual allegations. Proposed Count 8 and Count 9 charge the accused with violations under Article 3 Common to the Geneva Convention and Additional Protocol II thereto, for outrages upon personal dignity and for pillage, respectively. Count 8 is supported by new factual allegations contained in the concise statement of facts, in particular those contained in paragraph 7.8. Count 9 is

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also supported by new factual allegations, in particular those contained in paragraph 7.9.

In relation to the count of conspiracy to commit genocide, the Prosecutor requested leave to reformulate this count by adding the names of the alleged co-conspirators. The Trial Chamber is of the view that when the names of co-conspirators are known, these names should be stated in the body of the conspiracy count. In the present case, the proposed new count of conspiracy to commit genocide is supported by the factual allegations. Accordingly, the Chamber finds that the proposed amendments to the count of conspiracy to commit genocide should be granted.

The Temporal Jurisdiction of the Tribunal

The Defence submitted that some of the allegations in the proposed amended indictment do not fall within the temporal jurisdiction of the Tribunal. The Trial Chamber notes that some of the allegations in the proposed amended indictment do fall outside the period 1 January 1994 to 31 December 1994. The same issue was addressed by this Chamber in *Prosecutor v. Ferdinand Nahimana*, in its decision on Prosecutor's request for leave to file an amended indictment, filed on 10 November 1999. In that case the Chamber stated:

"the Trial Chamber accepts the Prosecutor's submission that she intends to rely on these allegations in proving the ingredients of the offences which were allegedly committed within the temporal jurisdiction of the Tribunal. The Trial Chamber recognises the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance and admissibility of these allegations at this stage of proceedings. The appropriate stage will be at the trial of the accused." (*ibid* at paras. 27 and 28).

In the present case, the Chamber concurs with this view.

The Issue of Delay

The Trial Chamber is not satisfied that the amendments sought will unduly delay the trial of the accused or that such delay, as may be occasioned, will prejudice the accused. Further, the Trial Chamber is convinced that the amendments requested by the Prosecution are in the interests of justice and will not adversely effect the accused persons right to a fair trial.

The Trial Chamber is satisfied that the amendments to the Indictment requested by the Prosecutor are supported in fact and in law.

FOR THESE REASONS:

THE TRIBUNAL,

GRANTS the Prosecutor's motion, filed on 28 June 1999, for leave to file an amended indictment against Barayagwiza.

ORDERS that the indictment be amended:

By adding:

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- i. Count 5. CRIMES AGAINST HUMANITY (EXTERMINATION), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute;
- ii. Count 8. SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II thereof, pursuant to Articles 4(e) and 6(3) of the Statute;
- iii. Count 9. SERIOUS VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II thereof, pursuant to Articles 4(f) and 6(3) of the Statute;
- iv) The names of the alleged co-conspirators in the Count of Conspiracy to Commit Genocide, pursuant to Article 2(3)(b) and 6(1) of the Statute;

And,

- v) By expanding the existing Counts in the form drafted in the proposed Amended Indictment, in order to reflect the more substantial supportive allegations.

ORDERS that the indictment reflecting the amendments as ordered above, along with the additional supporting material, be filed with the Registry and served on the accused, forthwith.

GRANTS the Prosecution leave to withdraw its motion filed on 18 December 1998 entitled "The Prosecutor's Request for Leave to File an Amended Indictment".

Arusha, 11 April 2000

Navanethern Pillay

Asoka de Zoysa Gunawardana

Erik Møse

Presiding Judge

Judge

Judge

Seal of the Tribunal

PROSECUTION INDEX OF AUTHORITIES

10. *Prosecutor v. Akayesu*, ICTR-96-4-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 17 June 1997.



UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

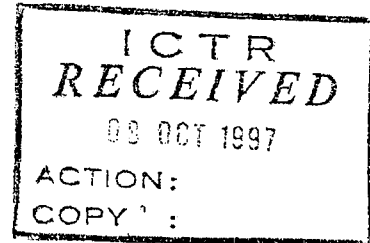
CHAMBRE I - CHAMBER I

OR : FR

Before : Judge Laïty Kama, Presiding Judge
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. Antoine Kesia-Mbe Mindua

Decision of: 17 June 1997



THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No.: ICTR-96-4-T

LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:

Mr. Pierre-Richard Prosper
Ms. Sara Darehshori

Counsel for the accused:

Mr. Patrice Monthé

THE TRIBUNAL,

SITTING as Trial Chamber I of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Laity Kama, Presiding Judge, Judge Lennart Aspegren and Judge Navanethem Pillay;

AFTER HAVING DELIBERATED,

WHEREAS during a hearing held to that end on 17 June 1997, the Prosecutor presented a motion seeking leave, pursuant to Rule 50 of the Rules of Procedure and Evidence (the "Rules"), to amend the indictment that she submitted on 13 February 1996 and which was confirmed on 16 February 1996, in Case No. ICTR-96-4-T, *The Prosecutor versus Jean-Paul Akayesu*, by adding three new counts:

- Count 13 : Crimes against humanity (rape), crimes punishable under Article 3 (g) of the Statute of the Tribunal (the "Statute");
- Count 14: Crimes against humanity (other inhumane acts), crimes punishable under Article 3(i) of the Statute;
- and Count 15 : Violations of Article 3 common to the Geneva Conventions and Article 4(2)(e) of Additional Protocol II, as restated in Article 4(e) of the Statute;

Whereas the Prosecutor submitted evidentiary material in support of this motion on 17 June 1997;

Whereas the Defence objected during the hearing that it had been unable to reply to the Prosecutor's motion as it had been informed only the day before and belatedly of the motion's object and content;

CONSIDERING the provisions of Rule 50 of the Rules and taking note of the fact that the trial on the merits of the present case began on 9 January 1997 and that the Tribunal decided on 24 May 1997 to adjourn it until 29 September 1997;

WHEREAS Rule 50 provides that : " The Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, if at trial, with leave of the Trial Chamber. If leave to amend is granted, the amended indictment shall be transmitted to the accused and to his counsel and where necessary the date for trial shall be postponed to ensure adequate time for the preparation of the defence";

WHEREAS thereupon, the Prosecutor may only amend an indictment during trial if leave is so granted beforehand by the Chamber hearing the said trial, thereafter the indictment must be communicated to the Defence, and, where necessary, the trial must be postponed to ensure adequate time for the preparation of the defence;

WHEREAS the Tribunal takes due note of the fact that the rights thus accorded to the accused correspond to the principles laid down in Article 20(4) of the Statute which provides, in sub-paragraph (a), that the accused must be informed promptly and in detail in a language he or she understands of the nature and cause of the charge against him or her, and in sub-paragraph (b), which stipulates that the accused must have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her choosing;



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Case No.: ICTR-96-4-T

Whereas the Chamber notes in passing, however, that, contrary to what the Defence seems to assert, the Prosecutor has no obligation to transmit to the Defence the request for amendment of the indictment that she is submitting to the Chamber;

WHEREAS having considered the Prosecutor's motion and the accompanying evidentiary material, the Tribunal is convinced that the motion is well-founded;

FOR THESE REASONS,

THE TRIBUNAL

GRANTS the Prosecutor's motion and consequently authorizes her to amend the indictment in Case No. ICTR-96-4-T, *The Prosecutor against Jean-Paul Akayesu*, by adding the following three new counts :

- Count 13 : Crimes against humanity (rape), crimes punishable under Article 3(g) of the Statute,
- Count 14 : Crimes against humanity (other inhumane acts), crimes punishable under Article 3(i) of the Statute,
- and Count 15: Violations of Article 3 common to the Geneva Conventions and Article 4(2) (e) of Additional Protocol II, as restated in Article 4(e) of the Statute;


REMINDS the Prosecutor of her obligation, under Rule 50 of the Rules, to transmit the amended indictment and the evidentiary material submitted in support of these amendments to the accused and his counsel, as soon as possible and in the two official languages of the Tribunal;

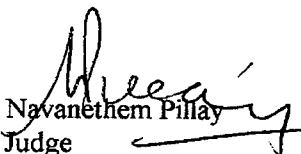
DECIDES to postpone the resumption date of the trial to Wednesday, 22 October 1997 at 09:30 hours;

DECIDES that the trial will resume on the date indicated above with a hearing during which the amended indictment will be read to the accused and he will be asked to enter a plea of guilty or not guilty on each of the counts added to the initial indictment, in accordance with the procedure laid down in Rule 62 of the Rules.

Done in Arusha on 3 October 1997


 Laity Kama
 Presiding Judge


 Lennart Aspegren
 Judge


 Navanethem Pillay
 Judge

(Seal of the Tribunal)

