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SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

Before: Judge Bankole Thompson, Presiding Judge
Judge Itoe
Judge Boutet

Registrar: Mr. Robin Vincent

Date filed: 9 February 2004

THE PROSECUTOR

Against

ISSA HASSAN SESAY also known as ISSA SESAY

MORRIS KALLON also known as BILAI KARIM

And

AUGUSTINE GBAO also known as AUGUSTINE BAO

CASE NO. SCSL-2004-15-PT

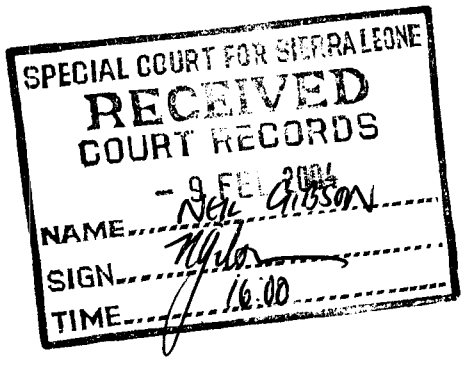
REQUEST FOR LEAVE TO AMEND THE INDICTMENT

Office of the Prosecutor:

Mr. Luc Côté, Chief of Prosecutions
Mr. Robert Petit, Senior Trial Attorney
Mr. Abdul Tejan-Cole, Trial Attorney
Ms. Boi-Tia Stevens, Associate Trial Attorney

Defence Counsel:

Mr. Timothy Clayson
Mr. James Oury
Mr. Andreas O'Shea



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REQUEST FOR LEAVE TO AMEND THE INDICTMENT

I. INTRODUCTION

1. The Prosecution files this "Request for Leave to Amend the Indictment" (the **"Request"**) pursuant to Rules 50(A) and 73(A) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (the **"Rules"**) seeking leave to amend the Indictment against Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the **"Accused"**).

II. BACKGROUND

2. On 7 March 2003 Judge Bankole Thompson approved the indictments against Accused Sesay and Kallon. On 16 April 2003, Judge Bankole Thompson approved the indictment against Accused Gbao. On 15 and 21 March 2003, Accused Sesay and Kallon each made an initial appearance before Judge Benjamin M. Itoe. On 25 April 2003, Accused Gbao made his initial appearance before Judge Bankole Thompson.

3. The indictments against the individual Accused were joined by Decision dated 27 January 2004 and a consolidated Indictment was filed on 4 February 2004 (the **"Consolidated Indictment"**). The Accused are charged with, inter alia, murder, sexual slavery, rape, other inhumane acts, violence to life, health and physical or mental well-being of persons, pillage, acts of terrorism, collective punishments, and child conscription.

III. SUMMARY

4. The only substantive changes in the proposed Amended Indictment (the **"Amended Indictment"**), a copy of which is annexed hereto as Annex 1, is the addition of a new charge of Crimes Against Humanity – Other Inhumane Act (forced marriage) as a new count in the Consolidated Indictment.

   The above change results in obvious changes to the format of the Consolidated Indictment. The new count now becomes Count 8. The previous Counts 8 through 17 now continue sequentially from Counts 9 through 18.

   The Prosecution submits that the Amended Indictment is justified both in law and on the evidence and should be granted because:

   (a) it better reflects the full culpability of the Accused;

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

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

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

   A. the addition of a new Count 8 - Other Inhumane Act – punishable under Article 2 .i. of the Statute in the Amended Indictment;
   B. the addition of "forced marriages" and the phrase "The 'wives' were forced to perform a number of conjugal duties under coercion by their 'husbands'" into paragraphs 54 – 59 of the Amended Indictment;

C. the inclusion of "rape, sexual slavery, and forced marriage" and the phrase "The 'wives' were forced to perform a number of conjugal duties under coercion by their 'husbands'" in the factual allegations in paragraph 60;

D. as a result of the inclusion of the new count 8, paragraph 44 of the consolidated indictment under Counts 1-2 now reads 'Counts 3 through 14' instead of 'Counts 3 through 13';

Furthermore the Prosecution seeks to avail itself of the opportunity of the Motion to make the following corrections and/or modifications to the Consolidated Indictment:

E. The modification of the date in the particulars for Counts 3- 5 Unlawful Killing of the Consolidated Indictment paragraph 46 under the rubric 'Bo District' to read 'Between about 1 June 1997 and 30 June 1997' instead of 'Between 1 June 1997 and 30 June 1997.' The word "about" is being added to qualify the time period in paragraph 46 of the Consolidated Indictment which contains the factual allegations for Counts 3-5, unlawful killings in Bo District. This change conforms to the format used throughout the Consolidated Indictment, the evidence disclosed and the jurisprudence of this Court;[1]

F. The inclusion of 'rape, sexual slavery and forced marriage' in paragraph 60 of the Consolidated Indictment. Following the filing of the Consolidated Indictment, the Prosecution noted a drafting inaccuracy in the descriptive paragraph for the Port Loko District in Counts 6-9 of the Consolidated Indictment headed 'Sexual Violence'. The evidence in the possession of the Prosecution at the time of the original drafting in the Bill of Particulars and disclosed to the Defence, demonstrated that the same sexual offences committed in the other districts, to wit, abduction, rape and sexual slavery, were also committed in the Port Loko District. However, the Counts as originally drafted only refers to 'other forms of sexual violence' and makes no mention of these sexual offences. The Prosecution therefore seeks leave to amend paragraph 60 of the Consolidated Indictment by the inclusion of the words 'rape, sexual slavery, forced marriage' in order that it

[1] See *Prosecutor Against Kondewa*, SCSL-2003-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 27 November 2003, para. 12.

will conform with the evidence already disclosed to the Defense and thereby accurately reflect the criminal responsibility of the Accused;

G. The modification of the time period in paragraph 71 to read "Between about 14 February 1998 to January 2000" instead of "Between about 14 February 1998 and 30 June 1998" to reflect evidence revealed by investigations done since the confirmation and the continuing analysis of the evidence used to support the initial charge. The evidence reveal the commission of crimes by the Accused and their subordinates far outside the time limit set out in paragraph 71 but within the jurisdiction of the Special Court. That evidence has been disclosed to the Defence and the modification would accurately reflect the criminal responsibility of the Accused.

H. The modification of the time periods in paragraph 23 in respect of Foday Saybana Sankoh to read "about May 2000 until about 29 July 2003" instead of "about May 2000 until present" and in respect of Issa Sesay to read "from about May 2000 until about 10 March 2003" instead of "during this period". The Prosecution seeks this amendment in order to reflect the death of Foday Sankoh and Issa Sesay's arrest and detention at the SCSL, both events affecting the period of Issa Sesay's authority as alleged in the Indictment;

I. The addition of the following alternative spellings: Bornoya' and 'Gbendembu/Pendembu in paragraph 51, in cognizance of the variations in the spellings of the following towns: 'Bonyoyo' and 'Gbendubu' respectively in Bombali District. Similarly, in Paragraph 57 and 65 of the Consolidated Indictment both headed "Bombali District", the Prosecution provides the following alternative spelling for 'Rosos' as 'Rosors/Rossos'.

These proposed amendments are reflected as well in the Amended Indictment annexed hereto (Annex 1). 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 charge and modifications (Annex 2).

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IV. LEGAL BASIS

6. 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 Rules of Procedure and Evidence International Criminal Tribunal for Rwanda ("ICTR") and to Rule 50(A)(i) of the Rules of Procedure and Evidence for the International Tribunal for Yugoslavia ("ICTY") concerning amendment of the indictment.

7. 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.[2]

8. The decision to grant a request to amend the indictment is discretionary and must be considered against the overall interest of justice,[3] having particular regard to the specific circumstances of the case and the accused' right to an expeditious trial.[4] 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"**).

V. FACTUAL BASIS

9. The Prosecution submits that there are sufficient factual grounds for the new count contained in the proposed Amended Indictment.

10. The factual allegations underlying the new count are the same factual allegations contained in the current Consolidated Indictment against the Accused, in particular paragraphs 54 – 62, which support the sexual violence charges in Counts 6 – 8 of the

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[2] *Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze*, ICTR-97-34-I and ICTR-97-30-I, "Decision on the Prosecutor's Motion to Amend the Indictment", 8 October 1999, para. 42. Also, *Prosecutor v. Kanyabashi*, ICTR-96-1-T, "Decision on Prosecution's Request for Leave to Amend the Indictment", 12 August 1999, para. 19.
[3] *Id.*, para. 43.
[4] *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, para. 27.

Consolidated Indictment. These allegations and the available evidence substantiate the commission of forced marriage against civilian women by members of the AFRC/RUF.

11. The Prosecution submits that forced marriage, which is an inhumane act of similar gravity to existing crimes within the Court's jurisdiction, constitutes a crime which falls within the jurisdiction of this Court namely, Crimes Against Humanity - other inhumane acts, in violation of Article 2.i. of the Statute.

12. The Prosecution does not seek to disclose further materials relating to the new count. It will rely on materials already disclosed to the Defence. These facts disclosed support the elements of the new charge of forced marriage and the Prosecution submits that it is incumbent upon it to charge the Accused for all offences under the Statute of the Court which the evidence supports. By doing so, the Prosecution submits that this truly represents the totality of the culpable conduct of the Accused and serves the interest of justice.

VI. AMENDMENT DOES NOT PREJUDICE THE RIGHTS OF THE ACCUSED

13. 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.[5]

A. Request for leave to amend is timely

14. The Prosecution submits that the filing of this motion is timely given the complexity of the case and the current stage of the proceedings.

15. In the *Karemera* decision[6], the Appeals Chamber of the ICTR held that in assessing whether delay resulting from an amendment to an indictment would be "undue", the tribunal must consider factors such as the diligence of the Prosecution in advancing the

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

case and the timeliness of the request. Moreover, the question of undue delay is dependent on all the circumstances of the case.

16. The Request is timely as it has been brought well in advance of trial. In carrying out investigations into the conduct of the Accused, the Prosecution submits that it 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.

17. Furthermore, 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.

B. Amendment will not unduly delay trial of the Accused

18. 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' right to a fair trial.[7]

19. The Prosecution submits that the amendment of the current Consolidated 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.

20. 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.[8]

21. The proposed amendment in the instant case will not result in any undue delay. The nature of the proposed change concerns the legal characterization of a conduct. Further, the amendment is based on existing allegations in the current Consolidated Indictment as well as evidence already disclosed to the Defence. It therefore does not place any undue burden on the Defence in the preparation of their case.

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[7] *Prosecutor v. Musema*, 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*, IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998, para. 28.

[8] *Prosecutor v. Kovacevic*, *supra* note 6, para. 30.

22. Furthermore, proceedings before the Court are still at the pre-trial stage with no date having been set for trial. Allowing an amendment of the current Consolidated Indictment at this stage will not require an adjournment of proceedings, a major cause of delays in most trials. Consequently, the issue of the amendment delaying trial does not arise.

23. Even if amending the Consolidated 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 Consolidated Indictment ought to be evaluated in the context of the overall effect of the proposed amendment on proceedings.[9] 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 challenges to the indictment or the evidence presented at trial.[10] [Emphasis added].

24. The Prosecution submits that incorporating the offence of forced marriage into the current Consolidated Indictment not only ensures a better understanding of the case against the Accused, but also reflects the totality of the crimes committed by the Accused. Evidence in support of crimes charged or not would inevitably come out at trial. The Prosecution has a duty to charge this additional crime.

25. Granting leave to amend the Consolidated Indictment against the Accused at this time will avoid unfair surprise and ensure that the Accused are fully informed of the case against them in advance of trial, giving them ample opportunity to conduct their investigations.

VII. AMENDMENT IS IN THE OVERALL INTEREST OF JUSTICE

26. 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 present all

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[9] *Id.*, para. 31.
[10] *Prosecutor* v. *Karemera*, *supra* note 5, para. 15

relevant evidence before the court.[11] It is of utmost importance, therefore, that the Prosecutor amends the Consolidated Indictment to show the full nature of the Accused conduct as indicated by the available evidence. In this case, having regard to the nature of the amendment which as stated above is of the kind that will not unduly burden the Defence and the efforts made by the Prosecutor to amend the Consolidated Indictment well in advance of trial, no serious prejudice will be caused to the Accused if the Consolidated Indictment is amended.

27. 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.[12] Given the nature of the new charge 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

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

29. The Prosecution submits that it is in the interest of justice to grant leave to amend the Indictment and the Accused are not prejudiced by such an amendment. The Amended Indictment gives fuller effect to the Court's mandate as 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[13] in that it reflects more completely the criminal culpability of the Accused.

RELIEF SOUGHT

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

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[11] *Id.*
[12] ICTR-96-4-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 17 June 1997.
[13] See Article 1 of the Statute of the Special Court for Sierra Leone.

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 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
Chief of Prosecutions

Robert Petit
Senior Trial Attorney

PROSECUTION INDEX OF ATTACHMENTS

1. Amended Indictment, *Prosecutor Against Sesay, Kallon, Gbao,* SCSL-2003-15-PT.

2. Investigator's Statement, 9 February 2004.

PROSECUTION INDEX OF ATTACHMENTS

ANNEX 1

Amended Indictment, *Prosecutor Against Sesay, Kallon, Gbao,* SCSL-2003-15-PT.

THE SPECIAL COURT FOR SIERRA LEONE

CASE NO. SCSL – 2004-15-PT

THE PROSECUTOR

Against

ISSA HASSAN SESAY
also known as ISSA SESAY

MORRIS KALLON
also known as BILAI KARIM

AUGUSTINE GBAO
also known as AUGUSTINE BAO

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:

ISSA HASSAN SESAY
also known as ISSA SESAY

MORRIS KALLON
also known as BILAI KARIM

AUGUSTINE GBAO
also known as AUGUSTINE BAO

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. **ISSA HASSAN SESAY aka ISSA SESAY** was born 27 June 1970 at Freetown, Western Area, Republic of Sierra Leone.

2. **MORRIS KALLON aka BILAI KARIM** was born 1 January 1964 at Bo, Bo District, Republic of Sierra Leone.

3. **AUGUSTINE GBAO aka AUGUSTINE BAO** was born 13 August 1948, at Blama, Kenema District, Republic of Sierra Leone.

4. He was a member of the Sierra Leone Police force from 1981 until 1986.

GENERAL ALLEGATIONS

5. At all times relevant to this Indictment, a state of armed conflict existed within Sierra Leone. For the purposes of this Indictment, organized armed factions involved in this conflict included the Revolutionary United Front (RUF), the Civil Defence Forces (CDF) and the Armed Forces Revolutionary Council (AFRC).

6. 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.

7. The organized armed group that became known as the RUF, led by FODAY SAYBANA SANKOH aka POPAY aka PAPA aka PA, was founded about 1988 or 1989 in Libya. The RUF, under the leadership of FODAY SAYBANA SANKOH, began organized armed operations in Sierra Leone in March 1991. During the ensuing armed conflict, the RUF forces were also referred to as "RUF", "rebels" and "People's Army".

8. The CDF was comprised of Sierra Leonean traditional hunters, including the Kamajors, Gbethis, Kapras, Tamaboros and Donsos. The CDF fought against the RUF and AFRC.

9. On 30 November 1996, in Abidjan, Ivory Coast, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement which brought a temporary cessation to active hostilities. Thereafter, the active hostilities recommenced.

10. The AFRC was founded by members of the Armed Forces of Sierra Leone who seized power from the elected government of the Republic of Sierra Leone via a coup d'état on 25 May 1997. Soldiers of the Sierra Leone Army (SLA) comprised the majority of the AFRC membership. On that date JOHNNY PAUL KOROMA aka JPK became the leader and Chairman of the AFRC. The AFRC forces were also referred to as "Junta", "soldiers", "SLA", and "ex-SLA".

11. Shortly after the AFRC seized power, at the invitation of JOHNNY PAUL KOROMA, and upon the order of FODAY SAYBANA SANKOH, leader of the RUF, the RUF joined with the AFRC. The AFRC and RUF acted jointly thereafter. The AFRC/RUF Junta forces (Junta) were also referred to as "Junta", "rebels", "soldiers", "SLA", "ex-SLA" and "People's Army".

12. After the 25 May 1997 coup d'état, a governing body, the Supreme Council, was created within the Junta. The Supreme Council was the sole executive and legislative authority within Sierra Leone during the junta. The governing body included leaders of both the AFRC and RUF.

13. The Junta was forced from power by forces acting on behalf of the ousted government of President Kabbah about 14 February 1998. President Kabbah's government returned in March 1998. After the Junta was removed from power the AFRC/RUF alliance continued.

14. On 7 July 1999, in Lomé, Togo, FODAY SAYBANA SANKOH and Ahmed Tejan Kabbah, President of the Republic of Sierra Leone, signed a peace agreement. However, active hostilities continued.

15. **ISSA HASSAN SESAY, MORRIS KALLON, AUGUSTINE GBAO** and all members of the organized armed factions engaged in fighting within Sierra Leone 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.

16. All offences alleged herein were committed within the territory of Sierra Leone after 30 November 1996.

17. All acts and 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.

18. The words civilian or civilian population used in this Indictment refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities.

INDIVIDUAL CRIMINAL RESPONSIBILITY

19. Paragraphs 1 through 18 are incorporated by reference.

20. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.

21. Between early 1993 and early 1997, **ISSA HASSAN SESAY** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, **ISSA HASSAN SESAY** held the position of the Battle Group Commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM

BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.

22. During the Junta regime, **ISSA HASSAN SESAY** was a member of the Junta governing body. From early 2000 to about August 2000, **ISSA HASSAN SESAY** served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

23. FODAY SAYBANA SANKOH has been incarcerated in the Republic of Sierra Leone from about May 2000 until about 29 July 2003. From about May 2000 until about 10 March 2003, by order of FODAY SAYBANA SANKOH, **ISSA HASSAN SESAY** directed all RUF activities in the Republic of Sierra Leone.

24. At all times relevant to this Indictment, **MORRIS KALLON** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.

25. Between about May 1996 and about April 1998, **MORRIS KALLON** was a Deputy Area Commander. Between about April 1998 and about December 1999, **MORRIS KALLON** was Battle Field Inspector within the RUF, in which position he was subordinate only to the RUF Battle Group Commander, the RUF Battlefield Commander, the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

26. During the Junta regime, **MORRIS KALLON** was a member of the Junta governing body.

27. In early 2000, **MORRIS KALLON** became the Battle Group Commander in the RUF, subordinate only to the RUF Battle Field Commander, ISSA HASSAN SESAY, the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

28. About June 2001, **MORRIS KALLON** became RUF Battle Field Commander, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, ISSA

HASSAN SESAY, to whom FODAY SAYBANA SANKOH had given direct control over all RUF operations, and to the leader of the AFRC, JOHNNY PAUL KOROMA.

29. At all times relevant to this Indictment, **AUGUSTINE GBAO** was a senior officer and commander in the RUF and AFRC/RUF forces.

30. **AUGUSTINE GBAO** joined the RUF in 1991 in Liberia. Prior to the coup, **AUGUSTINE GBAO** was Commander of the RUF Internal Defence Unit, in which position he was in command of all RUF Security units.

31. Between about November 1996 until about mid 1998, **AUGUSTINE GBAO** was a senior RUF Commander in control of the area of Kailahun Town, Kailahun District. In this position, between about November 1996 and about April 1997, **AUGUSTINE GBAO** was subordinate only to the RUF Battle Group Commander, the RUF Battle Field Commander and the leader of the RUF, FODAY SAYBANA SANKOH. In this position, from about April 1997 and about mid 1998, **AUGUSTINE GBAO** was subordinate only to the RUF Battle Field Commander, the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

32. Between about mid 1998 and about January 2002, **AUGUSTINE GBAO** was Overall Security Commander in the AFRC/RUF forces, in which position he was in command of all Intelligence and Security units within the AFRC/RUF forces. In this position, **AUGUSTINE GBAO** was subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

33. Between about March 1999 until about January 2002, **AUGUSTINE GBAO** was also the joint Commander of AFRC/RUF forces in the Makeni area, Bombali District. As commander of AFRC/RUF forces in the Makeni area, **AUGUSTINE GBAO** was subordinate only to the RUF Battle Field Commander, the leader of

the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.

34. In their respective positions referred to above, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** individually, or in concert with each other, JOHNNY PAUL KOROMA aka JPK, FODAY SAYBANA SANKOH, SAM BOCKARIE aka MOSQUITO aka MASKITA, ALEX TAMBA BRIMA aka TAMBA ALEX BRIMA aka GULLIT, BRIMA BAZZY KAMARA aka IBRAHIM BAZZY KAMARA aka ALHAJI IBRAHIM KAMARA, SANTIGIE BORBOR KANU aka 55 aka FIVE-FIVE aka SANTIGIE KHANU aka S. B. KHANU aka S.B. KANU aka SANTIGIE BOBSON KANU aka BORBOR SANTIGIE KANU and/or other superiors in the RUF, Junta and AFRC/RUF forces, exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces.

35. At all times relevant to this Indictment and in relation to all acts and omissions charged herein, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** through their association with the RUF, acted in concert with CHARLES GHANKAY TAYLOR aka CHARLES MACARTHUR DAPKPANA TAYLOR.

36. The RUF, including **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** and the AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.

37. The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their

geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.

38. **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** 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 joint criminal enterprise in which each Accused participated or were a reasonably foreseeable consequence of the joint criminal enterprise in which each Accused participated.

39. In addition, or alternatively, pursuant to Article 6.3. of the Statute, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** while holding positions of superior responsibility and exercising effective 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

40. Paragraphs 19 through 39 are incorporated by reference.

41. At all times relevant to this Indictment, members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF), subordinate to and/or acting in concert with **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,**

conducted armed attacks throughout the territory of the Republic of Sierra Leone, including Bo, Kono, Kenema, Koinadugu, Bombali and Kailahun and Port Loko Districts and the city of Freetown and the Western Area. Targets of the armed attacks included civilians and humanitarian assistance personnel and peacekeepers assigned to the United Nations Mission in Sierra Leone (UNAMSIL), which had been created by United Nations Security Council Resolution 1270 (1999).

42. These attacks were carried out primarily to terrorize the civilian population, but also were used to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the Kabbah government or to pro-government forces. The attacks included unlawful killings, physical and sexual violence against civilian men, women and children, abductions and looting and destruction of civilian property. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property.

43. As part of the campaign of terror and punishment the AFRC/RUF routinely captured and abducted members of the civilian population. Captured women and girls were raped; many of them were abducted and used as sex slaves and as forced labour. Some of these women and girls were held captive for years. Men and boys who were abducted were also used as forced labour; some of them were also held captive for years. Many abducted boys and girls were given combat training and used in active fighting. AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving "AFRC" and "RUF" on their bodies.

COUNTS 1 – 2: TERRORIZING THE CIVILIAN POPULATION AND COLLECTIVE PUNISHMENTS

44. Members of the AFRC/RUF subordinate to and/or acting in concert with **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO** committed

the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population. The AFRC/RUF also committed the crimes to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF.

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** 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: 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 2: 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.

COUNTS 3 – 5: UNLAWFUL KILLINGS

45. Victims were routinely shot, hacked to death and burned to death. Unlawful killings included the following:

Bo District

46. Between about 1 June 1997 and 30 June 1997, AFRC/RUF attacked Tikonko, Telu, Sembehun, Gerihun and Mamboma, unlawfully killing an unknown number of civilians;

Kenema District

47. Between about 25 May 1997 and about 19 February 1998, in locations including Kenema town, members of AFRC/RUF unlawfully killed an unknown number of civilians;

Kono District

48. About mid February 1998, AFRC/RUF fleeing from Freetown arrived in Kono District. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema and Biaya;

Kailahun District

49. Between about 14 February 1998 and 30 June 1998, in locations including Kailahun town, members of AFRC/RUF unlawfully killed an unknown number of civilians;

Koinadugu District

50. Between about 14 February 1998 and 30 September 1998, in several locations including Heremakono, Kabala, Kumalu (or Kamalu), Kurubonla, Katombo, Koinadugu, Fadugu and Kamadugu, members of the AFRC/RUF unlawfully killed an unknown number of civilians;

Bombali District

51. Between about 1 May 1998 and 30 November 1998, in several locations in Bombali District, including Bonyoyo (or Bornoya), Karina, Mafabu, Mateboi and Gbendembu (or Gbendubu or Pendembu), members of the AFRC/RUF unlawfully killed an unknown number of civilians;

Freetown and the Western Area

52. Between 6 January 1999 and 28 February 1999, AFRC/RUF conducted armed attacks throughout the city of Freetown and the Western Area. These attacks included large scale unlawful killings of civilian men, women and children at

locations throughout the city and the Western Area, including Kissy, Wellington, and Calaba Town;

Port Loko

53. About the month of February 1999, members of the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Between about February 1999 and April 1999, members of AFRC/RUF unlawfully killed an unknown number of civilians in various locations in Port Loko District, including Manaarma, Tendakum and Nonkoba;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** 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: Extermination, a **CRIME AGAINST HUMANITY**, punishable under Article 2.b. of the Statute;

In addition, or in the alternative:

Count 4: Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

Count 5: 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 6 – 9: SEXUAL VIOLENCE

54. 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:

Kono District

55. Between about 14 February 1998 and 30 June 1998, members of AFRC/RUF raped hundreds of women and girls at various locations throughout the District, including Koidu, Tombodu, Kissi-town (or Kissi Town), Foendor (or Foendu), Tomendeh, Fokoiya, Wondedu and AFRC/RUF camps such as "Superman camp" and Kissi-town (or Kissi Town) camp. An unknown number of women and girls were abducted from various locations within the District and used as sex slaves and/or forced into "marriages". The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands" ;

Koinadugu District

56. Between about 14 February 1998 and 30 September 1998, members of AFRC/RUF raped an unknown number of women and girls in locations in Koinadugu District, such as Kabala, Koinadugu, Heremakono and Fadugu. In addition an unknown number of women and girls were abducted and used as sex slaves and/or forced into "marriages" and/or subjected to other forms of sexual violence. The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

Bombali District

57. Between about 1 May 1998 and 31 November 1998, members of the AFRC/RUF raped an unknown number of women and girls in locations in Bombali District, including Mandaha and Rosos (or Rosors or Rossos). In addition, an unknown number of abducted women and girls were used as sex slaves and/or forced into "marriages" and/or subjected to other forms of sexual violence. The "wives"

were forced to perform a number of conjugal duties under coercion by their "husbands";

Kailahun District

58. At all times relevant to this Indictment, an unknown number of women and girls in various locations in the District were subjected to sexual violence. Many of these victims were captured in other areas of the Republic of Sierra Leone, brought to AFRC/RUF camps in the District, and used as sex slaves and/or forced into "marriages". The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands" ;

Freetown and the Western Area

59. Between 6 January 1999 and 28 February 1999, members of AFRC/RUF raped hundreds of women and girls throughout the city of Freetown and the Western Area, and abducted hundreds of women and girls and used them as sex slaves and/or forced them into "marriages" and/or subjected them to other forms of sexual violence. The "wives" were forced to perform a number of conjugal duties under coercion by their "husbands";

Port Loko District

60. About the month of February 1999, AFRC/RUF fled from Freetown to various locations in the Port Loko District. Between February 1999 and April 1999, members of the AFRC/RUF raped an unknown number of women and girls in various locations in the District. In addition, an unknown number of women and girls in various locations in the District were used as sex slaves and/or forced into "marriages" and/or subjected to other forms of sexual violence by members of the AFRC/RUF. 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, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** 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: Rape, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

Count 7: Sexual slavery and any other form of sexual violence, a **CRIME AGAINST HUMANITY**, punishable under Article 2.g. of the Statute;

And:

Count 8: Other inhumane act, a CRIME AGAINST HUMANITY, punishable under Article 2.i. of the Statute;

In addition, or in the alternative:

Count 9: 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.

COUNTS 10 – 11: PHYSICAL VIOLENCE

61. Widespread physical violence, including mutilations, was committed against civilians. Victims were often brought to a central location where mutilations were carried out. These acts of physical violence included the following:

Kono District

62. Between about 14 February 1998 and 30 June 1998, AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including Tombodu, Kaima (or Kayima) and Wondedu. The mutilations included cutting off limbs and carving "AFRC" and "RUF" on the bodies of the civilians;

Kenema District

63. Between about 25 May 1997 and about 19 February 1998, in locations in Kenema District, including Kenema town, members of AFRC/RUF carried out beatings and ill-treatment of a number of civilians who were in custody;

Koinadugu District

64. Between about 14 February 1998 and 30 September 1998, members of the AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including Kabala and Konkoba (or Kontoba). The mutilations included cutting off limbs and carving "AFRC" on the chests and foreheads of the civilians;

Bombali District

65. Between about 1 May 1998 and 31 November 1998 members of the AFRC/RUF mutilated an unknown number of civilians in various locations in Bombali District, including Lohondi, Malama, Mamaka, Rosos (or Rosors or Rossos). The mutilations included cutting off limbs;

Freetown and the Western Area

66. Between 6 January 1999 and 28 February 1999, members of the AFRC/RUF mutilated an unknown number of civilian men, women and children in various areas of Freetown, and the Western Area, including Kissy, Wellington and Calaba Town. The mutilations included cutting off limbs;

Port Loko

67. About the month of February 1999, the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Between February 1999 and April 1999 members of the AFRC/RUF mutilated an unknown number of civilians in various locations in the District, including, cutting off limbs;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or

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

Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation, **a VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II,** punishable under Article 3.a. of the Statute;

In addition, or in the alternative:

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

COUNT 12: USE OF CHILD SOLDIERS

68. At all times relevant to this Indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities. Many of these children were first abducted, then trained in AFRC/RUF camps in various locations throughout the country, and thereafter used as fighters.

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 12: Conscripting or 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.

COUNT 13: ABDUCTIONS AND FORCED LABOUR

69. At all times relevant to this Indictment, AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour. Forced labour included domestic labour and use as diamond miners. The abductions and forced labour included the following:

Kenema District

70. Between about 1 August 1997 and about 31 January 1998, AFRC/RUF forced an unknown number of civilians living in the District to mine for diamonds at Cyborg Pit in Tongo Field;

Kono District

71. Between about 14 February 1998 and 30 June 1998, AFRC/RUF forces abducted hundreds of civilian men, women and children, and took them to various locations outside the District, or to locations within the District such as AFRC/RUF camps, Tombodu, Koidu, Wondedu, Tomendeh. At these locations the civilians were used as forced labour, including domestic labour and as diamond miners in the Tombodu area;

Koinadugu District

72. Between about 14 February 1998 and 30 September 1998, at various locations including Heremakono, Kabala, Kumala (or Kamalu), Koinadugu, Kamadugu and Fadugu, members of the AFRC/RUF abducted an unknown number of men, women and children and used them as forced labour;

Bombali District

73. Between about 1 May 1998 and 31 November 1998, in Bombali District, members of the AFRC/RUF abducted an unknown number of civilians and used them as forced labour;

Kailahun District

74. At all times relevant to this Indictment, captured civilian men, women and children were brought to various locations within the District and used as forced labour;

Freetown and the Western Area

75. Between 6 January 1999 and 28 February 1999, in particular as the AFRC/RUF were being driven out of Freetown and the Western Area, members of the AFRC/RUF abducted hundreds of civilians, including a large number of children, from various areas in Freetown and the Western Area, including Peacock Farm, Kissy, and Calaba Town. These abducted civilians were used as forced labour;

Port Loko

76. About the month of February 1999, the AFRC/RUF fled from Freetown to various locations in the Port Loko District. Members of the AFRC/RUF used civilians, including those that had been abducted from Freetown and the Western Area, as forced labour in various locations throughout the Port Loko District including Port Loko, Lunsar and Masiaka. AFRC/RUF forces also abducted and used as forced labour civilians from various locations the Port Loko District, including Tendakum and Nonkoba;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 13: Enslavement, a **CRIME AGAINST HUMANITY**, punishable under Article 2.c. of the Statute.

COUNT 14: LOOTING AND BURNING

77. At all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property. This looting and burning included the following:

Bo District

78. Between 1 June 1997 and 30 June 1997, AFRC/RUF forces looted and burned an unknown number of civilian houses in Telu, Sembehun, Mamboma and Tikonko;

Koinadugu District

79. Between about 14 February 1998 and 30 September 1998, AFRC/RUF forces engaged in widespread looting and burning of civilian homes in various locations in the District, including Heremakono, Kabala, Kamadugu and Fadugu;

Kono District

80. Between about 14 February 1998 and 30 June 1998, AFRC/RUF engaged in widespread looting and burning in various locations in the District, including Tombodu, Foindu and Yardu Sando, where virtually every home in the village was looted and burned;

Bombali District

81. Between about 1 March 1998 and 31 November 1998, AFRC/RUF forces burnt an unknown number of civilian buildings in locations in Bombali District, such as Karina and Mateboi;

Freetown and the Western Area

82. Between 6 January 1999 and 28 February 1999, AFRC/RUF forces engaged in widespread looting and burning throughout Freetown and the Western Area. The majority of houses that were destroyed were in the areas of Kissy, Wellington and Calaba town; other locations included the Fourah Bay, Upgun, State House and Pademba Road areas of the city;

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 14: 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 15 –18 : ATTACKS ON UNAMSIL PERSONNEL

83. Between about 15 April 2000 and about 15 September 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL peacekeepers and humanitarian assistance workers within the Republic of Sierra Leone, including, but not limited to locations within Bombali, Kailahun, Kambia, Port Loko, and Kono Districts. These attacks included unlawful killing of UNAMSIL peacekeepers, and abducting hundreds of peacekeepers and humanitarian assistance workers who were then held hostage.

By their acts or omissions in relation to these events, **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:

Count 15: Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, an **OTHER SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW,** punishable under Article 4.b. of the Statute;

In addition, or in the alternative:

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Count 16: For the unlawful killings, Murder, a **CRIME AGAINST HUMANITY**, punishable under Article 2.a. of the Statute;

In addition, or in the alternative:

Count 17: 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;

In addition, or in the alternative:

Count 18: For the abductions and holding as hostage, taking of hostages, a **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II**, punishable under Article 3.c. of the Statute.

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

David M. Crane
The Prosecutor

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Investigator's Statement, 9 February 2004.

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Investigators Statement

9 February 2004

I, **Chris Bomford,** Investigator in the Office of the Prosecutor, Special Court for Sierra Leone make the following statement this 9th day of February 2004:

1. I work as an Investigator in the Office of the Prosecutor of the Special Court for Sierra Leone.

2. I have been working in the Office of the Prosecutor, Special Court for Sierra Leone since May 1 2003, investigating crimes under the Statute of the Special Court of Sierra Leone.

3. I have considerable experience in detecting and investigating international crimes.

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. Upon reviewing evidence collected by the Office of the Prosecutor before the confirmation of the indictments against the accused persons ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, I have found that the acts of sexual violence committed against women and girls within the temporal jurisdiction of the Special Court was not limited to rape and the use of women as sex slaves but also includes the abduction and forcing of women into conjugal-like relationships or forced "marriages" by the AFRC/RUF leadership and their subordinates. These women were commonly referred to as "bush wives" and often kept for the exclusive use of their captors.

6. 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.

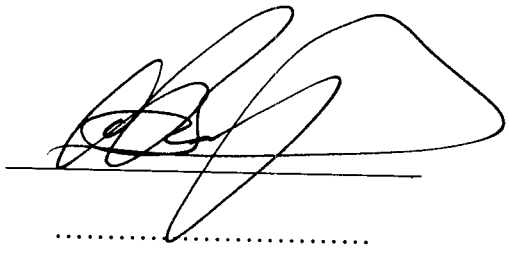
7. In the instances where the women were taken as "bush wives", they were confined and prevented from escaping through various forms of coercion, usually through the use or threat of serious physical harm. The "wives" were forced not only to provide sexual services but

also perform a range of conjugal duties including domestic chores, in some cases having children and taking care of the family – including their rebel "husbands". As a result of the stigma attached to their association with members of the AFRC/RUF forces, some of these women are still "married" to their captors.

8. The evidence reveals that the Accused either participated in these crimes or knew or had reason to know that their subordinates were committing such crimes.

9. Furthermore upon review of the evidence in the possession of the Office of the Prosecutor and new evidence uncovered since the original Indictment of the Accused it appears that the use of forced labour to mine diamonds in the Kono area was carried out in a more extensive fashion and during a much longer period then previously believed. Indeed the evidence now supports that the bulk of the forced mining was done between about February 14 1998 and January 31 2000.

10. I, **Chris Bomford**, 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.



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OFFICE OF THE PROSECUTOR

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1. *Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze*, ICTR-97-34-I and ICTR-97-30-I, "Decision on the Prosecutor's Motion to Amend the Indictment", 8 October 1999, para. 42.

2. *Prosecutor v. Kanyabashi*, ICTR-96-1-T, "Decision on Prosecution's Request for Leave to Amend the Indictment", 12 August 1999.

3. *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.

4. *Prosecutor v. Karemera* ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment", 19 December 2003.

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

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

7. *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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ANNEX 1.

Prosecutor v. Gratien Kabiligi & Aloys Ntabakuze, ICTR-97-34-I and ICTR-97-30-I, "Decision on the Prosecutor's Motion to Amend the Indictment", 8 October 1999

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

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 Gratien 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;

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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 Prosecution'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

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 53*bis

19. The Prosecution submits that Rule 53*bis* applies in the case at bench. Further, the Prosecution submits that the Tribunal adopted Rule 53*bis* 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 53*bis

38. The Defence submits that Rule 53*bis* 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 53*bis* 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 53*bis

59. The Trial Chamber notes that the Tribunal adopted Rule 53*bis* 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 53*bis* in deciding the Motion.

61. Any reference to Rule 53*bis* 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 53*bis* 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

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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

ANNEX 2

Prosecutor v. Kanyabashi, ICTR-96-1-T, "Decision on Prosecution's Request for Leave to Amend the Indictment", 12 August 1999.

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Case No. ICTR-96-15-T

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER II

OR:ENG

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

Registry: Mr. John Kiyeyeu

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 Tonye
Ms Sola Adeboyejo
Ms Ibukunolu Alao Babajide
Ms Nadira Bayat

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: AMINATTA L.R. N'GUM
SIGNATURE: [signature] DATE: 13/09/99

Counsel for the Accused:

Mr. Michel Boyer

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 Arséne 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 recomposition 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 Appelate 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 Appelate 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.

"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.

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

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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HE ABOVE REASONS,

CHAMBER

Defence, its investigators, the accused, persons under the control of the Defence, ersons to whom the Defence may have transmitted all or part of Annex B, to retrieve orthwith to the Registry all materials derived from Annex B communicated to it by ncluding 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 igs prior to its disclosure pursuant to the Rules of Procedure and Evidence.

ive to the Prosecutor to amend the indictment against Joseph Kanyabashi;

it the indictment shall be amended by:

ldition of a count of Conspiracy to Commit Genocide pursuant to Article 2(3)(b) of atute;

ldition of a count of Crime Against Humanity (Murder) pursuant to Article 3(a) of atute;

ldition of a count of Crime Against Humanity (Extermination) pursuant to Article f the Statute;

ldition of a count of Crime Against Humanity (Other Inhumane Acts) pursuant to e 3(i) of the Statute;

ldition of the allegation that the accused is responsible pursuant to Article 6(3) of the e to Count 1 (Conspiracy to commit Genocide), Count 2 (Genocide), Count 3 olicity to Commit Genocide), Count 5 (Crime Against Humanity), Count 6 (Crime st Humanity), Count 7 (Crime Against Humanity), Count 8 (Crime Against nity) and Count 9 (Serious Violations of Article 3 Common to the Geneva ntions and Additional Protocol II);

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

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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)

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PROSECUTION INDEX OF AUTHORITIES

ANNEX 3.

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.

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

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 Ramaroson (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 Bicamumpaka's Brief in Opposition to the Prosecutor's Request for Leave to File an Amended Indictment," filed on 3 September 2003 ("Mugiraneza and Bicamumpaka's joint Response"); **AND** the "Prosecutor's Reply to Prosper Mugiraneza's and Jerome Bicamumpaka'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 Bicamumpaka'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 Ramaroson. 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 15*bis* 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

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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 problemsparticularly 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	Asoka de Zoysa Gunawardana	Arlette Ramaroson
Presiding Judge	Judge	Judge

Seal of the Tribunal

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[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. Ndindabahizi*, "Decision on Prosecution Motion for Leave to amend indictment," filed on 20 August 2003 (the "*Ndindabahizi* 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

[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

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ANNEX 4.

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.

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ANNEX 5.

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

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TRIAL CHAMBER I

OR:ENG

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

Registry:
Ms Prisca Nyambe

Decision of: 18 November 1998

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

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

SITTING as Trial Chamber I, composed of Judge Lennart Aspegren, presiding, Judge Laïty Kama and Judge Navanethem Pillay;

CONSIDERING the indictment filed on 22 July 1996 by the Prosecutor against Alfred Musema pursuant to Articles 17 and 18 of the Statute of the Tribunal (the "Statute") and Rule 47 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that Musema has committed genocide, conspiracy to commit

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genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Yakov Ostrovsky on 15 July 1996;

CONSIDERING the initial appearance of the accused which took place on 18 November 1997;

BEING SEIZED of a motion filed by the Prosecutor on 3 November 1998 requesting leave to amend the indictment against the accused;

CONSIDERING the brief in support of the Prosecutor's request for leave to file an amended indictment and the attached draft amended indictment, both filed on 3 November 1998;

HAVING RECEIVED from the Defence Counsel on 11 November 1998, a reply to the Prosecutor's request for leave to file an amended indictment;

CONSIDERING the Defence brief, filed on 18 November 1998, in reply to the Prosecutor's request for leave to file an amended indictment;

HAVING HEARD the parties at the audience held to that end on 18 November 1998;

TAKING INTO ACCOUNT Articles 19 and 20 of the Statute and Rules 47 and 50 of the Rules;

TAKING NOTE of the Tribunal's Judgement of 2 September 1998 in the Case 'The Prosecutor *v.* Jean-Paul Akayesu' (Case No. ICTR-96-4-T), and the Tribunal's 'Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material' dated 30 September 1998 in the Cases 'The Prosecutor *v.* Pauline Nyiramasuhuko and Arséne 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);

AFTER HAVING DELIBERATED,

The legal basis of the request

1. The Prosecutor has brought her request for leave to file an amended indictment on the basis of Rule 50 of the Rules (Amendment of Indictment) which reads as follows:

2.

"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 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.

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(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."

1. The Tribunal takes note of its aforementioned decision dated 30 September 1998, specifically paragraph 14 thereof, wherein it is held that "[i]n considering the Prosecutor's motion for leave to amend the indictments under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of these motions and it is for the Defence to respond to these arguments".

2.

The arguments

1. The Prosecutor seeks leave to amend the indictment confirmed on 15 July 1996 so as:

2. To add one alternate charge against the accused;

3. To expand on the facts adduced in support of existing counts;

4. To add in relevant counts, the allegation that the accused is responsible not only pursuant to Article 6(1), but also pursuant to Article 6(3) of the Statute of the Tribunal;

5. To bring the current indictment in accord with the jurisprudence of the Tribunal and current charging practices.

6. The Prosecutor submitted during the audience and in the brief filed in support of her request for leave to file an amended indictment that the new charges contained in the proposed amended indictment, unlike those in the present indictment, accurately reflect the totality of the alleged criminal conduct of the accused as reflected by the evidence presently available to the Prosecutor. Further, she submits that the delay in bringing a request to amend the indictment was as a result of ongoing investigations. Moreover, the Prosecutor contends that the proposed amended indictment is justified in law and in no way prejudices the right of the accused to a fair and expeditious trial, in accordance with Articles 19(1) and 20(4)(c) of the Statute.

7. The Defence Counsel in response submits, *inter alia*, that the proposed amended indictment substantially alters the case against the accused more than 2 years and 3 months after the original indictment, and that the new allegations represent a substantial departure from the case originally put to the accused. Furthermore, he argues that in view of the new nature of the allegations, it would be necessary to have a postponement of the start of the trial on its merits. The Defence contends therefore that any further delay to the start of trial would not be in the interests of justice.

8. In reply to a question from the Tribunal, the Defence conceded that the Prosecutor was entitled in the Rules to apply for leave to amend the indictment, but objected that such amendment resulted in a totally new indictment which therefore changed the case as a whole against the accused.

On the alternative count

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1. The first amendment sought by the Prosecutor is to add one alternate count against the accused, namely Complicity in genocide pursuant to Article 2(3)(e) of the Statute, as an alternative to existing Count 1, Genocide. The Tribunal notes that the possibility of having Complicity in genocide as an alternative to Genocide is in conformity with the jurisprudence established in the aforementioned Akayesu Judgement. It is held in paragraph 532 thereof that "an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which the accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since both are mutually exclusive, the same individual cannot be convicted of both crimes for the same act". Thus, is envisaged the possibility of charging Genocide and Complicity in genocide alternatively if pertaining to the same set of facts.

2. In the opinion of the Tribunal, an alternate count may be charged, if founded on the same facts. Therefore, the addition of Complicity in genocide as an alternative to Genocide, as requested by the Prosecutor, is not problematic insofar as the new count purports to be based on facts already contained in the indictment against the accused. To include new facts in support of this amendment is unnecessary as the confirming Judge has already been satisfied that the Prosecutor has established a prima facie case against an accused in relation to the indictment as a whole, and hence, as pertains to the specific count of Genocide.

3. The Prosecutor and the Defence concurred with the Tribunal's aforementioned definition of an alternate count. Therefore, the Tribunal shall grant leave to the Prosecutor to amend the indictment by adding the count of Complicity in genocide as an alternative to existing Count 1 of Genocide in the present indictment.

On the supporting facts

1. The Prosecutor is seeking leave to amend the indictment by expanding on the facts adduced in support of the existing counts. The Tribunal notes that the existing counts in the indictment are specific as to, namely, the temporal and geographical settings of the charges against the accused. Thus, considering the specific request of the Prosecutor, any facts expanded upon should be in direct connection with the particulars of each count as it stands, that is as the count presently exists.

2. The Defence argues that the facts so expanded upon are wholly new and represent a substantial departure from the case originally put against the accused. In the opinion of the Tribunal, facts falling outside the aforementioned settings are not a mere expansion on the facts already adduced in support of the existing counts, but rather represent additional material which can be used later by the Prosecutor during trial.

3. Indeed, the Tribunal recalls that, in accordance with Rule 73 (*bis*) of the Rules, the Prosecutor has the opportunity to file a pre-trial brief addressing factual and legal issues as well as a statement of contested matters of facts and law. Moreover, inherent to trial proceedings is the presentation of evidence in complement to materials disclosed in accordance with Rule 66 of the Rules. Thus, an expansion on the facts adduced in support of existing counts does not in the opinion of the Tribunal represent an amendment to the indictment but rather further particulars which emerge during various stages of the trial against the accused.

4. Furthermore, the Tribunal finds upon perusal of the proposed draft amended indictment filed by the Prosecutor that the Prosecutor has not confined herself to her specific request, namely, to

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amend the indictment by expanding on the facts adduced in support of existing counts but rather attempts to adduce new factual material which goes beyond the particulars of the existing counts and which are, in its opinion, new facts not supporting the existing counts.

On the individual responsibility under Article 6(3) of the Statute

1. The Prosecutor also requests leave to amend the indictment by adding in relevant counts that the accused is responsible not only pursuant to Article 6(1) of the Statute but also pursuant to Article 6(3). Article 6(3) deals with the responsibility of a superior, or command responsibility. As aforementioned, for leave to be granted to amend the indictment by adding criminal responsibility pursuant to Article 6(3), it is incumbent on the Prosecutor to present legal motivations and demonstrate a factual basis from the present indictment justifying such a request.

2. The Prosecutor argues that evidence brought to light after further investigations tends to demonstrate that, at the time of the events alleged in the indictment, the accused in his capacity as a superior exerted authority and control over certain subordinates, namely employees of the Gisovu tea factory.

3. Considering the above, and the facts presented in the existing indictment, the Tribunal finds that there is sufficient basis to grant leave to the Prosecutor to amend the indictment by adding the allegation that the accused is also responsible under Article 6(3) of the Statute.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

GRANTS leave to the Prosecutor to add the count of Complicity in genocide as an *alternative* Count to the Count of Genocide in the present indictment and on the same facts adduced in respect of Count 1 of that indictment;

FINDS that the Prosecutor does not need to request leave of the Trial Chamber to expand on the facts adduced in support of existing counts;

REMINDS the Prosecutor of her obligation under Rule 66 of the Rules to disclose to the Defence as soon as possible all new materials she intends to present at trial in support of the Counts;

GRANTS leave to the Prosecutor to amend paragraph 5 of the present indictment to include the allegation of individual criminal responsibility under Article 6(3) of the Statute in respect of every mentioned Count;

DIRECTS the Prosecutor to withdraw the draft amended indictment filed by her, and to immediately amend the present indictment in conformity with this decision and to file it with the Registry.

Decision of 18 November 1998,

Signed on 14 December 1998.

Lennart Aspegren Laïty Kama Navanethem Pillay

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Presiding Judge Judge Judge

(Seal of the Tribunal)

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ANNEX 6

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

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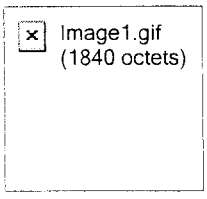
UNITED

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

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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, sub-paragraph (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.

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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

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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.

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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

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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

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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 Hernándes 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 Rossario 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.

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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

ANNEX 7

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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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 Laïty 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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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

Laïty Kama
Presiding Judge

Lennart Aspegren
Judge

Navanethem Pillay
Judge

(Seal of the Tribunal)

Case No. ICTR-96-15-T

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER II

OR:ENG

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

Registry: Mr. John Kiyeyeu

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 Tonye
Ms Sola Adeboyejo
Ms Ibukunolu Alao Babajide
Ms Nadira Bayat

Counsel for the Accused:

Mr. Michel Boyer

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
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NAME / NOM: AMINATA L.R. N'GUM
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 Arséne 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 recomposition 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 Appelate 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 Appelate 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.

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.

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

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 crim[redacted] 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.

HE ABOVE REASONS,

CHAMBER

: Defence, its investigators, the accused, persons under the control of the Defence, ersons to whom the Defence may have transmitted all or part of Annex B, to retrieve orthwith to the Registry all materials derived from Annex B communicated to it by ncluding 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 igs prior to its disclosure pursuant to the Rules of Procedure and Evidence.

ive to the Prosecutor to amend the indictment against Joseph Kanyabashi;

it the indictment shall be amended by:

ldition of a count of Conspiracy to Commit Genocide pursuant to Article 2(3)(b) of atute;

ldition of a count of Crime Against Humanity (Murder) pursuant to Article 3(a) of atute;

ddition of a count of Crime Against Humanity (Extermination) pursuant to Article f the Statute;

ddition of a count of Crime Against Humanity (Other Inhumane Acts) pursuant to e 3(i) of the Statute;

ldition of the allegation that the accused is responsible pursuant to Article 6(3) of the e to Count 1 (Conspiracy to commit Genocide), Count 2 (Genocide), Count 3 olicity to Commit Genocide), Count 5 (Crime Against Humanity), Count 6 (Crime st Humanity), Count 7 (Crime Against Humanity), Count 8 (Crime Against nity) and Count 9 (Serious Violations of Article 3 Common to the Geneva ntions and Additional Protocol II);

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

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)