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Case No. ICTR-97-34-I and ICTR-97-30-I

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR: ENG

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

Registry: John Kiyeyeu

Decision of: 8 October 1999

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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

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: AMINATTA L. R. N'GUM
SIGNATURE: ... DATE: 03 | 11 | 99

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;

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 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 1999).

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 1999).

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 1999). 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 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.

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
Judge, Presiding

Lloyd George Williams
Judge

Seal of the Tribunal

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TRIAL CHAMBER II

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Judge Pavel Dolenc

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GRATIEN KABILIGI and
ALOYS NTABAKUZE

Case No. ICTR-97-34-I
Case No. ICTR-97-30-I

SEPARATE AND CONCURRING OPINION OF JUDGE DOLENC

DECISION ON THE PROSECUTOR'S MOTION TO AMEND THE INDICTMENT

The Office of the Prosecutor:

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: AMINATTA L.R. N'GUM
SIGNATURE: DATE: 11/10/99

I. INTRODUCTION

1. By designation of the President of the International Criminal Tribunal for Rwanda (Tribunal), I, Judge Pavel Dolenc, have the honour of sitting in the former Trial Chamber II.

2. I concur with the decision of the majority of the Trial Chamber (Majority Decision) to grant the "Prosecutor's Request for Leave to File an Amended Indictment" (Motion) and deny the other related motions. I, however, submit this Separate and Concurring Opinion (Opinion) because I have a different opinion from that of the majority on the question of whether a Trial Chamber need review the supporting material for new charges and what standard of proof the Trial Chamber should apply in a review process.

3. The Majority Decision holds that the Trial Chamber need not review the supporting material for new charges (at para. 42; Transcript of oral decision, at 4) and introduces a new standard of proof for amending an indictment (at paras. 40-42; Transcript of oral decision, at 5). I do not agree with these holdings.

4. I also believe that the issue of the "substitution" of the indictment warrants further discussion. On the issue of the substitution of the indictment, the Majority Decision (at paras. 52, 53) relies only on a short citation of the decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) Trial and Appeals Chambers in *Prosecutor v. Kovacevic* (IT-97-24-AR73).

5. I submit this Opinion to present my understanding of the Statute of the International Criminal Tribunal for Rwanda (Statute) and the Rules of Procedure and Evidence (Rules) governing the procedure for amending an indictment. I think that some observations are not superfluous, particularly because this area of the law is not well settled. The Rule on amendment is silent regarding the standard of review, the practice is unsettled, and the views of the Judges, Prosecutors, and Defence Counsel are divergent.

6. Part II of this Opinion presents the relevant provisions of the Statute and Rules. Part III discusses the amendment of an indictment in general, the four different options in deciding motions to amend, disqualification, and an apparent dilemma. Part IV offers additional reasoning on the issue of the substitution of the indictment. Part V concludes that a Trial Chamber, under Rule 50, after an initial threshold, generally should review supporting material or other evidence to satisfy itself of the existence of a prima facie case for any new charges or amendments, and that the Trial Chamber should conduct such a review.

II. RELEVANT PROVISIONS

7. **Rule 15(C)** (Disqualification) reads:

> (C) The Judge of a Trial Chamber who reviews an indictment against an accused, pursuant to Article 18 of the Statute and Rules 47 and 61, shall not sit as a member of the Trial Chamber for the trial of that accused

8. **Rule 47(E) and (F)** (Submission of the Indictment by the Prosecutor) read:

(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.
(F) The reviewing Judge may:
(i) request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;
(ii) confirm each count;
(iii) dismiss each count; or
(iv) adjourn the review so as to give the Prosecutor the opportunity to modify the Indictment.

9. **Article 18** of the Statute (Review of the Indictment) reads:

1. The Judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of trial.

10. **Rule 50(A) and (B)** (Amendment of the Indictment) read:

(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.
(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.

11. ICTY **Rule 50(A)** (Amendment of Indictment) reads:

(A) The Prosecutor may amend an indictment:
(i) at any time before its confirmation, without leave;
(ii) thereafter, and until the commencement of the presentation of evidence in terms of Rule 85, with leave of the Judge who confirmed the indictment, or a Judge assigned by the President; or
(iii) after the commencement of the presentation of evidence, with leave of the Trial Chamber hearing the case, after having heard the parties.

If leave to amend is granted, the amended indictment shall be reviewed by the Judge or Trial Chamber granting leave. Rule 47(G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

12. **Rule 73*bis* (B)** (Pre-Trial Conference) reads, in part:

"At the Pre-Trial Conference, the Trial Chamber . . . may order the Prosecutor . . . to file . . . a summary of facts on which each witness will testify. . . ."

13. **Rule 73*ter* (B)** (Pre-Defence Conference) reads, in part:

"At that Conference, the Trial Chamber . . . may order that the defence . . . file . . . a summary of the facts on which each witness will testify. . . . "

III. DISCUSSION

A. Notion of Amendment

14. Neither the Statute nor the Rules have any provisions that expressly limit the scope of amendment. The Statute and Rules do not provide any subsequent prima facie test of amendments despite the fact that such amendments can include broadened charges or new charges against the same person or against new suspects. Notably, Rule 50 does not provide a standard of review.

15. Some interpret this lacuna to mean that the Judges do not review the evidence for motions to amend and Prosecutors need not present supporting material for new charges. Under such an interpretation, the question of disqualification of Judges who are dealing with motion for leave the amendment does not arise. I interpret this lacuna differently.

16. There is no need for review of supporting material if a motion to amend is not based on new evidence. The Prosecutor might make such a motion (not based on new evidence) to comply with an order to provide greater specificity in the form of the indictment, harmonise the indictment to current jurisprudence, clarify, correct, specify, or divide counts (to separate individual and superior responsibility). The practice of the Tribunal is varied, but all such changes to the indictment have been called "amendment."

17. A Confirming Judge or Trial Chamber can order amendments to correct the errors and defects of charges, to modify or to add some additional elements, to improve unclear, ambiguous, imperfect, uncertain or non-concrete charges. Such amendments do <u>not</u> need additional supporting material and, consequently, no review by a Trial Chamber.

18. The Prosecutor, however, may seek to add charges (charges that were dismissed from the previous indictment or that are completely new) or broaden existing charges with new aggravating circumstances or with new suspects. In this case, such amendments rely on new or additional support material and require review by a Trial Chamber.

19. Rule 50(B) provides that upon granting a motion to amend an indictment adding new charges, the Trial Chamber must hold "a further appearance . . . to enable the accused to enter a plea on the new charges." (emphasis added). First, this language implies that there is a different procedure for new charges. Second, this language implies that there is no need for any different procedure for "other" amendments, or those that are not related to new charges.

20. Under objective criteria, "new charges" could mean that the amendment includes the same accused with new charges, or the same accused with the same charges but the scope of the charge is new. Under subjective criteria, new charges could mean that the amendment includes new accused persons.

21. One dictionary defines amendment as: "[t]o change or modify for the better. To alter by modification, deletion, or addition." Black's Law Dictionary 81 (6th ed. 1990). Another defines amendment as: "make minor changes (in a text or piece of legislation or other ruling) in order to make it fairer or more accurate, or to reflect changing circumstances." The New Oxford Dictionary of English 53 (1998).

22. Some of the difficulty in deciding this issue of amendment of indictments lies in the use of the words "charges" and "counts." The Statute and Rules appear to use the terms interchangeably. According to one dictionary, a charge means "[i]n a criminal case, the specific crime the defendant is accused of committing" Black's Law Dictionary 233 (6th ed. 1990). The same dictionary, however, states that, "'[c]ount' and 'charge' when used relative to allegations in an indictment or information are synonymous." *Ibid.* at 348.

23. With regard to amendment, generally there exist two scenarios. In the first scenario, the Prosecutor finds new evidence. The new evidence is memorialised in new supporting material. The supporting material supports new allegations, which the Prosecutor will incorporate into a new proposed amended indictment, which will include a new concise statement of facts and new counts. The Prosecutor moves to amend, and the Trial Chamber may review the supporting material to determine the existence of a prima facie case and rule on the motion. In the second scenario, the Prosecutor has no new evidence, no new supporting material, and no new allegations, but moves to amend the indictment for other reasons. The Trial Chamber need not review supporting material in this second scenario.

24. Thus, the Trial Chamber must have discretion to decide if there need be a review of the supporting material.

B. A Judge Is Disqualified Upon Reviewing Supporting Material

25. Under Rule 15(C), a Confirming Judge who reviews supporting material at an *ex parte* hearing is disqualified from sitting at trial on the same case. Rule 15(C) is a procedural safeguard for the accused that attempts to ensure that the three Judges hearing his case will not have seen, reviewed, or in any way even appear to be biased by the supporting material.

26. This disqualification may represent one of the apparent reasons for the Trial Chambers' reluctance to review supporting material to grant leave to amend an indictment. The concern is that the disqualification under Rule 15(C) might apply by analogy to any

Judge that reviews supporting material or other evidence under Rule 50. It appears to me, however, that Rule 15(C) applies strictly to a Confirming Judge and does not apply to any other stage of the proceedings, including a motion to amend.

C. *Four Options for Deciding a Motion to Amend*

27. Such an expansive and unwarranted interpretation of Rule 15(C) creates a dilemma in deciding a motion to amend. The Trial Chamber must choose between four options: (1) denying a motion because no prima facie case is proved without presenting supporting material; (2) granting the motion without having reviewed the supporting material; (3) remanding the case to a Confirming Judge to review the supporting material and make a finding on the existence or not of a prima facie case, or; (4) granting or denying a motion after deciding whether or not to review supporting material.

28. I am of the opinion that the fourth option is the correct one. This is despite the fact that such a procedure possibly might invite an objection or appeal on the grounds of an alleged Rule 15(C) violation. I am of the opinion that such an objection or appeal is without merit. I think that the Trial Chamber should grant or deny a motion to amend after reviewing new supporting material or other new evidence for new charges. An analysis of each of the four options from which a Trial Chamber must choose follows.

1. Denying a motion because no prima facie case is proved

29. The first option of denying a motion to amend because no prima facie case is proved is the most unacceptable. This option, in effect, would mean denying all motions to amend. That is, the Trial Chamber could grant no amendment because it insists on reviewing supporting material but then insists that such a review would disqualify the Judges. Such a procedure defies logic and violates the spirit of Rule 50.

2. Granting a motion without reviewing the supporting material

30. The second option is that of granting a motion to amend without reviewing supporting material. Some contend that the language of Rule 50 does not trigger any need to review supporting material or other evidence to determine the existence of a prima facie case for an amendment. Indeed, the words prima facie do not appear in Rule 50. The problem, however, is that Rule 50 gives the Trial Chamber the authority to "grant leave," but does not provide the criteria or standard of proof on which to make such a decision. This constitutes a lacuna.

31. Trial Chamber I held that a Trial Chamber need not review supporting material (nor remand the case to a Confirming Judge) to grant leave to amend an indictment. "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 a *prima facie* basis for the charge." *Prosecutor v. Nyiramasuhuko & Ntahobali*, ICTR-97-21-I, at para. 13 (Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material, 30 September 1998 (emphasis added) (ruling on four cases).

32. The Prosecutor has cited the *Nyiramasuhuko* decision in several cases as authority for the proposition that a Trial Chamber need not review supporting material in deciding a motion to amend under Rule 50.

33. This decision asserts that a Trial Chamber can decide a motion to amend based only on the representations of the parties and need not satisfy itself as to the existence of a prima facie case for new counts. Several of my learned colleagues share this view, and several very recent written and oral decisions also reflect this view. *See Prosecutor v. Ndayambaje*, ICTR-96-8-I, at para. 15 (Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 2 September 1999) (holding that a "Trial Chamber seized with a motion, requesting leave to amend an indictment pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for proposed amendments to the indictment"); *Prosecutor v. Nsengiyumva*, ICTR-96-12-I, at para. 9 (Decision on the Prosecutor's Request for Leave to File an Amended Indictment (2 September 1999) (same); *Prosecutor v. Nsabimana & Nteziryayo*, ICTR-97-29-I, at 4 (Decision on Prosecutor's Request for Leave to File an Amended Indictment, 10 September 1999) (same); *Prosecutor v. Bagosora*, ICTR-96-7-I, at 5-6 (Decision on the Prosecutor's Request for Leave to Amend the Indictment, 23 September 1999) (same); *Prosecutor v. Kanyabashi*, ICTR-96-15-I, at paras. 17-21 (Reasons for the Decision on the Prosecutor's Request for Leave to Amend the Indictment, 13 September 1999) (same); *Prosecutor v. Nyiramasuhuko & Ntahobali*, ICTR-97-21-I, at paras. 17-18 (Decision on the Prosecutor's Request for Leave to Amend the Indictment, 6 September 1999) (same).

34. In the case at bench, the Prosecutor shares this view, and submits that the *Nyiramasuhuko* decision is controlling. The Defence disagrees, objects to the Motion, and urges the Trial Chamber to order disclosure and consider supporting or other evidence material (even if redacted) to determine the merit of the Motion.

35. In several recent motions to amend, including that in the case at bench, the Prosecutor prayed for the Trial Chamber to remand the motion to the Confirming Judge. The Prosecutor in its prayer, first moved to amend, then moved to "[d]esignate a single Judge to review the amended indictment pursuant to Rule 47." *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, ICTR-97-30-I, at para. 8(b) (Prosecutor's Request for Leave to File an Amended Indictment) (filed 31 July 1998); *Prosecutor v. Bagosora*, ICTR-96-7-T, at para 7(b) (Prosecutor's Request for Leave to File an Amended Indictment) (filed 31 July 1998); *Prosecutor v. Nsengiyumva*, ICTR-96-12-T, at para 7(b) (Prosecutor's Request for Leave to File an Amended Indictment) (filed 31 July 1998).

36. At the hearing in the case at bench (as in others) the Prosecutor, relying on the *Nyiramasuhuko* decision, withdrew this prayer, asserting that the Trial Chamber had jurisdiction and did not need to review the supporting material. *See* Transcript of Hearing of 11 August 1999, at 10, 82.

37. If, however, a Trial Chamber seized of a case need not review the supporting material (for a motion to amend the indictment) in the case of new charges, this means that the Prosecutor has not proved a prima facie case. This, in turn, creates a loophole through which the Prosecutor can circumvent the confirmation process. The Prosecutor could move to

amend an indictment, including adding new charges, for which she knows she cannot establish a prima facie case.

38. With such a loophole, the Prosecutor could charge in an indictment only one count and later file a motion to amend with an unlimited number of charges that are not supported by supporting material establishing a prima facie case. This type of filing would seem to be contrary to the principle of a fair trial, violating particularly the spirit and purpose of the provisions of the Article 18(1) of the Statute and of the Rule 47(E) that only a confirmed charge should be grounds for trial.

39. Under this option, a Trial Chamber is placed in a position where it can only accept at face value the Prosecutor's representations that there exists a prima facie case. To make a finding of fact, with regard to the merit of a motion to amend new charges, a Trial Chamber must review something, new supporting material or other new evidence.

40. In the case at bench, the Majority Decision (at para. 42) introduces a new standard of proof for new charges, in addition to the prima facie test for review of the indictment, namely, that "the Prosecutor does need to demonstrate that there are sufficient grounds both in fact and law to allow the amendments." The Majority Decision holds that this new standard of proof does not require the Trial Chamber to review the supporting material relating to new charges.

41. In my opinion, such an emergency exit from an awkward situation is not justified. This situation is caused by the legal lacunae in Rule 50, which does not lay down any specific standard of proof for amendments. Consequently, the only possible inference is that Majority Decision holds that the mere submissions of the Prosecutor are treated as a proof in order to demonstrate sufficient factual grounds to allow the amendments. This position conflicts with the basic requirement in Article 18(1) of the Statute and Rule 47(E) that only reviewed and confirmed charges should be grounds for trial. Indeed, this precondition for trial must be applied in proceedings for amendments not directly on the basis of Rule 50, but by analogy with Rule 47(E) just because of the respective lacunae in Rule 50. In my opinion, an application of Rule 47(E) by analogy also is well founded under Article 32(b) of the Vienna Convention on the Law of Treaties because the alternative leads to a result which is manifestly unreasonable.

42. The introduction of a new standard of proof in the process to amend an indictment has no support in any provision of the Statute, Rules, or, I believe, in national jurisdictions that require a judicial review of charges.

43. The Majority Decision holding that the mere submission of a party demonstrates sufficient factual grounds for alleged facts is not correct. The establishment of factual grounds, regardless of the standard of proof, is an evidentiary matter, not a matter of mere allegation.

3. Remanding the motion to a Confirming Judge for review

44. Some contend that remanding the motion to amend the indictment to the Confirming or "reviewing" Judge represents the best procedure to determine the merit of the motion and if a prima facie case exists for an amendment. This procedure would be analogous to that of Rule 47(E) and would avoid any objection or appeal based on an expansive interpretation of Rule 15(C). Remanding the motion, however, appears illogical to me because a Trial Chamber would decide the issue of a motion to amend the indictment without knowing if a prima facie case exists or if the Confirming or reviewing Judge will grant or deny the new charges. This also places a single Confirming Judge in an awkward position of greater authority than a Trial Chamber. Remanding also may hinder judicial economy if the motion must "yo-yo," or go back and forth, between the Trial Chamber and Confirming or reviewing Judge.

45. ICTY Rule 50 is different from ICTR Rule 50. At the ICTY, if the Prosecutor files a motion to amend *before the presentation of evidence*, the Trial Chamber must remand the motion to the Confirming Judge for purposes of determining if there exists a prima facie case, similar to the procedure under Rule 47. The ICTY procedure under Rule 50, that expressly directs either a Confirming Judge or the Trial Chamber (*after* the presentation of evidence) to review supporting material in determining a motion to amend, supports the notion that such a review is an important step which the Tribunal should not bypass. The ICTY procedure also supports the notion that the same body reviews the supporting material and decides a motion to amend.

46. In *Kovacevic*, the Appeals Chamber, though not specifically on this point, reversed an ICTY Trial Chamber's denial of the Prosecutor's motion to amend fourteen new charges. *Prosecutor v. Kovacevic*, IT-97-24-AR73, at para. 38 (Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998) (2 July 1998). For purposes of remand, the Appeals Chamber found that the Prosecutor had not yet established a prima facie case for the fourteen 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." *Ibid.* (emphasis added). Thus, this case may stand for the rule that the Prosecutor must prove that there exists a prima facie case for new charges that she seeks to amend.

47. In at least two other ICTY cases, both *Prosecutor v. Meakic and Others* and *Prosecutor v. Sikirica and Others*, the Trial Chamber held that under ICTY Rule 50 the Prosecutor should refer its applications to amend the indictment to the Judge who confirmed the indictment or to any other reviewing Judge designated by the President. *Prosecutor v. Meakic and Others*, IT-95-4-PT, *Prosecutor v. Sikirica and Others*, IT-95-8-PT, at 2 (Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 26 August 1998) (deciding both cases). Though these decisions show the difference between the two Tribunals' Rules regarding amendment, the decision to remand motions to amend to the Confirming Judge highlight the need for scrutiny of the substance behind the motion for amendment. *See also Prosecutor v. Kvocka et al*, IT-98-30 (Order Granting Leave to File an Amended Indictment and Confirming the Amended Indictment, 9 November 1998); *Prosecutor v. Kolundzija*, IT-95-8-I and IT-98-30-PT (Decision Rejecting the Prosecutor's

Request for Leave to Amend Indictments, 6 July 1999); *Prosecutor v. Sikirica et al*, IT-95-8-PT (Decision on the Prosecutor's Motion for Leave to Amend the Indictment, 29 July 1998).

4. Granting or denying the motion after deciding whether or not to review supporting material

48. The fourth option is granting or denying a motion to amend after deciding whether or not to review the supporting material. A Trial Chamber should review the supporting material or other evidence for the new charges, and the Judges should not be disqualified on this ground. This option seems the most acceptable to me.

49. Under Rule 50, a Trial Chamber should hear motion the motion for leave to amend the indictment, under a three-step process. First, the Trial Chamber should satisfy itself of the initial threshold (i.e. considering the parties' submissions regarding jurisdiction, admissibility, rationale, timeliness, any possible delay or prejudice, etc.). Second, the Trial Chamber should decide if it is necessary to review the supporting material or other evidence. Third, if having decided that a review is necessary, the Trial Chamber should review the new supporting material to determine if the Prosecutor has established a prima facie case for each amendment, and on that basis grant or deny a motion to amend.

50. The case law of the ICTR, namely three decisions, support the proposition that the Trial Chamber should review supporting material in deciding a motion to amend. The first two decisions, however, relate to motions to amend made after the commencement of trial, and the third relates more to the jurisdiction of the Trial Chamber, as opposed to a Confirming Judge, to hear the motion to amend. These decisions appear to be more on point than that in *Nyiramasuhuko*.

51. In *Musema*, the Prosecutor during trial moved to amend the indictment to add one new charge and amend others, relying on evidence in the form of witness testimony already before the Trial Chamber and new supporting material in the form of witness statements. *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 1999). Trial Chamber I "considered the evidence presented by the Prosecutor in support of her motion" and found "that a *prima facie* case has been established by the Prosecutor with respect to the new counts and grants leave to file the amended indictment. *Ibid.* at para. 19 (emphasis added). Thus, the Trial Chamber hearing the motion reviewed evidence already before it and new supporting material, satisfied itself as to the factual merit of the motion, and did not mention the possibility of disqualification. The Trial Chamber, in ruling on the Defence submission that only the Confirming Judge could hear the motion, found no need to remand the matter to the Confirming Judge, and found that Rule 50 makes "the Trial Chamber competent to entertain the motion." *Ibid.* at para. 13.

52. In *Akayesu*, the Prosecutor during trial moved to amend the indictment to add three new charges, and "submitted evidentiary [and supporting] material in support of his motion." *Prosecutor v. Akayesu*, ICTR-96-4-T, at 2 (Leave to Amend the Indictment, 17 June 1997). Trial Chamber I granted the motion after having considered the evidence already before it and "the accompanying evidentiary material." *Ibid.* at 3. The Trial Chamber found the

motion to be "well-founded." *Ibid.* The Trial Chamber did not discuss the possibility of disqualification, nor did it specifically make any findings related to whether the Prosecutor had established a prima facie case on the new charges. *Ibid.* The review of the new material, however, demonstrates that the Trial Chamber in *Akayesu* sought to satisfy itself as the factual merit of the motion to amend.

53. In *Bagosora and 28 Others*, the Prosecutor sought confirmation of an indictment, which included adding one new charge to the cases against eleven (out of twenty-nine) accused persons whom already had made an initial appearance before a Trial Chamber. *Prosecutor v. Bagosora and 28 others*, ICTR-98-37-I, at 1, 10 (Dismissal of Indictment, 31 March 1998). Judge Khan dismissed the entire indictment against all twenty-nine accused persons without an examination of the merits of the charges. *Ibid.* at 12. In so ruling, Judge Khan found that adding one new charge (in relation to eleven accused persons) amounted to a motion for leave to amend the (existing) indictments, and such motions properly lie before the Trial Chamber. *Ibid.* at 10. "Thus, the logical course to follow for the Prosecutor [to seek to amend an indictment] would be to approach the appropriate Trial Chamber in accordance with [R]ule 50." *Ibid.* This decision supports the position that after initial appearance, the Trial Chamber hears a motion for leave to amend, and the Confirming Judge does not participate further. This decision, however, is silent on the issue of the standard of review of a motion to amend.

D. *Ex parte* or *inter partes* hearing

54. I am inclined to believe that the Trial Chamber generally should perform a review of supporting material for an amendment at an *inter partes* hearing. I also can foresee a situation, however, well before the commencement of trial, where the Trial Chamber could grant a Prosecutor's motion for such a review to take place at an *ex parte* hearing. The Trial Chamber should have the flexibility and discretion to order an *ex parte* or *inter partes* hearing to review the supporting material or other evidence, including ordering the redaction of sensitive information and assignment of pseudonyms.

55. The decision on holding an *ex parte* or *inter partes* hearing should consider the stage of the proceedings; whether the motion is to take place early in the proceedings, during pre-trial, or during trial. The Trial Chamber must respect the right of the accused to a fair trial in making this determination.

E. *Review of Supporting Material Does Not Disqualify the Trial Chamber*

56. There are several reasons why a Trial Chamber's review of supporting material or other evidence in order to decide a motion to amend does not disqualify any of its members from sitting at trial.

57. The question is whether disqualification under Rule 15(C) (that the Confirming Judge who reviews supporting material under Rule 47 cannot sit at trial) applies by analogy to the Trial Chamber that reviews supporting material or other evidence for a motion for leave to amend the indictment under Rule 50. I think it does not.

58. The provisions on disqualification of Judges are an exception to the general presumption of the impartiality of Judges, under Article 12(1) and (3) of the Statute and Rule 14(A). One principle of the interpretation of laws requires that exceptions be construed *stricti sensu*; therefore, the Tribunal should apply strictly the provision on disqualification of Judges. This means that only the Confirming Judge is disqualified, but Judges of a Trial Chamber, who review supporting material or other evidence for purposes of deciding a motion for leave for amendment, are not disqualified from trial.

59. Supporting material for establishing a prima facie case for new charges merely must meet a low standard of proof and need not be the same evidence produced at trial. For these reasons, I think that prior knowledge of supporting material does not have the significance of unfair prejudice for the accused despite Rule 15(C). The position that the Trial Chamber Judges should rely on the Prosecutor's mere representations and not verify the existence of a prima facie case for new charge violates the presumption of innocence, the essence of the judicial function, and gives the Prosecutor an unjustifiably favourable position. This may be contrary to Article 20(1) of the Statute. That is, if the accused is presumed innocent, including of all new charges in a proposed indictment, some initial, low threshold, showing is required to overcome this presumption.

60. Disqualification of a Judge is presumed if he: took part in the investigation; served in other proceedings against an accused; was a counsel; was a witness; was affected by the alleged crime, or; is related to the parties (*iudex inhabilis*). The competent authority might order the withdrawal of a Judge if other circumstances raise a suspicion as to his impartiality (*iudex suspectus*).

61. Whether such an analogy applies may depend on the relationship between the review of the indictment under Rule 47 and the decision on the motion for leave to amend the indictment under Rule 50.

62. The purpose of the confirmation of an indictment is "to sift meritorious from a nonmeritorious cases." Daniel D.N. Nsereko, *Rules of Procedure and Evidence for the Tribunal for the Former Yugoslavia*, 5 Criminal Law Forum 528 (1994). The confirmation is "a safeguard against unreasonable or unwarranted action on the part of the prosecution." Morris & Scharf, The International Criminal Tribunal for Rwanda 478 (1997). Thus, the confirmation of indictment is a mechanism to ensure fair procedure in accordance with the Rule 47(E). This mechanism should apply to each count of the indictment (the "Judge shall examine each of the counts in the indictment . . . .") to prevent the suspect from being charged with even one charge that is not based on a finding of prima facie evidence.

63. The Confirming Judge examines supporting material and this is the reason for disqualification. The jurisprudence of the Tribunals, however, shows that the review of the indictment also includes other considerations, e.g., litispendence on previous confirmed charges. I presume that he could dismiss charges also on *non bis in idem* grounds, or because of death or incurable mental disease of the suspect.

64. What is the legal significance of the act of confirmation? Has it the significance of making an indictment legally valid (a constitutive effect), or is it only approbation of the Prosecutor's representation of the existence of a prima facie case (a declaratory effect)?

65. In an adversarial criminal procedure system, the trial and subsequent judgement can take place only on the basis of a valid indictment. If the confirmation has constitutive effect, unconfirmed charges are "null and void" and, consequently, also those proceedings and decisions of the Tribunal, which are based on said null and void indictment, are invalid. The Tribunal should pay careful attention to such defects of the indictment, *proprio motu*, at every moment of procedure.

66. Such a constitutive-effect approach seems wrong to me. If the Trial Chamber finds an accused person guilty—beyond a reasonable doubt—it is illogical to declare all the proceedings and the judgement "null and void" for lack of an earlier prima facie showing. The same argument also applies to the charges that were dismissed under Article 18(1) of the Statute and Rule 47(F)(iii) and renewed as amendment.

67. On the other hand, if the Trial Chamber acquits after trial based on a "null and void" indictment, a question of *non bis in idem* can arise. That is, if there existed no valid procedure and judgement, the Prosecutor could file a new indictment for the same charges against the same accused person.

68. I am of the opinion, therefore, that the confirmation only has a declaratory effect and does not affect the legal validity of the indictment. Although unconfirmed charges are valid grounds for criminal procedure before the Tribunal and for its judgement in spite of provisions of the Article 18(1) of the Statute and Rule 47. Of course, procedures based on unconfirmed counts breach these provisions, but since this error has no impact on the validity and correctness of the judgement, it cannot constitute grounds for appeal in the sense of provision of the Article 24(1)(a) of the Statute.

69. It appears that the same idea led the drafters of the Statute. The first paragraph of Article 18 of the Statute reads that "the Judge of the trial chamber to whom the indictment has been transmitted . . ." shall review the indictment and confirm or dismiss it. The definitive articles "the Judge" and "the chamber" reveal that the Confirming or reviewing Judge should not be disqualified from trial, most likely because the material supporting the indictment are not supposed to be of such significance as to justify any disqualification.

70. Article 14 of the Statute reads that ICTR shall adopt for itself the Rules of the ICTY with such changes as deemed necessary. Therefore, changes to the ICTY Rules should be based on good cause to be necessary.

71. ICTY Rule 50(A) requires that the amended indictment be reviewed using the same standard of proof as the confirmation of the first indictment. ICTR Rule 50 has not followed that provision, and without good reason. It seems to me, therefore, that ICTR Rule 50 is contrary to said provision of the Statute.

72. Review of an indictment also is common in civil law systems of criminal procedure. Usually the reviewing Judge is the same as the presiding Judge of the Trial Chamber. He verifies that the indictment complies with the law (regarding form, constituents, and contents). If he finds any defects, he sends it to the Prosecutor for correction. If he is satisfied with the indictment, he causes it to be served on the suspect without any further act of confirmation. For example, in Slovenia the reviewing Judge is not disqualified from the trial, on the contrary, he presides over the Trial Chamber. Indeed, the suspect may object to the indictment and the Judges who hear his motion are disqualified from siting in the Trial Chamber because they may hear and decide questions of fact, including a defence of contradictory evidence.

73. Accordingly, confirmation of the charges plays a relatively minor role and should not constitute grounds for disqualification of reviewing Judges. Also some other decisions of the Judges are based on a Prosecutor's investigative evidence, but without disqualification. Nevertheless, Rule 15 sets out this ground for disqualification, and the Tribunal must respect this, but it should not extend this ground by analogy to disqualify Judges in some similar procedural situations.

F. Waiver

74. The defence may waive the Trial Chamber's review of supporting material or other evidence if it does not object to the motion to amend. That is, the Trial Chamber may grant the amendment or order the filing of a new indictment, if the defence does not object to the Prosecutor's motion to amend or otherwise waives such review. *See Prosecutor v. Semanza*, ICTR-97-20-I, at 2 (Decision on the "Motion by the Office of the Prosecutor for Leave to Amend the Indictment") (2 September 1999).

75. One might consider waiver to be like a fifth option, allowing the Trial Chamber to grant a motion to amend without reviewing supporting material. In the case at bench, Counsel for both accused persons have objected to the Motion. Waiver is inapplicable here.

G. Disqualification and Eliminating Rule 15(C)

76. Eliminating Rule 15(C) represents one step toward settling this area of the law. The plain meaning of Article 18 of the Statute and other practical considerations favour eliminating Rule 15(C).

77. The plain meaning of Article 18 supports the elimination of Rule 15(C). The plain meaning of Article 18 of the Statue indicates that it is one of the Judges of the Trial Chamber (that will try the case) that confirms the indictment. Article 18(1) seems to indicate that a case goes to a Trial Chamber, for confirmation, and then trial in the same Trial Chamber. Article 18(2) further supports this view because the Confirming Judge can make orders "for the conduct of trial." The alternative thesis is that a Confirming Judge in one Trial Chamber is making orders for the conduct of trial in another Trial Chamber, and is, therefore, illogical.

78. There are other practical reasons for eliminating Rule 15(C). It is the practice of the ICTR that the Judges of the Trial Chamber review supporting material before trial, i.e. at the

Pre-Trial Conference (under Rule 73 *bis*) and at the Pre-Defence Conference (under Rule 73 *ter*). Under these Rules, the Trial Chamber may review "a summary of the facts on which each witness will testify." This fact alone obviates any purpose for the distinction made by Rule 15(C) and precludes any such application by analogy to a Trial Chamber reviewing supporting material or other evidence for a motion to amend. Thus, Rule 15(C) goes beyond the plain meaning of Article 18, and the purported procedural safeguard that it affords is impractical and unnecessary. The Tribunal should eliminate Rule 15(C).

IV. SUBSTITUTION OF THE INDICTMENT

79. The Defence submits that the requested amended indictment amounts to a substitution of the previous indictment because of the numerous new charges, allegedly based on new evidence, and other changes, including the increased length of the document (fifty-one pages instead of the previous eleven pages). The Majority Decision (at para. 52) cites the holding of the Trial Chamber in the *Kovacevic* case that the "proposed indictment is so substantial as to amount to a substitution of a new indictment" and the holding of the Appeals Chamber that reversed the decision in the same case that "the increased size of the indictment is but one factor to be taken into account." The Majority Decision (at para 53) then concludes "that the amendments proposed by the Prosecution do not amount to a substitution of the indictment."

80. My interpretation of these decisions is that the Trial Chamber could deny the proposed amended indictment if it amounts to a substitution of the previous indictment, considering among other reasons, the increased size of the amendments. It is difficult to say if my understanding of these decisions is correct because the reasoning contained in the decisions is very cursory, but if it is so, I disagree with them.

81. I think, contrary to the submission of the defence and the apparent view of the Majority Decision, that the alleged substitution of the indictment in the present case (and in similar instances of "amended indictments") has no impact on the admissibility of such amendments. A proposed amended indictment is an act of the Prosecution, an instrument of accusation, and when granted, it in fact replaces, substitutes for the previous indictment without the later being withdrawn. If it were not so, the Trial Chamber would have to consider and decide upon both, or even more, of the indictments on the trial.

82. I agree with the Defence contention that the amended indictment would substitute for the previous indictment. It appears that in similar situations, the Prosecution never has withdrawn the previous indictment at the ICTR and the ICTY. Rather, the previous indictment ipso facto became moot. This practice can invoke legal difficulties. Also this form of amendments most likely does not correspond with plain meaning of the word "amendment" and with the wording of the Rule 50(A) where it reads that Prosecutor may amend the indictment and not to replace it. Further, this form of amendment creates problems, such as difficulties as: establishing what changes in the concise statements of facts amount new charges, especially if changes are based on new evidence; limiting a further appearance and pleading only for new charges, and; limiting preliminary motions for the new charges or for new amended indictment as a whole. Nevertheless, the form of amendments is not prescribed and cannot be obstacle for granting the amendments.

83. Obviously the problem is not in form but in substance, since the defence objects to the amount of amendments, that means the quantity and quality of changes. But neither the Statute nor the Rules have any provisions on this issue. There are no criteria to assess when the amendments amount to a substitution of the indictment and what are the consequences if it is so. Consequently, the amount of amendments is not legal hindrance for granting the amended indictment. Therefore, in my opinion, the decision depends exclusively on the discretionary right of a Trial Chamber taking into consideration if such an amended indictment is justified under the circumstances of each particular case and not on accession whether the proposed amended indictment amounts to a substitution of the previous one. However, in my opinion, the Majority Decision should substantiate its finding with additional arguments to be persuasive to the parties.

V. CONCLUSION

84. The Trial Chamber, in deciding a Prosecutor's motion to amend the indictment under Rule 50, should hear the motion for leave to amend the indictment, under a three-step process. First, the Trial Chamber should satisfy itself of the initial threshold of the motion (i.e. submissions on jurisdiction, admissibility, rationale, timeliness, any possible delay or prejudice, etc.). Second, the Trial Chamber should decide if it is necessary to review the supporting material or other evidence. Third, if having decided that a review is necessary, the Trial Chamber should review the new supporting material to determine if the Prosecutor has established a prima facie case for the amendment, and on that basis grant or deny the motion.

85. If the Prosecutor has no new supporting material and her motion to amend is not for purposes of adding new counts based on new evidence, the Trial Chamber could decide the motion based on the submissions of the parties alone.

86. I am inclined to believe that the Trial Chamber generally should perform a review of supporting material at an *inter partes* hearing. I, however, also can foresee a situation—well before the commencement of trial—where the Trial Chamber should grant a Prosecutor's motion for such a review to take place at *an ex parte* hearing. The Trial Chamber should have the flexibility and discretion to order an *inter partes* or *ex parte* hearing to review the supporting material or other evidence, including ordering redaction and pseudonyms.

87. I am of the opinion that Rule 15(C) does not bar a Trial Chamber from reviewing supporting material or other evidence at a hearing on a motion to amend the indictment. It is in light of my interpretation of Article 18 of the Statute, other Rules, and the practice of the Tribunal that I am in favor of eliminating Rule 15(C) at the next Plenary.

88. In my view, substitution of the indictment does not constitute sufficient legal grounds to deny a motion to amend.

89. In the case at bench, I **CONCUR** in granting the Motion and denying the other related motions. I, however, think that the Trial Chamber generally should review the Prosecutor's supporting material or other evidence to determine if there exists a prima facie case for her motion to amend new charges.

Arusha, 8 October 1999.

Pavel Dolenc
Judge

Seal of the Tribunal