

UNITED NATIONS  NATIONS UNIES
International Criminal Tribunal for Rwanda

TRIAL CHAMBER II

OR: ENG

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registrar: Agwu U. Okali

Decision of: 21 June 2000

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THE PROSECUTOR
v.
ELIEZER NIYITEGEKA

Case No. ICTR-96-14-I


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

The Office of the Prosecutor:

Ken Fleming
Don Webster
Ifeoma Ojemeni

Counsel for the Accused:

Sylvia Geraghty



THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II of the International Criminal Tribunal for Rwanda (the “Tribunal”) composed of Judge Laïty Kama, Presiding, Judge William H. Sekule and Judge Pavel Dolenc as assigned by the President to temporarily replace Judge Mehmet Güney;

BEING SEIZED OF the Prosecutor’s Motion filed on 2 July 1999, for “Leave to File an Amended Indictment” and the brief supporting the said Motion, along with the proposed amended Indictment (Attachment A) and the materials and documentary evidence (Attachment B);

CONSIDERING the response from the Defence, filed on 22 May 2000, and the Prosecutor’s supplementary response to the aforementioned Defence’s response, filed on 30 May 2000;

TAKING NOTE of the original indictment confirmed by Judge Yakov Ostrovsky on 15 July 1996 against Éliezer Niyitegeka (the “Accused”) which charges the Accused with:

- Count 1: Crime of Genocide in violation of Article 2(3)(a) of the Statute of the Tribunal (the “Statute”).
- Count 2: Conspiracy To Commit Genocide in violation of Article 2(3)(b) of the Statute.
- Count 3: Murder of civilian, as part of the widespread or systematic attack against a civilian population on political, ethnic, or racial grounds and has thereby committed Crime Against Humanity in violation of Article 3(a) of the Statute.
- Count 4: Extermination of civilian, as part of the widespread or systematic attack against a civilian population on political, ethnic, or racial grounds and has thereby committed Crime Against Humanity in violation of Article 3(b) of the Statute.
- Count 5: Inhuman acts against a civilian population on political, ethnic, or racial grounds and has thereby committed Crime Against Humanity in violation of Article 3(i) of the Statute.
- Count 6: Commit or order other persons to perpetrate acts of violence seriously affecting life, health and physical or mental well-being of persons, and has therefore, committed Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II in violation of Article 4 (a) of the Statute.

TAKING NOTE that the Accused was arrested and served with a copy of the confirmed indictment in Nairobi on 9 February 1999 pursuant to an arrest warrant issued by Judge Ostrovsky dated 16 December 1998;

NOTING that the Accused was transferred to the Tribunal’s Detention Facility in Arusha on 11 February 1999, made his initial appearance before the Tribunal on 15 April 1999, and entered a plea of not guilty to all counts of the indictment;

TAKING NOTE that the Prosecutor filed the “First Amended Indictment” without adding new facts and new charges on 29 April 1999, incorporating only corrections of translation, grammar and punctuation that were made by oral motion during the Accused’s initial appearance on 15 April 1999;

HAVING HEARD the parties at a hearing held on 1 June and 5 June 2000;

CONSIDERING particularly Articles 6, 15, 18, 19, 20 and 21 of the Statute of the Tribunal (the “Statute”) and Rules 2, 37, 47, 49, 50, 53, 66, 72, and 95 of the Rules of Procedure and Evidence (the “Rules”);

SUBMISSIONS OF THE PROSECUTOR

1. In support of this motion, the Prosecution submits that the proposed amended indictment is justified in law and on the evidence, and will not infringe on the rights of the Accused to a fair trial. The proposed amended indictment is sought, *inter alia*, for the following purpose:
 - (i) To add four new charges against the Accused:
 - (a) the alternative charge of Complicity in Genocide against the Accused pursuant to Article 2(3)(e) of the Statute;
 - (b) the Charge of Direct and Public Incitement to Commit Genocide in violation of Article 2 (3)(c) of the Statute;
 - (c) the charge of Crimes Against Humanity for rape as part of a widespread and systematic attack against a civilian population on political, racial and religious grounds in violation of Article 3(g) of the Statute; and
 - (d) the charge of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II based on allegations of responsibility for outrages upon personal dignity, in particular humiliating and degrading treatment, rape and indecent assault, as part of an armed internal conflict.
 - (ii) To further allege in relevant counts that the Accused is not only responsible pursuant to Article 6(1), but also pursuant to Article 6(3) of the Statute.
 - (iii) To expand and elaborate upon the factual allegations adduced in support of existing counts and new charges.
 - (iv) To make the proposed amended indictment consistent with the jurisprudence of the Tribunal and its current charging practices.
2. The Prosecutor grounds its motion on Rule 50 of the Rules. The Prosecutor submits that the proposed amended indictment is based on new evidence obtained after the confirmation of the indictment against the Accused on 15 July 1996. The uncovered new evidence substantiates new allegations of sexual violence, conspiracy and the planned nature of the massacres during the period between April and July 1994. These investigations have produced evidence of how this plan was carried out and how the Accused joined the conspiracy and acted in its execution.



3. The proposed amended indictment emphasizes the Accused's authority, control and responsibility as superior for acts committed by his subordinates, pursuant to Article 6(3) of the Statute. There are also additional witnesses that have provided information specifically concerning the acts and omissions of the Accused as one of governmental officials in encouraging, condoning or failing to halt the massacres that were taking place.
4. The Prosecutor submits that one of the reasons for the proposed amendment is because it is a preliminary step in anticipation of a consolidated motion for Joinder with other indicted government officials. Because the Accused was one of the ministers in the *Interim Government*, he was responsible for the formulation and implementation of the governmental plans against the Tutsi population. Thus, the Accused is implicated in the conspiracy of former government officials to implement genocide as a policy of social and political control. Because the instant case involves complex legal issues, this application is an attempt to expedite a final resolution of the charges currently pending against the Accused and, will save time rather than cause delay.
5. The Prosecutor submits that the provisions in Articles 19(1) and 20(4)(c) of the Statute will ensure that the Accused be entitled a fair and expeditious trial without undue delay. Most of the specific factual allegations related to the Accused are the same. Only allegations of conspiracy have been broadened, and new allegations of sexual violence have been introduced.
6. The Prosecutor points out that at this stage of the proceeding, the addition of new charges should not present an unfair surprise, and the investigation of such charges by the Defence should not present unreasonable or impracticable delays. The Prosecutor also submits that any prejudice to the Accused must be assessed in the context of the overall interest of justice in a full and final determination of the guilt of the Accused.
7. In response to the Defence's allegations of abuse of process, illegal joinder, tainted evidence, and disclosure of supporting material for the existing indictment, the Prosecutor denies there was any impropriety on the part of the Prosecutor. The Prosecutor submits that all the above mentioned objections by the Defence are without any basis and are not valid legal arguments to oppose to the Prosecutor's application to amend the current indictment.
8. The Prosecutor further submits that it was because of the Accused's insistence and his refusal to speak that there was no recording. And it was the Accused who demanded that some of the allegations against him be dropped if he cooperates with the Prosecutor.
9. With respect to allegations concerning disclosure of information by the Defence, the Prosecutor contends that the Accused have in his possession, the copy of the confirmed existing indictment and copies of supporting materials even prior to his arrest by the Kenyan national authority. Furthermore, the Prosecutor asserts that she had complied with the disclosure requirements of Rule 66 and there is no exculpatory material in her possession.



10. The Prosecutor also submits that some of the issues (e.g. the indictment being vague and imprecise) raised by the Defence concern the defects in form in the indictment and this is not the stage to address these issues before the proposed amended indictment is granted.
11. Finally, the Prosecutor requests the Trial Chamber to sever the annexure (Attachment B) which contains witness statements from the Prosecutor's Motion, set them aside from the public record of the archives, and be designated as confidential documents that would be available only to the Trial Chamber and the parties only.

SUBMISSIONS OF DEFENCE

12. In response, the Defence's Motion submits, *inter alia*, that the Prosecutor has insufficient credible and untainted evidence to sustain the six charges against the Accused in the existing indictment if he were to be tried separately, and that this proposed amended indictment serves only to facilitate the Prosecutor's Joinder Motion, with her stated objective of obtaining the same verdict and the same treatment for the Accused as all the indicted former ministers that the Prosecutor is seeking to join.
13. The Defence alleges that the Prosecutor has repeatedly misused the legal process in violating the rights of this Accused, and is in breach of Article 19.1, 19.2, Article 20.3, 20.4 (g) of the Statute; Rule 42(A)(i) and (iii), 42 (B), 43 (i) (ii)(iii)(iv) and (v), *mutatis mutandis*, Rule 44 *bis* (D), 45, Rule 55 or Rule 57. Summary of alleged abuses are as follows:
 - (a) the Prosecutor tried to compel the Accused to confess to the existing charges, to testify against himself and against others by offering inducements, and threatening the Accused with added new charges;
 - (b) because of the Accused's refusal to cooperate, in retaliation, the Prosecutor is now seeking to amend the existing indictment, and to seek to delay trial for the purpose of joining him as co-accused with others, some of whom were not indicted until as late as this year;
 - (c) interviewed the Accused on a number of occasions with no lawyer present and failed to audio/video record the interviews or if they were recorded, failing to give a copy to the accused;
 - (d) attempting to join this case with others whom evidence may be more convincing; thus prosecuting the Accused as a member of the *Interim Government*;
 - (e) failure to set a trial date, causing undue delay and prejudice to the Accused by failing and delaying the disclosures of evidence;
 - (f) bring numerous new motions against the Accused; and
 - (g) serving documents on the Accused in a language he does not understand.
14. The Defence asserts that because witness statements were not provided by the Prosecutor until 13 March 2000 and because some of the exculpatory evidence was disclosed towards the end of April 2000, the Accused has not yet had an opportunity to consider all of this evidence with his defence counsel. The Defence also alleges



- that some of the witness statements (e.g. Statement 255) given to her do not have the same information as those in the possession of the Prosecutor. Thus, the Defence asks the Trial Chamber not to permit the Prosecutor to gain an unfair advantage over the Accused before he has had sufficient time to examine the evidence in the existing indictment.
15. The Defence alleges that the Prosecutor may have misled Judge Ostrovsky who confirmed the existing indictment. To substantiate this allegation, the Defence points out that count 2 of the confirmed existing indictment is conspiracy to commit Genocide and according to the Prosecutor, the application for joinder of the Accused with others is founded upon this count. However, there is no disclosed evidence of an agreement or participation in an agreement. Moreover, the Prosecutor submitted on 2 July 1999, 3 years after the existing indictment has been confirmed, that the evidence of conspiracy has only emerged because of the so-called "NAKI" operation which only started in July 1997. Thus, the charge of conspiracy should have been dropped because there was no evidence to sustain this charge that was confirmed on 15 July 1996, which was one year before the "NAKI" operation.
 16. In light of the above mentioned abuse of legal process by the Prosecutor, and the threats and inducements inflicted on the Accused and his intention to prove innocence before this Trial Chamber, the Defence submits that granting the Prosecutor's request for an amendment against the Accused would be prejudicial to the Accused.
 17. The Defence submits that because there is no credible untainted evidence to sustain all six charges in the existing indictment, the existing indictment is outside the temporal Jurisdiction of this Tribunal pursuant to Article 1. The Defence also argues that the current indictment does not relate the Accused to any of the violations indicated in Article 2, 3, 4 and 6 of the Statute.
 18. The Defence points out that the Prosecutor based her application for an amendment on a false premise of joining the Accused with other indicted government officials. If the existing indictment is allowed to be amended and the Accused is to be joined with others, there will be too many combined counts. Not only an excessive number of counts in one trial is unmanageable administratively, it will also be prejudicial to the Accused. Because the Accused is separately indicted, the Defence asserts that this case should stand-alone.
 19. The Defence contends that the Prosecutor in her zeal to join the others, fails to comply with Articles 19 and 20. The proposed amended indictment is also vague and imprecise, and some paragraphs set out in the proposed amended indictment are inconsistent with the jurisprudence of this Tribunal. The Defence points out that there are one hundred and sixty-nine (169) paragraphs and the Accused's name only appears in twenty-nine (29) paragraphs. In view of this, the Defence alleges that the proposed amendment is a "catch all" indictment with the name of the Accused inserted at random thus failing to comply with Rule 47(C).



20. In addition, the proposed indictment refers to names of other accused but a number of the co-accused are still at large, some have been dropped from the Prosecutor's original joinder, and others have already being tried separately as the "Butare Group" and the "Military Group". The period of the alleged commission of the offences indicated in the proposed amended indictment is also vague.
21. The Defence submits that the proposed amended indictment is oppressive and prejudicial. Specifically some of the paragraphs (the Defence cited 5.3-5.8, 5.12, 5.14-5.38, 6.1-6.17, 6.19, 6.21-6.25, 6.31-6.35, 6.37-6.52, 6.55-6.63, 6.67-6.68, etc) do not mention the name of the Accused and are not related to him and thus should be struck out. The Defence also notes that the Prosecutor, if has the information, should provide specific details (for example, date, time, names of other accused, what weapon, from whom, to whom, and etc) in those paragraphs that mention the Accused.
22. The Defence contends that some of the facts cited in the proposed amended indictment are false, and that the Prosecutor knowingly used unreliable witness statements to support the proposed amended indictment. Specifically, the Defence points out that the Accused was the president of *Mouvement Démocratique Républicain* (MDR) which was the opposition party to *Mouvement Révolutionnaire National pour le Développement* (MRND). Consequently, attempting to join the Accused with the most influential members of the MRND is unfair and prejudicial.
23. In accordance with Article 18 and Article 19.1 of the Statute, Rule 47(E) and (F) of the Rules, the Defence submits that the Trial Chamber has the obligation to review the materials and documentary evidence in Attachment B (which accompany the Prosecutor's request for an amended indictment), so as to ensure that there is a *prima facie* case for each proposed new charges.
24. Finally, the Defence urges the Trial Chamber to prevent further abuse by the Prosecutor by denying the Prosecutor's application, to decline to exercise jurisdiction over the Accused, to award the immediate and unconditional release of the Accused and to compensate the Accused.

AFTER HAVING DELIBERATED,

Preliminary Matters

25. The Trial Chamber notes that the Accused made his initial appearance before the Tribunal on 15 April 1999, and entered a plea of not guilty to all counts of the indictment.
26. (a) Rule 50(A) states that at or after the initial appearance of an accused, an amendment of an indictment may only be made by leave granted by a Trial Chamber.



- (b) Article 15(1) and (2) provide that the Prosecutor, acting as a separate organ of the Tribunal, shall have the unfettered power to investigate and prosecute persons responsible for serious violation of international humanitarian law with respect to Rwanda.
27. The above stated provisions enable the Prosecutor to conduct on-going investigations against an accused after the initial indictment has been confirmed. The Prosecutor also has the responsibility to prosecute an accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.
28. The Trial Chamber notes that the Defence alleges issues of abuse of process and unlawful interrogations of the Accused by the Prosecutor, lack of temporal jurisdiction in regard to the existing indictment, and unlawful joinder. However, the Trial Chamber is of the opinion that all these issues lie beyond the framework of her response to the Prosecutor's application for an amended indictment pursuant to the above mentioned Rule 50(A) and Article 15(1) and (2).
29. The Trial Chamber also notes that some of the issues (notably: the issue of disclosure, review of the existing indictment and the abuse of power) submitted in this Defence's response are the same issues raised in the Defence Preliminary Motion dated 11 April 2000. These issues are considered in a separate Decision on Preliminary Motion of the Defence.

Accordingly, the Trial Chamber will only address the issues advanced by both Parties that it considers are pertinent to the proposed amended indictment.

The Applicable Standard

30. The rights of an accused are enshrined in the provisions of Articles 19 and 20 of the Statute. Among them are the 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.
31. Article 15 sets forth that the Prosecutor, as an independent entity, has the sole discretion to determine whether or not to charge an individual. Rule 37 authorises the Prosecutor to perform her functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by her.
32. Neither the Statute nor the Rules have any provisions that expressly limit the scope of amendment of a confirmed indictment. However, once 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). Thus, in the interests of the proper administration of justice, the Trial Chamber likes to establish a more precise way to govern the principal aspects of the amendment proceedings for a confirmed indictment.



33. The Trial Chamber has looked to the Rules and precedents, and recognises that, in general, an amendment to a confirmed existing indictment is sought for the following reasons: to add new charges to a confirmed indictment, to expand and elaborate upon the factual allegations adduced in support of existing confirmed counts, or to make minor changes to the indictment.

The Trial Chamber now likes to further examine each application for a proposed amendment.

(1) Adding new charges to an confirmed indictment;

- (a) Pursuant to Article 15 and Rule 50(A), the Prosecutor may apply for leave to amend the existing amendment with new or expanded charges when she obtains further supporting materials in an on-going investigation. However, to prevent miscarriage of justice and to protect an accused from surprises at a late stage of trial preparation, the Trial Chamber likes to further define new charges in an amended indictment as an application to:
- i) charge in the alternative (e.g. the Prosecutor may allege that the accused's acts constitute at least one of several charged offenses);
 - ii) allege an additional legal theory of liability with no new acts (for example alleging that an accused is not only criminally responsible pursuant to Article 6(1), but also pursuant to Article 6(3)); or
 - iii) allege the commission of additional acts that constitute new charges.

The first two categories are self-explanatory and less problematic. However, the Trial Chamber likes to examine the third category where new acts and charges are added in a proposed amendment to a confirmed indictment.

- (b) As discussed above, the Prosecutor is permitted to bring new charges based upon the acts underlying the initial indictment or portions thereof. However, the Trial Chamber is of the opinion that adding of new charges in connection of allegations of new acts should be granted only if the offenses charged, are of the same or similar character or are based on the same transaction.
- (c) In Rule 2(A), "transaction" is defined as "[a] number of acts or omissions whether occurring as one event or a number of events, at the same or different location and being part of a common scheme, strategy or plan."

Rule 50 does not expressly require that the proposed new charges be based on the "same transaction" with the crimes already indicted.



However, this principle has been used repeatedly where two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused (e.g. *see* Rule 49 for joinder of crimes)

Similarly, under the common law jurisdictions, the ‘same transaction’ analysis is used where an accused is being charged with several crimes.

Thus applying the “same transaction” test, the legal requirement for adding new charges against the same accused or the acts or omissions which were alleged to have been committed by an accused in an amended indictment, is that these new charges must be committed *in the course of the same transaction*.

When this “same transaction” test for proposed new charges is met, the Trial Chamber shall then balance the overall interests of justice against an accused’s right for a fair trial without undue delay. And if substantial rights of the accused are not prejudiced, it would exercise its discretion to grant or deny an amendment to an existing indictment.

- (d) For the instant case, factual allegations in the proposed amended indictment focus on the Accused’s activities between 9 April to July 1994, and how as the Minister of Information, the Accused was involved in the formulation and implementation of the governmental policy to exterminate the Tutsi population. The Prosecutor’s allegations also illustrate, *inter alia*, criminal acts of speeches and incitement by the radio and television stations ran by the government, his participation in meetings to encourage massacres of the Tutsis, and places where the Accused was seen shooting persons seeking refuge.

Taking into consideration all these alleged facts, the Trial Chamber finds that there is a reasonable showing that the proposed new charges against the Accused and the acts or omissions which were alleged to have been committed by him are committed *in the course of the same transaction*. Thus, the “same transaction” test is met for the proposed new charges against the Accused.

(2) Expanding and elaborating upon the factual allegations adduced in support of existing confirmed counts.

- (a) Pursuant to Rule 47(C), the Trial Chamber notes that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged, including the citation of the Statute for each count, which an accused is alleged therein to have violated.
- (b) The Trial Chamber also notes that the text in the proposed amended indictment may serve as background information to the events alleged



and may be relevant. At this stage of the proceeding, the Trial Chamber is of the opinion that it is premature to address the relevance of these allegations.

In *Prosecutor v. Nsengiyuma*, ICTR-96-12-I, at 3 para. 24 (Decision On The Defence Motions Objecting To The Jurisdiction of the Trial Chamber On the Amended Indictment, 13 April 2000), Trial Chamber III observed that:

“Rule 47(C) reads (in part): ‘[t]he indictment shall set forth . . . a concise statement of the facts of the case and of the crime with which the suspect is charged.’ The Trial Chamber interprets that the Prosecution may include in an indictment allegations that are not strictly related to the elements of the crimes themselves. Here, it is important to distinguish between the word ‘crime’ and ‘case’ as they appear in Rule 47(C). The ‘crime’ means any of the offences enumerated in Article 2 to 4 of the Statute. The ‘case’ has a broader meaning and includes relevant allegations of facts or circumstances that relate to the Prosecution’s entire theory of a case that paint a more full picture of the events of a given case for other purposes, including *inter alia*, providing context, showing relationships, demonstrating the large-scale nature of the crimes, or proving elements of the crimes by inference to acts dating before 1994. The Trial Chamber finds that the Defence submission that the indictment’s concise statement of the facts is limited strictly to the crimes is erroneous. The Trial Chamber finds that under Rule 47(C) the Prosecution may allege facts of its case which go beyond the more limited scope (temporal or otherwise) of the crimes.”

- (c) The Trial Chamber concurs with the view above. In addition, the Trial Chamber observes that a detailed proposed amended indictment that includes historical background of the offences, and other useful information in connection to the crimes charged could provide a greater degree of specificity and clarity to the allegations against an accused, and is therefore favorable to the accused.
 - (d) Further, the Trial Chamber likes to point out that new factual allegations that are included in a proposed amended indictment should clearly and directly relate to the acts alleged against an accused or to the context of the case. Thus, on motion of the defence, the Trial Chamber in its discretion may strike any surplusage that is totally unrelated to the case involved.
- (3) Making minor changes to the confirmed indictment.

After an indictment is confirmed, the Prosecutor may apply for an amendment to correct minor changes. A “minor change” is any change which does not



add any charges or counts to the confirmed existing counts. It may not add any substantial matter not fairly included in the indictment and which is not likely to mislead the accused as to the confirmed charge or charges.

As noted previously, the present indictment is an amended Indictment filed on the basis of minor changes incorporating minor corrections of translation, grammar and punctuation.

The Issues of Delay and Infringement on The Rights of The Accused


34. Although there is no trial date set for the present case yet, the Trial Chamber is under the duty to ensure that the Accused's trial is fair and expeditious, and that proceedings are conducted in accordance with the Rules. This fundamental protection is enshrined in the provisions of Articles 19(1) and 20(4)(c) of the Statute.
35. Rule 50(B) provides that, if the amended indictment includes new charges after the Accused's initial appearance, a further appearance shall be held as soon as practicable to enable the Accused to enter a plea on the new charges. Rule 72 also provides for the Accused the opportunity to raise objections within thirty (30) following the disclosure of the Attachment B or other supporting material pursuant to Rule 66, after the proposed indictment has been granted.
36. In addition to the provisions above, the Trial Chamber notes that it is necessary to balance the rights of the Accused with the complexity of the case. In *Prosecutor v. Bagosora* (*supra* at 5 para. B(i)), the Trial Chamber held:

“[t]hat the amendment of the Indictment at this stage will not contravene the provisions of Article 20(4)(C) of the Statute regarding undue delay. In determining whether a delay in the criminal proceedings against the accused is ‘undue,’ it is essential to consider the length of the delay, the gravity, nature and complexity of the case, as well as any prejudice that the accused may suffer.”

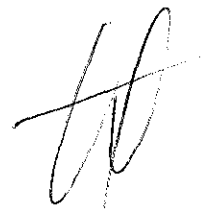
37. Likewise, the Trial Chamber is not convinced that the amendments sought would cause undue delay that would prejudice the Accused. In light of the seriousness of the crimes involved, the Trial Chamber is persuaded that the amendments requested by the Prosecutor are in the interests of justice and would not adversely effect the Accused's right to a fair trial.

Factual Basis of The Prosecutor's Application

38. The Trial Chamber notes that the Defence challenges some of the facts alleged by the Prosecutor in the proposed amended indictment. The Defence also maintains that the vague and imprecise allegations fail to sustain both the existing and proposed amended indictment. The Defence further submits that the Trial Chamber should review the supporting material to establish a *prima facie* case for new charges against the Accused.



39. The Trial Chamber first likes to point out that any disputed matters of facts and credibility of evidence are to be examined at trial. At the present moment, the Trial Chamber is not engaged in reviewing the existing indictment; rather, it is moved on the Prosecutor's request to decide whether or not to grant leave to amend the existing indictment.
40. Thus, at this juncture, the Trial Chamber distinguishes the procedural requirements of Rules 47 and 50(A).
41. Rule 47(B) provides that the Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material.
42. Rule 47 (E) further states that the reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standards set forth in Article 18 of the statute, whether a case exists against the suspect.
43. In *Prosecutor v. Nahimana (Case No. ICTR-96-11-I*, 10 Nov.1999, at 4, paras. 14-15), the Tribunal held that, in considering the Prosecutor's request for leave to file an amended indictment pursuant to Rule 50, it is sufficient that the Prosecutor establishes the factual basis and the legal motivation in support of her motion. In the same decision, the Tribunal further stated that:
- “[i]n the case of Rule 47, a single Judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with a motion requesting leave to amend an indictment, pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for the proposed amendments to the indictment. Since such a finding has already been made in respect of the Accused, it is not necessary for the Trial Chamber to consider the supporting material contained in Annex C. The Trial Chamber has therefore not considered the supporting marked Annex C, in its deliberation. The Trial Chamber finds that in considering the Prosecutor's request for leave to file an amended indictment pursuant to Rule 50, it is sufficient if the Prosecutor establishes the factual basis and the legal motivation in support of her motion ”
44. The same case law distinguishing Rule 47 and 50 is also found in *Prosecutor v. Barayagwiza (Case No. ICTR-97-19-I*, 11 Feb. 2000, pg. 3), *Prosecutor v. Nsabimana & Nteziryayo (Case No. ICTR-97-29-I*, 10 Sept.1999, pg. 4), and in *Prosecutor v. Bagosora (Case No. ICTR-96-7-I*, 22 Sept. 99, pg. 4-5, paras. C(i) and (ii)).



45. In line with the above-discussed applicable legal standard for amending a confirmed indictment, it is not necessary for the Trial Chamber to consider the documents contained in Attachment B as submitted by the Defence.
Thus, the Trial Chamber holds that at this stage of the proceeding, the Prosecutor need, based upon the evidence, to satisfy the Trial Chamber that there is sufficient legal and factual basis to justify each new proposed count in the proposed amendment.

46. Accordingly, the Trial Chamber addresses the Prosecutor's application and the factual basis for the amendment:

(a) the charge of complicity in genocide as an alternative charge to Genocide against the Accused pursuant to Article 2(3)(e) of the Statute;

(i) The Trial Chamber recalls that an individual cannot be both the principal perpetrators of a particular act and the accomplice thereto. Therefore, an act with which an accused is being charged cannot be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Since the two are mutually exclusive, the Accused cannot be convicted of both crimes for the same act, the Trial Chamber holds that this charge should be included as an alternative to the charge of Genocide to cover the second form of participation.

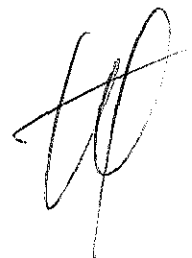
(ii) Paragraphs 4.3-4.5, 5.1, 5.2, 5.13, 6.9, 6.10, 6.14, 6.18-6.37, 6.45, 6.48, 6.53, and 6.64-6.75 of the proposed concise statement of facts describe the alleged acts or omissions by the Accused which justify the inclusion of this charge pursuant to Article 6(1) and Article 6(3). Thus, the Trial Chamber grants leave to the Prosecutor to add this charge to the indictment.

(b) the charge of Direct and Public Incitement to Commit Genocide in violation of Article 2 (3)(c) of the Statute;

Paragraphs 4.3-4.5, 5.1, 5.2, 5.11-5.13, 6.20, 6.27-6.32, 6.64, 6.66, and 6.71 - 6.75 of the proposed concise statement of facts describe the alleged acts or omissions by the Accused which justify the inclusion of this proposed charge pursuant to Article 6(1) and Article 6(3). Thus, the Trial Chamber grants leave to the Prosecutor to add this charge to the indictment.

(c) the charge of Crimes Against Humanity for rape as part of a widespread and systematic attack against a civilian population on political, racial and religious grounds in violation of Article 3(g) of the Statute;

Paragraphs 5.38, 6.71 and 6.72 of the proposed concise statement of facts describe the alleged acts or omissions by the Accused which justify the inclusion of this proposed charge pursuant to Article 6(1) and Article 6(3).



Thus, the Trial Chamber grants leave to the Prosecutor to add this charge to the existing indictment.

- (d) the charge of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II based on allegations of responsibility for outrages upon personal dignity, in particular humiliating and degrading treatment, rape and indecent assault, as part of an armed internal conflict;

Paragraphs 5.1, 5.2, 5.13, 6.9, 6.10, 6.14, 6.18-6.37, 6.45, 6.48, 6.53, and 6.64-6.75 of the proposed concise statement of facts describe the alleged acts or omissions by the Accused which justify the inclusion of this proposed charge pursuant to Article 6(1) and Article 6(3). Thus, the Trial Chamber grants leave to the Prosecutor to add this charge to the existing indictment.

- (e) to further allege in relevant counts that the Accused is not only responsible pursuant to Article 6(1), but also pursuant to Article 6(3) of the Statute;

- (i) Article 6(1) states that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Article 2 to Article 4 of the present Statute, shall be individually responsible for the crime.

Article 6(3) stipulates that the fact that any of the acts referred to in Article 2 to 4 of the present Statute was committed by a subordinate does not relieve or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

- (ii) The existing confirmed indictment alleges only that the Accused is individually responsible for the crimes pursuant to Article 6(1). On the basis of new allegations (e.g. the Accused was a former minister, and exercised considerable influences and control over governmental policies) in the proposed amendment submitted by the Prosecutor, the Trial Chamber considers it justified for each of the existing six counts to further allege that the Accused is criminally responsible pursuant to Article 6(3) of the Statute.

- (iii) The Trial Chamber also points out that it is important that the Prosecutor identify which alleged acts of the Accused engage his individual criminal responsibility under Article 6(1), and which acts engage his individual criminal responsibility under Article 6(3) of the Statute for each of the existing six counts and the four added new counts.



- (iv) For the instant case, the Trial Chamber notes that the proposed amended indictment is unclear in this aspect. Most of the factual bases cited for the charges are the same under Article 6(1) and 6(3) in the proposed amendment. Accordingly, the Trial Chamber orders the Prosecutor to file a new amended indictment distinguishing which alleged acts of the Accused engage his individual criminal responsibility under Article 6(1) and 6(3) of the Statute for each count.
- (f) to expand and elaborate upon the factual allegations adduced in support of existing counts and new charges and to make the proposed amended indictment consistent with the jurisprudence of the Tribunal and its current charging practices.
- (i) Although the Prosecutor submits that most of the specific factual allegations related to the Accused is the same, the instant proposed amended indictment includes substantial expanded factual allegations. The proposed amended indictment contains sixty-one pages (including the French translation), whereas the original indictment only contains four pages. Furthermore, as pointed out by the Defence only twenty-nine paragraphs out of the one hundred and sixty-nine paragraphs referred to the Accused.
- (ii) As discussed above, the Trial Chamber points out that the expanded test must provide, *inter alia*, the pertinent background information, showing relationships, demonstrating the large-scale nature of the crimes, or proving elements of the crimes by inference to acts by the Accused. Factual allegations that are totally unrelated to the case or fail to provide any pertinent background information should be deleted.
- (iii) In light of this, the Trial Chamber orders the Prosecutor to file a new amended indictment and to ensure new factual allegations included in the amended indictment clearly and directly relates to the acts alleged against the Accused or to the context of the case.

FOR THESE REASONS, THE TRIBUNAL,

GRANTS the Prosecutor Request for leave to amend the indictment by adding

- (i) the charge of Complicity as an alternative charge to Genocide against the Accused pursuant to Article 2(3)(e) of the Statute pursuant to Article 6(1) and 6(3);
- (ii) the charge of Direct and Public Incitement to Commit Genocide in violation of Article 2 (3)(c) of the Statute pursuant to Article 6(1) and Article 6(3);
- (iii) the charge of Crimes Against Humanity for rape as part of a widespread and



systematic attack against a civilian population on political, racial and religious grounds in violation of Article 3(g) of the Statute pursuant to Article 6(1) and 6(3);


- (iv) the charge of Serious Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II based on allegations of responsibility for outrages upon personal dignity, in particular humiliating and degrading treatment, rape and indecent assault, as part of an armed internal conflict pursuant to Article 6(1) and 6(3).

ORDERS

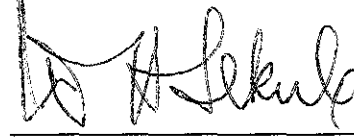
- (i) the Prosecutor to file a new amended indictment reflecting the involvement of the Accused pursuant to Article 6(1) and Article 6(3) for each count, the amended indictment has to be concise and clear, and to make sure that what is included in the new amended indictment is relevant to the Accused, and to delete paragraphs that are unrelated to the Accused;
- (ii) the Prosecutor to file the new amended indictment reflecting the orders above, in French and in English **by Friday, 23 June 2000, at 9 hours.**
- (iii) the Registry to sever the annexure (Attachment B) from the Prosecutor's Motion and set them from the public record of the archives, and be designated as confidential documents.

FURTHER ORDERS the Registry to serve the new amended indictment, in French and in English, immediately on the Accused and his Counsel **no later than Friday, 23 June 2000, at 12 hours.**

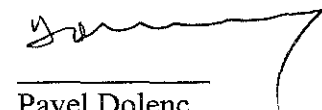
Arusha, 21 June 2000.



Laity Kama,
Presiding Judge



William H. Sekule
Judge



Pavel Dolenc
Judge

(Seal of the Tribunal)