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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER I

Original: English

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

Registry: Ms Aminatta N'gum

Date of Decision: 6 October 2000

THE PROSECUTOR
v.
ELIZAPHAN NTAKIRUTIMANA
GERARD NTAKIRUTIMANA
CHARLES SIKUBWABO

(ICTR-96-10-I)

JUDICIAL RECORDS ARCHIVES
RECEIVED

ICTR

Handwritten signature and date: 09/10/2000

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

Office of the Prosecutor:
Mr Charles Adeogun-Phillips
Mr Wallace Kapaya

Counsel for the Elizaphan Ntakirutimana:
Mr Ramsey Clark

Counsel for the Gerard Ntakirutimana:
Mr Edward Medvene

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

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

CONSIDERING the indictment, ICTR-96-10-I, confirmed on June 20, 1996, by Honourable Judge Khan, as amended on 27 March 2000, in the case of Prosecutor v. Elizaphan Ntakirutimana, Gerard Ntakirutimana, and Charles Sikubwabo (hereinafter "the present indictment");

CONSIDERING the Prosecution's motion, filed on 7 April 2000, entitled *Prosecutor's Request for Leave to File an Amended Indictment*, and the proposed amended indictment attached thereto;

CONSIDERING the brief in opposition filed jointly by the Defence for Elizaphan Ntakirutimana and Gerard Ntakirutimana, on 14 July 2000;

THE Trial Chamber hereby decides the motion on the basis of the written briefs.

THE FACTS

1. The present indictment, ICTR-96-10-I, charges Elizaphan Ntakirutimana, Gerard Ntakirutimana, and Charles Sikubwabo for events that occurred at the Mugonero Church Complex, Gishyita Commune, Kibuye, on or about 16 April 1994. Elizaphan Ntakirutimana and Gerard Ntakirutimana are also charged jointly in a separate indictment, ICTR-96-17-I, for events that occurred in the area of Bisesero, Kibuye, in April to June 1994. Charles Sikubwabo, who is still at large, is charged, along with the others, in another separate indictment, ICTR-95-1-I, for events that occurred in the area of Bisesero, and at Mubuga Church, Kibuye, in April to June 1994.
2. The Prosecution requested leave to amend the present indictment, ICTR-96-10-I, pursuant to Rule 50 of the Rules of Procedure and Evidence (hereinafter "the Rules"). Specifically, the Prosecutor requested leave to:
 - i. Amend paragraph 2 to include the period of May and June 1994, and to incorporate Gishyita and Gisovu communes, as presently exist in two separate indictments ICTR-96-17-I and ICTR-95-1-I;
 - ii. Amend counts 1 and 2 so that the charge outlined in count 2 is alleged as an alternative count;
 - iii. Amend paragraph 3 to include the allegation that Gerard Ntakirutimana had authority and control over his subordinates;
 - iv. Amend paragraph 5 and all six counts, to include the allegation that Gerard Ntakirutimana is responsible under Article 6(3) of the Statute;

- v. Amend paragraph 5 and all six counts, to include the allegation that the alleged acts were committed during the months of April, May and June 1994, in Gisovu and Gishyita communes;
- vi. Amend the concise statement of facts to consolidate allegations of the criminal conduct of the three accused in Bisesero and of Charles Sikubwabo at Mubuga Church, as presently exists in two separate indictments ICTR-96-17-I and ICTR-95-1-I.

3. In their opposition to the said Prosecutor's motion, the Defence submitted that the purported amendment is in fact a vehicle to circumvent the Rules governing joinder. Regarding the request to add responsibility under 6(3) of the Statute in relation to Gerard Ntakirutimana, the Defence submitted that this request is inconsistent with the law and is not supported by the allegations contained in the proposed amended indictment. Further, that combining the charges in the three indictments would hinder judicial economy.

PROCEDURAL ISSUES

4. Rule 50(A) states,

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

5. In the instant case Gerard Ntakirutimana made his initial appearance on 2 December 1996, and Elizaphan Ntakirutimana made his initial appearance on 31 March 2000.¹ Therefore, in respect of the Ntakirutimana's, an amendment may be requested by leave of a Trial Chamber pursuant to Rule 73. Although Charles Sikubwabo is still at large and has not yet made an initial appearance, because he is jointly charged in the same indictment with the two Ntakirutimana's, the Trial Chamber will hereby consider the Prosecution's request for leave to amend in relation to Charles Sikubwabo also.

DELIBERATIONS

6. The Prosecution sought leave to amend the present indictment in three ways. Firstly, to consolidate the factual allegations and incorporate the charges contained the indictments ICTR-96-17-I and ICTR-95-1-I, into the present indictment. Secondly, to prefer counts 1 and 2 in the alternative. Thirdly, to charge Gerard Ntakirutimana with responsibility as a superior under Article 6(3) of the Statute. The Chamber will deal with these requests in order.

¹ The Prosecution incorrectly stated, in its brief in support at para 3.4 that Elizaphan Ntakirutimana has yet to make his initial appearance.

The Prosecution's requests to consolidate the factual allegations and incorporate the charges contained in the indictments, ICTR-96-17-I and ICTR-95-1-I, into the present indictment

7. The Prosecution has submitted that the amendment is sought, "to consolidate the factual allegations and incorporate the charges contained in three confirmed indictments into the present indictment, save for counts 18, 19, 24 and 25 in the indictment ICTR-95-1-I and count 7 of the indictment ICTR-96-17-I, which are excluded." (Prosecutor's brief in support at para 3.10). It has further stated that, the amendments are "necessary to consolidate the evidence alleged [sic] all the accused persons named herein [sic], presently contained in three existing indictment. (*Ibid* at para 3.41) The evidence implicates the accused together with others already before this tribunal in a broad conspiracy at a national level and the request for leave to amend . . . is a valid procedure provided for in the Statute and the Rules and the best procedure to reflect the totality of the accused alleged criminal conduct." (*Ibid* at para 3.43).

8. The Defence has submitted that the Prosecution's request for amendment is, in fact, a request for joinder. It is under the provisions of Rules 48 and 49, which govern joinder that the Prosecution must show that the acts to be joined were committed in the course of the same transaction, which the Prosecution has failed to do. Further that prior decisions granting leave to amend, have been granted on the basis of new evidence discovered during ongoing investigations. In the instant case, the Prosecutor has not based its request on new evidence.

9. The Defence notes that the charges that the Prosecution proposed to add relating to Sikubwabo from the indictment ICTR-95-1-I, include a conspiracy to commit genocide in Kibuye Prefecture in which the two Ntakirutimana's are not implicated. The Defence has argued that the addition of acts from indictment ICTR-95-1-I would cause prejudice to the Ntakirutimana's, since findings of fact implicating Sikubwabo in the commission of genocide, have already been made in the Kayishema and Ruzindana Judgement, thus exposing the case to contamination. According to the Defence, the end result of the proposed amendments would be to add allegations of separately charged conduct unrelated to the Ntakirutimana's as well as adding individuals, who are not charged with conspiring with the Ntakirutimana's.

10. In relation to judicial economy, the Defence has submitted that combining the charges in the three indictments would turn a one-month trial of two accused persons, in relation to events on a single day, at one site, into a complicated trial of at least six months. Further, that the Prosecution never asserted commonality of witnesses in the three indictments, or any other substantive issue purported to support judicial economy. The Defence also pointed out that Charles Sikubwabo at all times since the confirmation of his indictment has been a fugitive and, if he remains a fugitive when this case comes for trial on 22 January 2001, his severance would be required by reason of his absence alone, without regard to other factors. Therefore, joining the allegations from indictment ICTR-95-1-I to the present indictment, would be a futile exercise.

11. Finally, the Defence noted that, if the Ntakirutimana's are convicted on the present indictment, then the Prosecution may not need to proceed on the other indictment. Conversely, if the Ntakirutimana's are acquitted, then the Prosecution would still have the option to proceed on the second indictment.

12. The Trial Chamber, having considered all the matters stated above, is of the view that the request of the Prosecution to consolidate the factual allegations and charges contained in three confirmed indictments into the present indictment, should be denied.

The Prosecution's request to amend counts 1 and 2 so that the charge outlined in count 2 is alleged as an alternative count

13. The Prosecution, in its request for leave to file an amended indictment, sought to allege count 2, complicity in genocide, an alternative to count 1, genocide. Although, in its brief in support, the Prosecution has provided no reasons for this request, it is clear to the Chamber that the request is intended to bring the indictment in line with current jurisprudence of the Tribunal. In *Akayesu*, the Chamber held that, "given that genocide and complicity in genocide are mutually exclusive by definition, the accused cannot obviously be found guilty of both these crimes for the same act."² Thus, where the counts of genocide and complicity in genocide are based on the same facts, they should be charged in the alternative. The Defence, in its opposition brief, did not oppose this amendment.

14. Therefore, the Chamber is of the view that the Prosecution may amend counts 1 and 2 in order to charge count 2 as an alternative to count 1, and to renumber the counts accordingly.

The Prosecution's request to amend the factual allegations and include charges under Article 6(3) of the Statute against Gerard Ntakirutimana

15. The Prosecution sought to amend the factual allegations contained in paragraph 3.2 of the present indictment, and to add paragraph 4.27 as contained in the proposed amended indictment, in order to add charges against Gerard Ntakirutimana under Article 6(3) of the Statute. In the proposed amended indictment, paragraphs 3.2 and 4.27 read as follows:-

"3.2 Gerard Ntakirutimana is believed to have been born in 1957 in Ngoma sector, Gishyita commune, Kibuye Prefecture. During the time of the events referred to in this indictment, he was a physician and Medical Director at Mugonero hospital within the Mugonero complex, Gishyita commune Kibuye Prefecture. In this capacity, Gerard Ntakirutimana exercised authority and control over employees of the Mugonero hospital including patients that sought medical attention therein.

4.27 Before all of the above mentioned attacks, Gerard Ntakirutimana knew or had reason to know that his subordinates, including various employees of the

² Akayesu Judgement, 2 September 1998, at para 700

Mugonero hospital under his authority and control, were about to participate in attacks on the men, women, and children, and did not take necessary and reasonable measures to prevent such attacks. In addition, after the attacks, Gerard Ntakirutimana did not punish the perpetrators.”

16. The Prosecution further requests the amendment to paragraph 5 and all six counts to include the charges that Gerard Ntakirutimana is responsible under Article 6(3) of the Statute. The Prosecution stated that these amendments are necessary to reflect the accused's involvement in the commission of crimes as a superior and the current jurisprudence of the Tribunal.

17. The Defence submitted that the proposed amendments to the factual allegations, which relate to command responsibility, are merely repetitions of the wording of the Statute and are insufficient to put the accused on proper notice. More specifically, that the proposed amended indictment fails to allege facts, which meet the prerequisites for a charge of command responsibility and, as such, is deficient and impermissibly vague. The Defence further argued that to base a charge of command responsibility on such evidence is contrary to the jurisprudence of the ICTR and ICTY. The Defence urged the Chamber to reject these amendments or, in the alternative, to undertake a preliminary review to determine whether a *prima facie* case exists to warrant the new charges.

18. The Chamber notes that the amendments are intended to establish the culpability of Gerard Ntakirutimana on the basis of his responsibility as superior under Article 6(3), by virtue of the official position that he held, in relation to the events for which he is already charged under Article 6(1). The Chamber is of the view that, in the context, the allegations are sufficiently specific. Whether a charge under Article 6(3) is contrary to the jurisprudence of the ICTR and ICTY, is a matter of evidence, and it will be for the Prosecution to substantiate its allegations during the trial. Therefore, the Chamber is of the view that the Prosecution may amend the factual allegations, in the manner drafted in paragraphs 3.2 and 4.27, and the charges as contained in paragraph 5 and all 6 counts, of the proposed amended indictment.

**FOR ALL THE ABOVE REASONS
THE TRIBUNAL**

Grants the Prosecution's request for leave to amend counts 1 and 2 in the present indictment in order to charge count 2 as an alternative to count 1, and to renumber the counts accordingly.

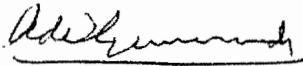
Grants the Prosecution's request for leave to amend the factual allegations, in the manner drafted in paragraphs 3.2 and 4.27, and paragraph 5 and all 6 counts of the proposed amended indictment, in order to add the charge that Gerard Ntakirutimana is liable under Article 6(3) of the Statute.

Denies the Prosecution's request for leave to amend the indictment in all other respects.

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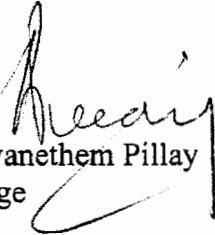
Done this 6th October 2000



Asoka de Zoysa Gunawardana
Presiding Judge



Erik Møse
Judge



Navanethem Pillay
Judge

