

ICTR-99-50-I

06.10.2003

(5945 — 5937)



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 6 October 2003

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

Case No. ICTR-99-50-I

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ICTR
OFFICE OF THE PROSECUTOR

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

Office of the Prosecutor

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

Counsel for the Defence

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

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

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

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

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

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

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

SUBMISSIONS OF THE PARTIES

Prosecution Submissions

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

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

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

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

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

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

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

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

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and balancing them with the interests of justice. The Prosecution submits that she has made all efforts to submit the proposed Amended Indictment prior to the commencement of trial although in the *Akayesu* case the Trial Chamber allowed the Indictment to be amended during the trial in the interests of justice.³

7. The Prosecution submits that it has already disclosed all the new and additional evidence to the Defence in the interests of justice. It submits that the amendment will not be prejudicial to the Accused because it will not result in the delay of the trial given the amendments proposed in the current Indictment. Whereas the current Indictment is comprised of 80 pages, the proposed Amended Indictment is less than 30 pages.

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

Joint Response of Mugiraneza and Bicamumpaka

9. Noting Mugiraneza's Motion to dismiss the Indictment for *inter alia* undue delay⁴, the Defence Counsel for Mugiraneza and Bicamumpaka submit a short joint response to the Motion.

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

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

12. The Defence points out that that the Prosecution have had four years to complete investigations. The Defence submits that for the past four years the Prosecution has been indicating that it intends to amend the Indictment but instead, it files its Motion to amend the

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

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

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Indictment on the eve of trial. The Defence thus prays that the Chamber deny the Prosecution Request for leave to amend the Indictment.

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

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

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

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

Bizimungu's Response

16. The Defence for Bizimungu objects to the Motion.

17. The Defence recalls the provisions of Articles 19(1) and 20(4)(a) – (c) of the Statute.

18. The Defence submits that in conformity with the jurisprudence of the Tribunal, the Motion should be considered by the Trial Chamber to which the Accused made his initial appearance,⁵ which in the instant case was composed of Judges Sekule, Maqutu and Ramarosan. The Defence notes that the Chamber now includes Judge Gunawardana in place of Judge Maqutu whose mandate was not extended due to his non re-election. The Defence requests that the President definitively name pursuant to Article 15*bis* and Rule 27, the Judge who is replacing Judge Maqutu to make up the Trial Chamber.

19. The Defence argues that the proposed amendment is unfair to Bizimungu because it includes substantial new facts, yet the Prosecution requests the Chamber to consider it not as a new Indictment but as an amended Indictment. In view of the substantial proposed changes, the Defence requests the Chamber to order the Prosecution to provide a table comparing the elements of the current Indictment and proposed Amended Indictment, in order to understand the magnitude of the requested modifications.

20. In fact, the Defence points out that the proposed Amended Indictment has 28 new allegations in prefectures where Defense investigators have not made any investigations, i.e., the Prefectures of Ruhengeri, Butare, Gisenyi and Gitarama. It points to the following as substantial new changes made in the proposed Amended Indictment;

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

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- a. allegations with regard to Ruhengeri are new and contain new events, new individuals, new dates and new sites;⁶
- b. allegation at paragraph 21 are new as they refer to a speech given by the Prime Minister at the University of Butare between 1 and 31 May 1994, inciting the population to exterminate the enemies;
- c. allegations of crimes committed in Gitarama in paragraphs 44 and 45 are new as they refer to murders that Bizimungu allegedly ordered and to which he was witness between 15 April and 15 May 1994;
- d. allegation at paragraph 125 are new as they refer to a directive from the Interim Government in May 1994 requiring civil servants to report for their salaries; and this paragraph further alleges that Bizimungu knew that this directive was intended to exclude Tutsis and to put them at risk of being killed;
- e. allegations at paras. 52, 53, 54, 124 and 126 are new because they refer to incitement by Bizimungu at Umuganda Stadium and the Meridien Hotel between the months of May and June 1994;
- f. allegations at paragraphs 28, 29 and 47 are new as they refer to a speech made by Bizimungu in April 1994 and that the RTLM will be controlled by the Interim Government;
- g. the allegations at para. 14 are new as they allege that Bizimungu made a radio broadcast on 11 April 1994.

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

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

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

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

Prosecutions reply to Bizimungu's Response

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

HAVING DELIBERATED

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

Rule 50: Amendment of Indictment

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

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

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

26. The Chamber recalls its opinion in the *Niyitegeka* Decision that, "[o]nce the indictment is confirmed, the Prosecutor's power to amend a confirmed indictment is not unlimited and must be considered against the overall interests of justice as envisioned by Rule 50(A)." In that Decision it was stated that, "[g]enerally amendments pursuant to Rule 50 are granted in order to; (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment."⁷

27. Essentially, the Trial Chamber balances the rights of the Accused as prescribed under Article 19 and 20 of the Statute, which *inter alia* provide for the Accused right to be informed promptly and in detail of the nature and cause of the charge against him or her, and the right to a fair and expeditious trial without undue delay. These rights are balanced with the complexity of the case. It is therefore the discretion of the Trial Chamber to consider requests under Rule 50 in the light of the particular circumstances of the case before it.

28. Under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of its Motion and it is for the Defence to respond to these arguments.⁸

29. In the instant case, the Prosecution seeks leave to amend the current Indictment following the discovery of new evidence which was not available at the time of confirmation of the current Indictment. The Prosecution submits that she seeks to remove two Counts and

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

⁸ *Prosecutor v. Musema*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment," of 18 November 1998

combine and charge alternatively the Counts of Genocide and Complicity in Genocide. She further seeks to expand the remaining Counts focusing on the Accused's participation in the crimes they are alleged to have committed in 1994. Finally the Prosecution submits that she seeks to remove the section on 'Historical Context,' thereby reducing the current Indictment from a total of 80 pages and substituting it with the proposed Amended Indictment which consists of a total of less than 30 pages.

30. The Chamber notes that it is only the Defence of Mugenzi who does not object to the Motion, rather it maintains that the Accused, "[v]igorously denies all of the allegations made against him, whether they are said to be supported by the original evidence or any new evidence obtained after the confirmation of the original indictment."⁹ On the other hand the Defence Counsel for the Accused Bizimungu, Mugiraneza and Bicumupaka object to the Motion mainly because of the Prosecution's delay in bringing the Motion particularly as the commencement of the trial in this case has been set to be 3 November 2003 – hardly two months from the date when the Motion was filed.

31. In regard to the Prosecution intention to remove certain Counts of the current Indictment and likewise the section on 'Historical Context,' the Chamber notes that the Prosecution may do so without necessarily requiring an amendment under Rule 50. With regard to the Prosecution intention to combine and charge alternatively the Counts of Genocide and Complicity in Genocide, the Chamber finds this procedure irregular and would render the count bad for duplicity and will pose problems particularly when it has to pronounce judgment and sentence on one or the other of the charges. The Chamber thus finds that it is not in the interests of judicial economy to allow the Prosecution to amend the current Indictment for the reasons she has provided above.

32. The Chamber considers the Prosecution further request to amend the current Indictment following its discovery of new evidence which was not available at the time of confirmation of the current Indictment which thereby necessitates the expansion of the remaining Counts.

33. It is noted that the Prosecution submits that although the amendment she makes will result in the expansion of the Accused individual participation in the crimes they are alleged to have committed, the amendments themselves do not result in the addition of new charges. In fact, the Prosecution submits that the proposed Amended Indictment is clearer and more specific making it in accord with the jurisprudence of the Tribunal and the current charging practices of the Prosecution. The Defence on the other hand point to specific areas of the proposed Amended Indictment where in they allege that the factual allegations amount to new charges.

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

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

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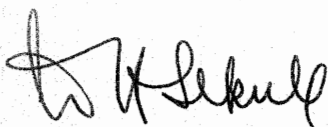
crimes. The Chamber finds that such substantial changes would necessitate that the Accused be given adequate time to prepare his defence.

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

FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion in its entirety.

Arusha, 6 October 2003



William H. Sekule
Presiding Judge



Asoka de Zoysa Gunawardana
Judge



Arlette Ramaroson
Judge

Seal of the Tribunal