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NATIONS UNIES
UNITED NATIONS

tribunal pénal international pour le Rwanda
International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

Before: Judge Andréia Vaz, presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registry: Adama Dieng
Date: 13 February 2004

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THE PROSECUTOR

v.

ÉDOUARD KAREMERA
MATHIEU NGIRUMPATSE
JOSEPH NZIRORERA
ANDRÉ RWAMAKUBA

Case No.: ICTR-98-44-T

DECISION ON THE PROSECUTOR'S MOTION FOR LEAVE TO AMEND THE
INDICTMENT

Rule 50 of the Rules of Procedure and Evidence

Counsel for the Defence:

Dior Diagne
David Hooper and Andreas O'Shea
Charles Roach and Frédéric Weyl
Peter Robinson

Office of the Prosecutor:

Don Webster
Ifeoma Ojemeni
Dior Fall
Simone Monasebian
Holo Makwaia
Tamara Cummings-John
Ayo Fadugba
Sunkarie Ballah-Conteh

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The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera, André Rwamakuba
Case No.: ICTR-98-44-T

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the Tribunal),

SITTING as Trial Chamber III (the Chamber), composed of Judge Andréia Vaz, presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey,

BEING SEIZED of the Prosecutor's Motion for leave to amend the Indictment, entitled "Prosecutor's *Observations Supplémentaires* concerning the Motion to file an amended Indictment of 29 August 2003, The Appeals Chamber Decision of 19 December 2003 and Prosecutor's request for leave to include additional factual allegations in the amended Indictment filed pursuant to Trial Chamber III Order of 19 January 2004" filed on 23 January 2004,

CONSIDERING the Prosecutor's Motion for leave to amend the Indictment entitled "Prosecutor's Consolidated Motion (i) for separate trials pursuant to Rules 72 and 82; and (ii) for leave to file an amended Indictment pursuant to Rules 73 and 50", filed on 29 August 2003,

CONSIDERING the Trial Chamber's decision of 8 October 2003 dismissing the motion,

CONSIDERING the Appeals Chamber's decision of 19 December 2003 vacating the said decision and referring the parties to the Trial Chamber,

CONSIDERING the Order of 13 January 2004 following the Appeals Chamber's decision of 19 December 2003,

CONSIDERING Mr. Rwamakuba's response entitled "André Rwamakuba's consolidated supplementary observations on Prosecution request to amend the indictment in the light of the Appeals Chamber Decision of 19 December 2003" filed on 26 January 2004,

HAVING heard the Parties on 27 January 2004,

CONSIDERING Mr. Ngirumpatse's response entitled "Submissions on behalf of Matthieu Ngirumpatse on Prosecutor's Motion to file an amended indictment" filed on 4 February 2004,

CONSIDERING the Prosecutor's reply filed on 9 February 2004,

CONSIDERING the fact that the Defence failed to file a rejoinder,

CONSIDERING the Tribunal's Statute and the Rules of Procedure and Evidence (the Rules),

RULES on the strength of the afore-mentioned briefs and oral arguments, in conformity with Rule 73(A) of the Rules.

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SUBMISSIONS OF THE PARTIES

The Prosecutor

1. By his Motion of 23 January 2004, the Prosecutor reasserts his previous motion of 29 August 2003 by appending as Annexure A ("Annexure A") a revised version of the proposed amended Indictment.

2. The Prosecutor's Motion is based on the discovery of new evidence concerning the details of the crimes the Accused are charged with. He further explains that the evidence could not be gathered earlier for the following reasons:

- (i) Improved co-operation between ICTR and the Government of Rwanda especially on matters of logistics and the increased access to detainees in Rwanda has recently enabled the Prosecutor to compile information from other perpetrators of the crimes who implicated their superiors, including the Accused, on the basis of which the charges could be expanded with enhanced specificity;
- (ii) With regards to Joseph Nzirorera's responsibility for crimes committed in Ruhengeri (paras. 33 to 33.12 of Annexure A) and various acts of incitement (paras. 24 to 24.6 of Annexure A), the proposed amended Indictment relies on recent statements of witnesses, among them GAP, GFF, GBU and GFA, who were charged with the same crimes before the Rwandan courts. Their statements implicating Joseph Nzirorera only became available after their conviction in 2002 and 2003; -
- (iii) Paragraphs 32 to 32.5 of Annexure A on the activities of Mathieu Ngirumpatse in Cyangugu *préfecture*, and in particular in Bisesero, are based on new information provided by several witnesses (LAP, LAI, LAJ and LAR) between 28 August and 11 November 2003;
- (iv) The Prosecutor submits that Édouard Karemera's direct involvement in killings in Bisesero in mid-May and in late June 1994 as set forth for the first time in paragraphs 34 to 34.3 and 53.1 of Annexure A is based, *inter alia*, on the statement of Witness EY disclosed to the Defence before 1 March 2001. According to the Prosecutor, the said paragraphs refer only to the allegations set forth in the Indictment of 21 November 2001.

3. The Prosecutor relies on developments in the case law of the international tribunals with regard to war crimes, joint criminal enterprise and the applicability of the extended notion of joint criminal enterprise to crimes of sexual violence. He cites cases in which other trial chambers excluded testimonies on the extended notion of joint criminal enterprise on the grounds that this was not explicitly mentioned in the indictment. He emphasizes that joint criminal enterprise is not tantamount to the introduction of new charges, and also submits that the proposed changes are necessary in order to ensure the admissibility of some testimonies in the trial.

4. The Prosecutor also submits that his motion to amend the Indictment is a *bona fide* attempt to afford the parties and the Trial Chamber the clearest possible picture of what will be presented during the trial.

5. The Prosecutor recalls the provisions of Rule 50(B) and (C) and the comment of the Appeals Chamber Decision that:

“One may safely assume a delay on [*sic*] the order of months, due to motions challenging the Amended Indictment under Rules 50(C) and 72 and additional time to allow the Accused to prepare to respond to new allegations in the Amended Indictment.”¹

The Prosecutor concludes that the amendment will not be prejudicial to the Accused persons, since the Trial Chamber, by hearing the witnesses testifying on the new allegations towards the end of the Prosecution case, will allow the Defence enough time to undertake new investigations.

6. The Prosecutor requests the Trial Chamber to assess the delay that might result from his proposal to amend the Indictment in the light of the added time required by the Defence for Édouard Karemera, owing to the recent assignment of a new counsel following the withdrawal of his Counsel and co-Counsel.

7. The Prosecutor requests the Trial Chamber:

- (i) To grant him leave to amend the Indictment against Mathieu Ngirumpatse, Joseph Nzirorera, Édouard Karemera and André Rwamakuba as proposed in Annexure A;
- (ii) To organize the initial appearance of the Accused persons as soon as possible to enable them to plead guilty or not guilty to the charges in accordance with the provisions of Rule 50(B).

The Defence

Nzirorera

8. On 23 January 2004, the Defence for Nzirorera filed a response referring to the following observations, which were submitted orally during the informal meeting of 22 January 2004:

- (i) The amended Indictment will violate the right of the Accused to be tried within a reasonable time;

¹ *The Prosecutor v. Édouard Karemera et al*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's interlocutory appeal against Trial Chamber III Decision of 8 October 2003 denying leave to file an Amended Indictment, 19 December 2003, para. 24.

- (ii) The proposed amended Indictment will contain new charges that would not have been confirmed had the Prosecutor proposed them in the initial Indictment. It is therefore necessary for the Trial Chamber to base its decision on the motion on supporting materials for the new Indictment;
- (iii) In its Decision of 19 December 2004 [*sic*], the Appeals Chamber did not contradict the Prosecutor's position that the amended Indictment contained new allegations;
- (iv) The principle established by the case law of the two Tribunals, namely that new factual allegations which carry considerable weight require the holding of a new initial appearance, would be applicable;
- (v) With the addition of the notion of joint criminal enterprise, the Indictment will contain new charges;
- (vi) The Defence took note of the new charges in August 2003, but has not yet had the opportunity to conduct the relevant investigations;
- (vii) In its Decision of 19 December 2004 [*sic*], the Appeals Chamber anticipated a "delay of the order of several months" if the Trial Chamber authorized the amendment of the Indictment.

9. In the event that the Trial Chamber grants leave to amend the Indictment, the Defence for Nzirorera requests that a further appearance be held pursuant to the provisions of Rule 50(B), with the consequences envisaged in Rule 50(C) of the Rules of Procedure and Evidence.

Ngirumpatse

10. The Defence for Ngirumpatse affirms as follows:

- (i) The Trial Chamber should rule only on the Prosecutor's Motion of 23 January 2004;
- (ii) The Prosecutor has not demonstrated proof that he acted diligently and in good faith;
- (iii) The delay resulting from the late proposal to amend the Indictment violates the right of the Accused to a speedy and fair trial;
- (iv) The Prosecutor has not justified the belated filing of his 29 August 2003 Motion, given the fact that the amended Indictment presented on that day had already been finalized a month before;
- (v) The Prosecutor has not explained why access to the Rwandan judicial authorities had not improved earlier;

- (vi) The Prosecutor has not demonstrated that it was impossible to obtain earlier new statements from witnesses including GAP, GFF, GBU, GFA, LAP, LAI, LAR and LAJ, most of whom had been in custody for a long time;
- (vii) The evidence on the new factual allegations, including the Bisesero events, should have been collected and disclosed to the Defence a long time ago;
- (viii) The reformulation of the responsibility of the Accused on the basis of developments in case law on the notion of joint criminal enterprise is prejudicial to the Accused;
- (ix) The introduction of the charge of joint criminal enterprise, which moreover is not necessary, in the light of the existing charges of conspiracy, coupled with the factual details contained in the proposed Indictment, calls for a new initial appearance;
- (x) The proposed amendments would be prejudicial to the Accused in so far as the Prosecutor appears to be deducing individual responsibility from that of MRND;
- (xi) Paragraph 66 of the proposed amended Indictment is prejudicial to the Accused because it is vague and general in nature;
- (xii) If the Trial Chamber admits the amendments, then the Defence should be given ample time to conduct new investigations, especially on the allegations made about the events at Bisesero. The Trial Chamber should also instruct the Registry to facilitate the said investigations;
- (xiii) The Trial Chamber should not hear witnesses before a final decision is rendered on the proposed amendment.

11. The Defence for Ngirumpatse prays the Trial Chamber to deny the Prosecutor's motion on the grounds that, in its view, the motion exceeds the Trial Chamber's Decision of 8 October 2003.

Rwamakuba

12. The Defence for André Rwamakuba affirms as follows:

- (i) The Prosecutor has not indicated the dates when the new evidence was discovered and the impact it has on the Indictment, thereby failing to justify his lack of diligence;
- (ii) The Prosecutor bases his case to a large extent on witness statements taken well before August 2003 or January 2004;

- (iii) The Prosecutor could have incorporated the notion of joint criminal enterprise in the current Indictment. Admitting an amendment in these circumstances would be unjust insofar as the delays occasioned by the amendment constitute an abuse of process;
- (iv) Granting the amendment would lead to unjustifiable delays. The Appeals Chamber had urged the Trial Chamber to take into consideration the effect of the amendment on the overall proceedings, but the fact that the Prosecutor has not reduced the number of his witnesses makes his case vague;
- (v) Since the discovery of new facts would require further investigations, serious prejudice would be caused to the Accused were the amendment granted.

13. The Trial Chamber notes that Karemera's Defence has not filed a response to the Prosecutor's motion for amendment, despite several extensions of the time limit.

Prosecutor's Reply

14. The Prosecutor denies that he derived any unfair advantage from his exclusive control over the evidence. Indeed, he asserts that he provided continuous disclosures of witness statements to the Defence in accordance with Rule 66 of the Rules of Procedure and Evidence.

15. The Prosecutor further submits that he had disclosed all the statements in support of the allegations not contained in the current Indictment (attachment 1 to his reply).

16. As regards the notion of joint criminal enterprise, the Prosecutor maintains that from the very beginning his case was based on the theory that the Accused persons were co-perpetrators. In support of his argument he cites, *inter alia*, paragraph 6.104 of the November 2001 Indictment.

17. The Prosecutor submits that the collective responsibility of the co-Accused for creating RTLM and financing its activities did not come as a surprise, as this allegation is contained in paragraphs 5.12 and 5.13 of the November 2001 Indictment, which correspond to paragraphs 22 and 23.6 of the proposed Indictment.

18. The Prosecutor concedes that the charge of rape as a crime against humanity in category 3 of the notion of joint criminal enterprise pleaded in the proposed Indictments may exceed the allegations contained in the current Indictment. However, the Prosecutor notes that the Defence has never raised this issue in its responses to his Motion.

19. The Prosecutor further submits that evidence recently obtained following confessions made to the Rwandan judicial authorities forms the basis of the allegations against Nzirorera and Ngirumpatse. The same applies to witnesses who implicated them in their statements taken in 2002 and 2003.

20. With respect to Accused Karemera, the Prosecutor acknowledges that paragraphs 34 to 34.3 and 53.1 of the Indictment are completely new. The Prosecutor submits, however, that these paragraphs make more specific the charges contained in the current Indictment as well as in the other accusatory instruments. Furthermore, he submits that the charges are based essentially on the testimony of Witness EY, who was included in the final list of witnesses transmitted on 10 October 2003. According to the Prosecutor, it was during a mission of reconfirmation conducted in November 2003 that Witness EY provided additional testimony on the events that occurred in Kibuye. This led the investigators to record the statements of three additional witnesses who corroborated the testimony of EY.

21. Moreover, the Prosecutor considers that the Trial Chamber could grant him leave to include, on the basis of the November 2001 and July 2003 Indictments, recently obtained testimony from witnesses implicating Karemera in the Kibuye killings of mid-May 1994.

22. The Prosecutor also considers that, by virtue of Rule 66(A)(i), he is not obliged to provide supporting materials for his motion if leave to amend is granted. He has already provided the Defence with all the witness statements and documentary evidence used to support the new charges.

Deliberations

23. First of all, the Trial Chamber notes that the Prosecutor does not contest the severance and reduction of the counts. The arrangements made by the Chamber concerning the said amendments are final and will not be revisited. Therefore, the Trial Chamber will rule only on the Prosecutor's Motion of 23 January 2004.

New charges and diligence on the part of the Prosecutor

24. The Appeals Chamber considered that one of the most important factors to be taken into consideration in granting leave to amend an indictment is ascertaining if the Prosecutor has shown evidence that he "acted with diligence in securing the new evidence and in bringing the Motion in the Trial Chamber".² His diligence must be measured "within the framework of the overall requirement of the fairness of proceedings",³ taking into account the rights of the accused.

25. The Trial Chamber notes that the Prosecutor brought before it a request, which was allegedly based on new evidence, to amend the Indictment. It is then proper, also taking into account the reasoning of the Appeals Chamber, to determine if the evidence in support of the new allegations could have been found and incorporated into the proposed indictment earlier, thereby making any amendment at this stage unjustifiable.

26. This issue must be resolved by making a distinction between diligence and *mala fides*. The absence of diligence on the part of the Prosecutor does not necessarily mean that he acted

² *Ibidem*, para. 22.

³ *Ibidem*.

with the intention of obtaining an advantage over the Defence, which would create a presumption of *mala fides* on his part.

27. The Trial Chamber notes that the memorandum on the organization of the civil defence programme used to support the new allegation that Ngirumpatse, Nzirorera and Karemera exercised control over the heads of that programme and of *Interahamwe* did not reach the Prosecutor until long after August 1998, when the current Indictment had already been confirmed. The fact that the Prosecutor failed to establish the date and origin of the memorandum reflects a lack of diligence on his part, which is prejudicial to the Accused; consequently this document, as it stands, cannot be used in support of the allegations.

28. Furthermore, the Trial Chamber notes the Prosecutor's submission that many witnesses recently pleaded guilty before Rwandan courts and implicated the Accused persons in their fresh statements. Thus, witnesses GAP, GFF, GBU, GFA, GFG, GFB, GDC and ALG implicated Nzirorera only in their statements recorded in 2002 and 2003. This would have provided substantial support for paragraphs 24 to 24.6 and paragraphs 33 to 33.12, which correspond to the fresh allegations not contained in the current Indictment. The Trial Chamber notes that the Prosecutor used these witness statements, most of them dating from the end of 2002 and the first half of 2003, to justify part of his Motion for amendment of July 2003. In so doing, the Prosecutor was diligent at that time, and still is, insofar as the aforementioned paragraphs of the 2004 amended Indictment incorporate the same changes supported by the same evidence. Furthermore, the Trial Chamber considers that the justification adduced by the Prosecutor in respect of the new allegations brought against Nzirorera should also be assessed in the light of the complex nature of the trial and, consequently, of the difficulty of collecting evidence to sustain the allegations made against the Accused.

29. The Trial Chamber also notes Rwamakuba's submissions to the effect that an analysis of Annexure A shows clearly that the Prosecutor relies to a large extent on witness statements taken well before August 2003 or January 2004.⁴ However, the Chamber is convinced by the Prosecutor's submissions that even though witnesses pleaded guilty as far back as 1998, it was only with the advent of the *Gacaca* courts that he had freer access to the witnesses. In addition, the fact that some new witnesses have become available only recently because of the ripple effect the *Gacaca* courts have had on potential witnesses and the changes in the Rwandan judicial system are acceptable justifications. The Chamber notes that the statements of Witnesses GIJ and GLM (dated 11 February 1998), used *inter alia* to support the allegation that Rwamakuba joined the extremist "*Hutu Power*" wing, had already served as a basis for the proposed Indictment of July 2003. The Chamber is therefore satisfied with the diligence shown by the Prosecutor in respect of the new allegations against Rwamakuba.

30. The allegations in paragraph 32 and the corresponding subparagraphs of the proposed Indictment refer to the Accused Ngirumpatse and to events that occurred in Cyangugu and Bisesero. By and large, these allegations are included in the current Indictment, on the basis of which the Accused Ngirumpatse knew that he had to defend himself against allegations relating

⁴ André Rwamakuba's consolidated supplementary observations on Prosecution request to amend the Indictment in the light of the Appeals Chamber Decision of 19 December 2003, 26 January 2004, para. 6.

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to speeches inciting anti-Tutsi violence, and even the killing of Tutsis, as set forth in paragraphs 32.1 and 32.3 of the proposed Indictment.⁵ The Accused was also aware by reason of the current Indictment that he had to defend himself against allegations relating to the distribution of weapons and the provision of logistical support to *Interahamwe*, as set forth in paragraph 32.2 of the proposed Indictment.⁶ The same can be said of the allegation set forth in paragraph 32 of the proposed Indictment that charges Ngirumpatse with planning, preparing, ordering and aiding and abetting attacks against the Tutsi population in Kigali-Ville.⁷ The allegation, set forth in paragraph 32.4 of the proposed Indictment, that Ngirumpatse ordered Yusuf Munyakazi to send *Interahamwe* as reinforcements to the attackers of Bisesero, in Kibuye *préfecture*, is not specifically mentioned in the current Indictment, but it is alleged, *inter alia* in paragraphs 4.20, 6.21[sic] and 6.54 thereof, that the Accused exercised some authority over the *Interahamwe* and that he gave them orders regarding the massacres of April to July 1994. Overall, these more specific allegations will assist the Defence in preparing its case. It will, however, need to conduct additional investigations into them. The Trial Chamber will therefore hear the relevant witnesses only towards the end of the Prosecution case.

31. In paragraph 34 of the proposed Indictment, the Accused Karemera is alleged to have committed certain acts relating to the massacres perpetrated in Bisesero, Kibuye *préfecture*, between April and July 1994. The allegations are as follows:

- (i) Paragraph 34.1: towards the end of April 1994, Karemera addressed local administrative authorities and inhabitants of Mwendu, Kibuye *préfecture*, explicitly inciting them to help Hutus kill the Tutsis who had sought refuge in the hills of Bisesero;
- (ii) Paragraphs 34.2 and 53.1: in mid-May 1994, Karemera was present during the attacks against Tutsi refugees on the hills of Bisesero, and with the local authorities, instigated, organized and ordered the massacre of Tutsi civilians;
- (iii) Paragraph 34.3: on 17 June 1994, Karemera requested military authorities to send reinforcements for a mopping up operation in the hills of Bisesero against Tutsis who had sought refuge there.

32. The allegations in subparagraphs (i) and (iii) above are not new, as the allegation set forth in paragraph 34.3 of the proposed Indictment is also mentioned in paragraph 6.50 of the November 2001 Indictment.⁸ The allegation in paragraph 34.1 of the proposed Indictment, for its

⁵ See especially paras. 5.4 to 5.14 of the current Indictment.

⁶ See, *inter alia*, para. 5.27 of the current Indictment.

⁷ See *inter alia*, para. 6.21[sic] of the current Indictment.

⁸ Para. 6.50 reads "In June 1994, Interior Minister Édouard Karemera ordered the Commander in Gisenyi, Anatole Nsengiyumva, to send troops into the Bisesero area, in Kibuye *préfecture*, supposedly to combat the enemy, although the RPF was in fact never in Bisesero. There was only a group of Tutsis refugees who had gathered in that region, fleeing the massacres."

part, only makes paragraph 6.42 of the November 2001 Indictment⁹ more specific. These additional details are in the interests of the Defence.

33. The proposals for amendment in respect of paragraphs 34.2 and 53.1 of the proposed Indictment do not figure in the August 2003 motion. Contrary to the Prosecutor's submissions, the Chamber notes that no paragraph in the current Indictment, and no passage in the supporting documents, shows any allegation against the Accused, Karemera, that he was present during the Bisesero attacks perpetrated in May 1994 and that he gave orders for Tutsi civilians to be killed.

34. However, according to the Prosecutor, these allegations derive originally from two witness statements, one of which was obtained from Witness ADA in June 1996 and the other from Witness EY in November 1998.¹⁰ The Prosecutor also submits that it was only after he had contacted Witness EY in November 2003 that he obtained information that enabled him to take the statements of several other witnesses who also declared that they had seen the Accused at Bisesero in May 1994.¹¹ The Prosecutor does not explain why he contacted Witnesses ADA and EY again on the subject of the allegations not included in the current Indictment only in June and November 2003, that is more than seven years after the first statement in the case of Witness ADA, and more than five years in the case of Witness EY. The Prosecutor does not demonstrate that he acted diligently to conduct additional investigations within a reasonable time in respect of these allegations, and, once the investigations were conducted, to seek leave to amend the Indictment. This, in the eyes of the Chamber, shows a lack of diligence prejudicial to the Accused. The Chamber therefore cannot authorize the amendment in respect of the allegations set forth in paragraphs 34.2 and 53.1 of the proposed Indictment relating to the presence of the Accused during attacks on Tutsi refugees in the hills of Bisesero in May 1994.

35. As regards the second count, namely, direct and public incitement to commit genocide, the Chamber notes that the Prosecutor has failed to adduce sufficient *prima facie* evidence that all the four Accused took part in the establishment of *Radio-Télévision Libre Des Mille Collines* (RTL) and the financing of its activities.¹² The Chamber is not satisfied with the Prosecutor's explanation in paragraph 25 of his reply that this allegation had already been mentioned in paragraphs 5.12 and 5.13 of the 21 November 2001 Indictment. The said paragraph 5.12 mentions only Félicien Kabuga in that context, while the supporting materials for the current Indictment regarding paragraph add only the name of Mathieu Ngirumpatse, among the Accused, to that of Kabuga. As regards paragraph 5.13, it refers only to the use of RTL for propaganda purposes. Paragraph 22 of Annexure A thus contains a new allegation, at least with respect to the Accused Karemera, Nzirorera and Rwamakuba. The Chamber notes that this new allegation is prejudicial to the Accused because it is not based on supporting materials, showing

⁹ Para. 6.42 reads "(...) between 24 April and 14 July 1994, (...) Édouard Karemera, [with other persons] travelled, either on their own or with others, to several *préfectures*, including Butare, Gitarama, Gisenyi, Kibuye and Cyangugu, to incite and urge the population to commit massacres, notably by commending the perpetrators."

¹⁰ See pp. 21 to 23 of Annexure B of the motion (original in English) and para. 48(ii)[sic] of the Prosecutor's reply.

¹¹ Namely, Witness AMM, AMO and GGX, whose statements were recorded in November 2003. See para. 48 of the Prosecutor's reply and Annexure B. Another witness is cited in Annexure B, with respect to these allegations, namely AMN, whose statement was also recorded by the Prosecutor in November 2003. *Ibid.*

¹² See in this regard para. 22 of Annexure A.

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lack of diligence on the part of the Prosecutor. Consequently the Chamber does not authorize the amendment of the Indictment in respect of these three Accused.

36. The third count, genocide, is based on Article 6(1) of the Statute, jointly with the notion of joint criminal enterprise, and at the same time on Article 6(3). The Chamber is of the view that this does not constitute a serious error of law justifying rejection of the new allegations made in support of this notion.

37. Furthermore, the Chamber is satisfied that in view of the new factual allegations and supporting material in relation to the fifth count, rape as a crime against humanity, there are grounds for commencing prosecution.

38. The Chamber notes the Prosecutor's submission that the proposed amendment adding new allegations is aimed at specifying the crimes the Accused are charged with and that the new allegations had already been brought to the knowledge of the Accused persons through the disclosure to the Defence of other documents and witness statements well before the presentation of the proposed Indictment.

39. The Chamber further notes that the Prosecutor cannot attempt to replace the Indictment by other accusatory documents (*inter alia*, the supporting material referred to in Rule 66(A)(i)), the pre-trial brief referred to in Rule 73(B)(i), less still by an Indictment dismissed by the Chamber, as he does in his reply. The right of the Accused to be informed through the Indictment of the charges preferred against them, as specified in Article 20(4)(c) of the Statute, is fundamental to the guarantee of a fair trial and, hence, to the requirement of avoiding irreparable prejudice to the Accused.

40. The Chamber is of the view that some of the new facts alleged in the proposed Indictment by the Prosecutor with the aim of specifying and extending the already existing charges are tantamount to new charges. Furthermore, the Chamber notes that these new allegations led the Prosecutor to apply the notion of joint criminal enterprise as regards counts 3 to 7. The Chamber therefore considers that new initial appearances will have to be organized.

Delays caused by amendment of the Indictment

41. In view of Article 20(4)(c) of the Statute, which guarantees the right of accused persons to be tried without undue delay, and Article 19(1), which requires the Trial Chamber to ensure that trials are fair and expeditious, it is necessary to assess whether granting leave to amend the Indictment could lead to unjustifiable loss of time.

42. Indeed, the Chamber holds the view that the amendment of the Indictment is aimed at restricting, in some respects, the scope of the allegations against the Accused. For instance, whereas it is stated in paragraph 5.27 of the November 2001 Indictment that before and during the period from April to July 1994, Joseph Nzirorera participated in the distribution of weapons to militiamen, the proposed Indictment states in paragraph 24.1 that, in the evening of 6 April and the morning of 7 April 1994, or thereabouts, Joseph Nzirorera participated in meetings in

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Mukingo and Nkuli *communes* at which he delivered firearms to militiamen. Furthermore, it is stated in paragraphs 5.1 and 5.4 of the November 2001 Indictment that incitement to ethnic hatred and violence was, from as far back as the end of 1990 up to July 1994, an important component of the conspiracy of which Ngirumpatse was a part. Paragraph 32.1 of the proposed Indictment mentions a meeting held on or about 1 January 1993 at Nyakabuye *commune*, Cyangugu *préfecture*, at which Ngirumpatse officially championed the “new ideology of the *Interahamwe*”, which gave “the green light to combat with arms the Tutsi enemy wherever he was found”. In view of the restriction of the scope of the allegations, including those cited above, granting leave to amend the Indictment should simplify and streamline the procedure. Consequently, amending the Indictment should, in that regard, ensure a more expeditious trial.

43. Furthermore, the proposed amendment develops the Prosecutor’s theory of criminal conspiracy and alleged responsibility of the accused persons with much more precision, thereby making it possible to focus and streamline the presentation of the Prosecution evidence. It will be possible to shorten the list of prosecution witnesses in order to discard witnesses appearing on account of general allegations; thus the time allocated for the presentation of the prosecution case will be reduced.

44. For the Defence, greater precision in specifying the dates and locations of the alleged acts and omissions will serve to reduce the scope of the issues to be dealt with in the course of its preparation. More specifically, the Defence will be able to focus its investigations on specific allegations. In the same manner, during its examination and cross-examination, it will be able to put more specific questions, thereby avoiding any waste of time.

45. In conclusion, the Chamber notes that, in the light of the Appeals Chamber’s Decision of 19 January 2003 and the aforementioned submissions, the right of the Accused to be tried within a reasonable time will, in the final analysis, be assured by the amendment of the Indictment.

Possible prejudice to the Accused

46. As indicated hereinabove, the Chamber is of the view that greater precision and streamlining of the Indictment, resulting from the amendments authorized, would facilitate the Defence’s preparation. In this respect, these amendments guarantee the fairness of the proceedings and ensure that the Accused will not suffer any prejudice as a result.

47. The introduction of the notion of joint criminal enterprise is not detrimental to the Defence. The rewording of the charge relating to the responsibility of the Accused persons on the basis of the developments in case law on the subject is not tantamount to an allegation of a new crime, contrary to the submissions of the Defence. At the close of the proceedings the Chamber will decide, on the basis of its own knowledge of the law (according to the principle *iura novit curia*), whether the Prosecutor has proven the guilt of the Accused beyond reasonable doubt. For the time being, the fact that the Chamber has granted the Prosecutor leave to develop this notion in the Indictment entails no prejudice to the Accused.

48. If, through the proposed Indictment, the Prosecutor was attempting to deduce the individual responsibility of the Accused on the basis of that of MRND, as contended by the

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Defence, then the issue of prejudice to the Accused would arise. However, the Chamber is convinced that the Prosecutor adduced the alleged involvement of MRND in the events that occurred in Rwanda in 1994 for the purposes of shedding light on the historical, political and social context. It is incumbent on the Prosecutor to prove the individual responsibility of the accused persons for each of the acts and omissions he has charged them with.

49. The Chamber is of the view that paragraph 66 of the proposed Indictment constitutes a general conclusion to the allegations referred to in the preceding paragraphs, and does not add any new charges against the Accused. This paragraph, which is contested by the Defence, subjects the Accused to no prejudice.

50. The Chamber considers that whenever there has been lack of diligence on the part of the Prosecutor, a factual examination does not show a deliberate pattern of behaviour with the aim of obtaining an advantage over the Defence.

51. The Chamber calls on the Prosecutor to call the witnesses who are to testify on the new allegations within a time limit that will enable the Defence to conduct its related investigations. In addition, the Chamber reserves the right to recall some witnesses, if necessary.

FOR THE FOREGOING REASONS THE TRIAL CHAMBER:

- I. **GRANTS** in part the Prosecutor's motion to amend the Indictment;
- II. **DISALLOWS** the amendment regarding the allegations in paragraphs 34.2 and 53.1 of the proposed Indictment with regard to the presence of Accused Karemera during the attacks against Tutsi refugees in the hills of Bisesero in May 1994;
- III. **ORDERS** the Prosecutor to amend paragraph 22 by removing the allegations against Nzirorera, Karemera and Rwamakuba;
- IV. **ORDERS** the Prosecutor to file the amended Indictment in both French and English at the latest on 18 February 2004;
- V. **REQUESTS** the Registrar to hold an initial appearance of the Accused on 20 February 2004.

Arusha, 13 February 2004

[Signed]

[Signed]

[Signed]

Judge Andréia Vaz,
Presiding

Judge Flavia Lattanzi

Judge Florence Rita Arrey



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