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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, Presiding
Judge William H. Sekule
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 26 March 2004

The PROSECUTOR
v.
Augustin NDINDILYIMANA
Augustin BIZIMUNGU
François-Xavier NZUWONEMEYE
Innocent SAGAHUTU

Case No. ICTR-2000-56-I

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JUDICIAL OFFICE OF THE PROSECUTOR
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**DECISION ON PROSECUTOR'S MOTION UNDER RULE 50 FOR LEAVE TO
AMEND THE INDICTMENT ISSUED ON 20 JANUARY 2000 AND CONFIRMED
ON 28 JANUARY 2000**

The Office of the Prosecutor:

Ciré Aly Bâ
Alphonse Van
Faria Rekkas
Justus Bwonwonga

Counsel for the Accused:

Michel Croisier, for Augustin Bizimungu
Christopher Black, for Augustin Ndindiliyimana
André Ferran and Antoine Beraud,
for François-Xavier Nzuwonemeye
Fabien Segatwa and Didier Patry
for Innocent Sagahutu

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

SITTING as Trial Chamber II composed of Judges Arlette Ramaroson, presiding, William H. Sekule, and Solomy Balungi Bossa (the "Chamber")

BEING SEIZED of the "Prosecutor's Motion Under Rule 50 of the Rules of the Procedure and Evidence for Leave to Amend the Indictment Issued on 20 January 2000 and Confirmed on 28 January 2000 (cf. Amended Indictment on 17 October 2002)," to which is attached copies of the proposed amended Indictment, in English and French, and supporting materials introducing the new facts, filed on 28 October 2003 (the "Motion");

HAVING RECEIVED AND CONSIDERED THE "*Conclusions en réponse No.2 à l'encontre de la requête du Procureur en date du 28.10.2003 aux fins de modification de son acte d'accusation du 20.01.2000, modifié le 17.10.2002,*" filed on 15 December 2003 ("Bizimungu's Second Response"); "*Réponse du procureur aux « Conclusions en réponse No. 2 » de la défense de Augustin Bizimungu,*" filed on 17 December 2003 ("Prosecutor's Reply to Bizimungu's Response"); **AND** "Reply of Respondent Augustin Nindiliyimana to Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment," filed on 23 January 2004 ("Nindiliyimana's Response"); **AND** "*Réplique du Procureur à la réponse de Maître Christopher Black datée du 23 janvier 2004, faisant suite à la requête en modification de l'acte d'accusation du 30 octobre 2003,*" filed on 27 January 2004 ("Prosecutor's Response to Nindiliyimana's Response"); **AND** "*Réponse à la Requête du Procureur sur le fondement de l'article 50 du Règlement de Procédure et de preuve, aux fins d'être autorisé à modifier son acte d'accusation du 20 janvier 2000, confirmé le 28 janvier 2000,*" filed on 17 November 2003 ("Nzuwonemeye's Response"); **AND** "*Réponse à la requête du procureur en date du 28 octobre 2003 aux fins d'être autorisé à modifier l'acte d'accusation,*" filed on 15 December 2003 ("Nzuwonemeye's Response to Prosecutor's Reply"); **AND** "*Réponse du procureur à la réponse du conseil de François-Xavier Nzuwonemeye sur la requête en modification de l'acte d'accusation datée du 28 octobre 2003,*" filed on 17 December 2003 (the "Prosecutor's Reply to Nzuwonemeye's Response"); **AND** "*Réplique à la requête du Procureur aux fins de demande d'autorisation de modifier son acte d'accusation du 20 janvier 2000 confirmé le 28 janvier 2000,*" filed on 17 November 2003 ("Sagahutu's Response"); **AND** "*Réplique du Procureur à la requête du Procureur aux fins d'être autorisé à modifier son acte d'accusation du 20 janvier 2000, confirmé le 28 janvier 2000,*" filed on 24 November 2003 ("Prosecutor's Reply to the Defence Responses");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rules 50 and 73;

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

PRELIMINARY MATTER

1. Judge Asoka de Zoysa Gunawardana is temporarily absent from the seat of the Tribunal. The President of the Tribunal, on 22 March 2004, has assigned *ad litem* Judges to Trial Chamber II to adjudicate over pre-trial proceedings pursuant to Article 12 *quarter* (d) of the Statute. Therefore, for purposes of deciding this Motion, the Trial Chamber is composed of Judges Arlette Ramaroson, presiding, William H. Sekule, and Solomy Balungi Bossa.

SUBMISSIONS OF THE PARTIES

Prosecution

2. Based on Articles 15, 17, and 18 of the Statute and pursuant to Rules 50 and 73, the Prosecution requests that the Chamber grant it leave to amend the current Indictment, confirmed on 28 January 2000 and amended on 17 October 2002, after the initial appearance

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of four of the five Accused, so as to include new facts brought to the Prosecution's notice since the confirmation of the Indictment (in the last quarter of 2002 or during 2003), fulfil the interests of justice, and ensure consistency with the Tribunal's jurisprudence on vagueness of charges. The Prosecution submits that the proposed amended Indictment does not prejudice the rights of the Accused, disrupt any pre-established schedules, or lead to a delay in the speedy conduct of the trial.

3. The Prosecution submits that certain charges in the original Indictment, for example those contained in Paragraphs 5.19, 5.43 to 5.45, were overly vague, and did not meet the requirements stipulated in the Tribunal's jurisprudence and criminal law. The Prosecution alleges, in particular, that new facts, a well-established ground for leave to amend indictments in international jurisprudence, are provided by the following witnesses:
 - (a) Witnesses GFA, GFB, GFC, GFD, GFE, GFF, GFU, GFV and GAP for Accused Augustin Bizimungu;
 - (b) Witnesses FAM, FAN, CDV, KJ, GLJ, FAV, KSB, GFH, GFR, GFS, GFT, GFW and XS for Accused Augustin Nindiliyimana;
 - (c) Witnesses GFQ and ZG for Accused Protais Mpiranya;
 - (d) Witnesses DCK, DN, DAK, HP, DA and ALN for Accused François-Xavier Nzuwonemeye and Innocent Sagahutu.

4. The Prosecution specifically refers to the following amendments:
 - (a) Count 2, Genocide, and Count 3, Complicity in Genocide, are withdrawn against the Accused François-Xavier Nzuwonemeye and Innocent Sagahutu;
 - (b) Count 8, Crimes Against Humanity (persecution), and Count 9, Crimes Against Humanity (inhumane acts), are withdrawn against all Accused;
 - (c) Count 4 and Count 5 are combined to charge all Accused with Count 4, Crime Against Humanity (Murder);
 - (d) Count 10 and Count 11 of the Indictment are combined to charge all Accused with Count 7, Violation of Article 3 Common to the Geneva Convention and Additional Protocol II (Murder);
 - (e) Accused Augustin Bizimungu, Augustin Nindiliyimana, and Protais Mpiranya, are charged with the Count of Genocide, with the alternative Count of Complicity to Commit Genocide; and
 - (f) The proposed amended Indictment reduces the counts charged against each Accused:
 - a. for Augustin Bizimungu, from nine to seven counts;
 - b. for Augustin Nindiliyimana, from nine, to five;
 - c. for Protais Mpiranya, from eleven to seven;
 - d. for François-Xavier Nzuwonemeye and Innocent Sagahutu, from eleven to five.

5. The Prosecution alleges that the new Indictment contains only new charges and no new counts. The Prosecution argues that, although Rule 50 (b)'s "new charges" corresponding French text should read "*charges nouvelles*" instead of "*nouveaux chefs d'accusation*", the Accused should be given the opportunity to have a new Initial appearance in order to plead guilty or not guilty to the proposed amended Indictment, and an additional period of 30 days from the date of the new appearance to submit to the Chamber any preliminary motions that they may wish to bring.

Preliminary Issues

6. Nzuwonemeye's and Bizimungu's motion, filed on 17 November 2003 and 21 November 2003 respectively, asked for additional time to file a response to the Motion. The Prosecution objected on 24 November 2003. The Chamber directed on 24 November 2003 that an additional twenty days be granted to the Accused to file their responses to the Prosecution Motion.

Defence Submissions

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7. As a preliminary remark, the Defence for Bizimungu notes that the Motion reopens a debate on numerous aspects settled by the Judge's confirmation of the current Indictment, pursuant to Rule 47, which deemed that the Indictment satisfied the threshold to proceed with a fair trial. Defence for Bizimungu also contends that only the confirming judge is competent to decide the Motion.
8. The Defence for Sagahutu argues that the Prosecution's Motion is filed with undue delay because, following the Chamber's Decision on 25 September 2002, the indictment was amended on 17 October 2002. Defence for Bizimungu also submits that the Prosecution's Motion is filed late, two years after the *Kupreškić* judgement on which it is allegedly based.
9. The Defence for Bizimungu submits that the general criteria in deciding on leave to amend an indictment are new facts, absence of prejudice to the accused, and with respect to the organisation of the defence, judicial economy.
10. The Defence for Nindiliyimana submits that the Motion is not consistent with the changes in the Indictment. Both the Defence for Nindiliyimana and Bizimungu allege the proposed amended Indictment to be new. Defence for Nindiliyimana alleges that it shifts the thrust of the prosecution case against the Accused, and will delay the trial proceedings as it requires a new defence strategy as well as new investigations. Defence for Bizimungu argues that the legal qualifications, the nature and the number of charges are modified, rather than just reduced as indicated in the Motion.
11. Defence for Bizimungu alleges that the summary of facts in support of the Count of Conspiracy is vague and imprecise. In addition, Defence for Nindiliyimana alleges that the new charges with respect to counts relating to murders, specifically Paragraphs 71, 72, 73, 76, 77, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, and 104 do not specify dates.
12. The Defence for Sagahutu submits that, on receiving the Prosecution's pre-trial belief, filed pursuant to Rule 73 *bis*, it understood that the Prosecution had completed its investigation. Defence for Bizimungu also requests that the Prosecution should stop its investigations to prevent constant changes. The Defence for Bizimungu also notes that, although the Prosecution has been working on this case since 1995, it only now submits that the Indictment is often vague, in contrast to the specificity required in criminal law, and that the lack of substance in some paragraphs of the Indictment has led to the withdrawal and addition of charges in the proposed amended Indictment. The Defence also points out that the newly communicated charges could have been previously disclosed in the Prosecution's witness statements.
13. The Defence submits that the proposed amended Indictment causes undue delay to the trial proceedings. Defence for Sagahutu and Bizimungu argue further that the Prosecution's undue delay in filing its Motion will inevitably result in a delay in the scheduling of the trial proceedings. Defence for Sagahutu contend that the thirty days afforded to the Accused, pursuant to Rule 72, to file any preliminary motions with respect to the new counts will delay the pre-trial conference. Defence for Nzuwonemeye also requests that a further initial appearance for the Accused should be allowed, with leave to the Defence to file additional preliminary motions. Defence for Bizimungu points out that any delays in the proceedings of the trial will prolong the Accused's provisional detention. Further, Defence for Bizimungu cites the Trial Chamber's decisions in *Bizimungu*, dated 6 October 2003, and *Karemura*, dated 8 October 2003, in support of their argument that the timing of the amendments, just before the start of the trial, would cause serious prejudice to the Accused's right to be tried without undue delay. Defence for Nindiliyimana also argues that paragraphs 48, 49 and 52 of the proposed amended Indictment, in linking the Accused Nindiliyimana with Bagasora, adds



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new charges, and other charges bring in the Butare trial, Muvunyi and Nzabirinda, lengthening the trial proceedings to beyond the completion strategy date of 2008.

14. Defence for Nzuwonemeye also submits that the statement of Witness ALN, against the Accused Nzuwonemeye, has not been disclosed, and requests the Chamber to order its disclosure. Further, Defence for Bizimungu alleges that the thirty witness statements in support of the proposed amended Indictments are too redacted to be meaningful. Defence for Nindiliyimana also questions the value of redacted witness statements and requests that the unredacted witness statements be disclosed. Further, according to the Defence for Nindiliyimana, the Prosecution's contention of new factual evidence to support the proposed amended Indictment is incorrect as the statements in support of the Motion are dated between 1995 and 2000, before the confirmation of the current indictment on 28 January 2000.
15. Defence for Sagahutu contends that the proposed amended Indictment's structure does not clearly demonstrate the actual changes from the current Indictment. Sagahutu is also unclear on the new numbering system as some paragraphs are not numbered in Counts one, two, three, four, five, six, seven and eight, which may cause reference problems in the future. Defence for Nzuwonemeye further submits that the Prosecution's modification of the Indictment, without distinguishing between new counts and new charges, prejudice the Accused.
16. The Defence for Bizimungu cites *Kupreškić* in arguing that the Prosecution's Indictment should have given the Accused sufficient notice of the charges against him, with a concise and optimally precise statement of the criminal allegations and factual allegations against him. The Defence also argues that it should have sufficient time to prepare, the Accused has a right to be tried within a reasonable timeframe and that the principle of judicial economy is a necessity. The Defence further alleges that the principle of *nemo auditor propriam turpitudinem allegans* prevents the Prosecution from using its own incompetence in support of a Motion.
17. Defence for Nindiliyimana contends that the Prosecution Motion is premature in light of his motion for a stay of proceedings because of abuse of process.
18. Defence for Nindiliyimana submits that paragraph 39's new charge accusing Nindiliyimana of responsibility for the actions of the RTLM radio staff will require review of the entire "Media" case, disclosure of the "Media" trial to the Defence team, and will therefore increase the length of the trial.
19. Defence for Nindiliyimana accuses the proposed amended Indictment of propaganda for mixing charges with prosecution theory.
20. With respect to the Prosecution's withdrawal of the Count of Genocide against the Accused Sagahutu, Defence for Sagahutu points out that Sagahutu is still charged with the Count of Conspiracy to Commit Genocide in the proposed amended Indictment, and has his name mentioned in paragraph 38, referencing the planning of genocide, and paragraph 43, referencing concomitant acts of genocide. The Defence demands, for purposes of consistency, that all references to genocide be withdrawn against all the Accused.
21. All Defence Counsel requests the Chamber that the Motion be dismissed except for the following:
 - (i) Defence for Sagahutu requests that, pursuant to Rule 51, the Chamber grant the Prosecution's Motion in respect to the withdrawal of the Counts of Genocide and Extermination against the Accused Sagahutu.

- (ii) Defence for Bizimungu requests that the reduction of the Counts against Accused Bizimungu from nine to seven, with the withdrawal of the Counts of Crimes Against Humanity (persecution) and Crimes Against Humanity (inhumane acts) be allowed by the Chamber.

Responses by the Prosecution

22. The Prosecution submits that, with respect to Bizimungu's Response, pursuant to Rule 50, the confirming judge is no longer competent to rule on a Prosecution Motion to amend an indictment, with jurisdiction resting with the Trial Chamber.
23. The Prosecution submits that Nzuwonemeye's arguments on the dates of witness statements are premature, as these are issues for the trial. Similarly, allegations of vagueness of the Indictment can be argued at trial. Also, preliminary motions can be filed after the proposed amended Indictment is allowed. Further, redactions in the witness statements are authorized by the Chamber.
24. The Prosecution contends that the Tribunal's jurisprudence on Rule 50 requires only that the Prosecution ascertain that there are sufficient grounds in fact and law to allow the amendments, without demonstrating the existence of exceptional circumstances. It cites *Bagosora et al.* in arguing that the Motion itself is well founded in law, and the new factual allegations better articulate the Accused's role in the serious crimes alleged against them, as requested by the Defence. According to the Prosecution, it is allowed in law to correct imperfections in the Indictment through amendments. Further, *Karemera et al.* is cited to argue that the Prosecution is not proscribed from offering substantial arguments.
25. With respect to the new structure of the proposed amended Indictment, the Prosecution argues that it is consistent with Rule 47(C), and alternatively, the Defence is premature in raising issues more appropriately argued with preliminary motions pursuant to Rule 72.
26. The Prosecution submits that the proposed amended Indictment will not cause an undue delay as Trial Chamber II's judicial calendar has no scheduled start date for the trial yet, and the Motion for protective measures is still pending. The Prosecution cites *Prosecutor v. Akayesu*, where the Indictment was amended during trial proceedings. It also points out that if its application for leave to amend the Indictment is granted, it does not intend to ask for additional time to prepare its case.
27. The Prosecution submits that the Accused Sagahutu, Ndindiliyimana, and Nzuwonemeye were arrested only in 2002, while the Accused Bizimungu was arrested in 2000. Citing *Bagosora et al.*, it argues that Article 20(4)(c) guaranteeing the rights of the Accused to a trial without undue delay must be considered taking into the account the nature, complexity and seriousness of the case.
28. The Prosecution submits that the Count of Conspiracy to Commit Genocide and the Count of Genocide are separate counts, pursuant to Article 2(3) of the Statute. It also submits that the Count of Conspiracy is maintained against the Accused Sagahutu, and the Count of Conspiracy existed in the confirmed Indictment.
29. The Prosecution submits that Defence cannot simultaneously ask for the dismissal of the leave to amend the Indictment and ask for the Chamber to withdraw counts.
30. The Prosecution, responding to the Accused Nzuwonemeye's request for disclosure of the statement of witness ALN, produces the Defence receipt, and points out the standing order of 12 July 2001 in response to the Defence arguments on redaction of statements.

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31. The Prosecution submits that the proposed amended Indictment is not new.
32. The Prosecution requests that Defence for Ndindiliyimana's 23 January 2004 submission be held inadmissible for lateness.
33. The Prosecution submits that the "Media" trial need not be reopened in the instant case.

HAVING DELIBERATED

34. The Prosecution seeks leave to amend the current Indictment, pursuant to Rule 50, which states, *inter alia*:

Rule 50: Amendment of Indictment

- a. The Prosecution 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 [. . .].

As the Prosecution acknowledges, the Chamber's leave is required before the Indictment can be amended.

35. Firstly, the Chamber notes the Defence contention regarding undue delay in the filing of the Motion. Although the Defence argues that the witness statements supporting the Indictment date prior to 2000, he makes no specific allegations that the Prosecution did not act in a timely manner. The Chamber maintains that a decision on the tardiness of a motion must take into consideration all circumstances related to the proceedings.¹ Further, Rule 50 does not specify any timeline for filing amendments to the Indictment.
36. With respect to the Defence submissions on applying standards of confirmation of the amendments, pursuant to Rule 47, to the amendment of the Indictment, the Chamber "distinguishes between the stage of confirmation of the Indictment and the stage of amendment of the Indictment."² Accordingly, the Chamber rejects Defence submissions on this issue.
37. The Chamber finds no support for the Defence of Sagahutu's submissions that in conjunction with the withdrawal of the Counts of Genocide and Complicity in Genocide, the other charge related to Genocide should be withdrawn against the Accused.
38. The Chamber also notes that the Motion contends that it is imperative to amend the Indictment to comply with the Tribunals' jurisprudence on specificity and vagueness of Indictments, in order, *inter alia*, to cure potential material defects in the Indictment, and protect the rights of the Accused. The Chamber finds, however, that the Motion does not

¹ *Prosecutor v Limaj et al.*, Case No. IT-03-66-PT, "Decision on Prosecutor's Motion to Amend the Amended Indictment", 12 February 2004, para. 13 (citing *Prosecutor v. Kovačević*, Case No. IT-97-24-AR73, "Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998", 2 July 1998, para 31) (the "*Limaj* Decision").

² *Prosecutor v. Bagosora*, Case No. ICTR-96-7-T, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 12 August 1999, para. C(i) (the "*Bagosora* Decision").

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specify any material defects that are cured by the proposed amended Indictment. The Motion states only that the proposed amended Indictment is less "vague", and more "specific".

39. The Chamber finds no support in the Tribunal's jurisprudence for the Defence submission that the Prosecution should have given notice of the new amended charges in the current Indictment.
40. The Chamber reiterates that pursuant to Rule 50, the Prosecution bears the burden of convincing the Court that the Accused suffers no prejudice.³ After a careful review of the Tribunal's jurisprudence, the Chamber notes further that the Tribunal has granted leave to amend an indictment "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."⁴
41. The Chamber recalls the Appeals Chamber's reasoning in the *Bizimungu* decision:

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.⁵

42. Consistent with the Tribunal's jurisprudence, the Chamber must consider the Prosecution's right to seek an amendment to the Indictment, pursuant to Rule 50, balanced with the likely prejudice to an accused's right to a fair trial, through a case specific analysis of the totality of circumstances. The Chamber must give appropriate weight and consideration to the relevant circumstances, which include, but are not limited to:
- (i) The effect of the proposed amended Indictment on the Accused persons' right to an expeditious trial, to prompt notices of the charges against them, and to adequate time and facilities in order to prepare their defence;⁶
 - (ii) Whether any additional time can be granted to the Accused for the preparation of their defence;⁷
 - (iii) Reasonableness of resulting delays in the scheduled start day of trial, and the length of the trial itself;⁸
 - (iv) Effect on the time spent by the Accused in pre-trial detention;⁹
 - (v) "Nature and scope of the proposed amendment";¹⁰
 - (vi) "Whether the [A]ccused and Trial Chamber had prior notice of the Prosecutor's intention to seek leave to amend the indictment", the nature of the notice, and any improper tactical advantage gained by the Prosecution as a result of the proposed amended Indictment;¹¹

³ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003, para. 28 (the "*Bizimungu* Decision:").

⁴ *Id.* para. 26.

⁵ *Id.* para. 27.

⁶ *Limaj* Decision, para. 9.

⁷ *Id.* para. 10.

⁸ *Id.*

⁹ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-AR50, "Appeals Decision on Prosecutor's Interlocutory Appeal against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment, 12 February 2004", para. 16 (the "*Bizimungu* Appeals Decision").

¹⁰ *Id.*

¹¹ *Id.*

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- (vii) The evidentiary basis of the new charges, if any, and the timing of their discovery;¹²
 - (viii) Judicial economy; and
 - (ix) Whether the proposed amended Indictment, through more specificity and accuracy, allows the Accused to better respond and prepare for trial, or shortens the length of the trial proceedings, thus protecting rather than prejudicing the Accused persons' rights to a fair trial.¹³
43. The Chamber observes that an amendment seeking to expand the scope of the Indictment increases the risk of prejudice to the rights of the Accused, while a narrowing of the Indictment, even though substantially different, may "increase the fairness and efficiency of proceedings, [and] should be encouraged and usually accepted."¹⁴ In the *Bizimungu* Decision, for instance, despite the Prosecution's contention that no new charges were added, the Chamber held that the "expansions, clarifications and specificity made in support of the remaining counts [. . .] do amount to substantial changes that would prejudice the [rights of] the accused [. . .]."¹⁵
44. With respect to the type and scope of the amendments, the Chamber recalls the reasoning in the *Bizimungu* Appeals Decision:
- [. . .] the Prosecution's Motion and Amended Indictment intertwined the two [types of amendment], such that they were not readily separable. In this context, the Trial Chamber was justified in dismissing the entire request. The Trial Chamber was not required to disaggregate the changes that would have caused *prejudice* from those that would not. *However, this holding does not preclude the Prosecution from coming forward with a new proposed amendment that would provide greater notice of the particulars of the Prosecution's case without causing prejudice in the conduct of the trial.*" (emphasis added).¹⁶
45. In the instant case, the Chamber finds that the proposed amended Indictment and the accompanying Motion, do not separate the amendments that could cause prejudice from those that do not. Amendments narrowing the scope of the Indictment, that may even meet the approval of the Accused, are intertwined with amendments that add substantial new charges. The latter amendments, as mentioned above, may increase the risk of prejudice to the rights of the Accused. For instance, paragraphs 34, 41, 42, 43, 44, 47, 48, 51, 61, 62, 63, 80, 88, 94, 109, 110, 115, and 116 of the proposed amended Indictment combine existing factual allegations with new factual allegations. However, for the sake of judicial economy, the Chamber has undertaken a comparative analysis of the proposed amended and current Indictments to make a determination on the merits of this Motion.
46. The Prosecution's motion combines four of the counts into two counts, and withdraws both the counts of Crimes Against Humanity based on persecution and other inhumane acts as a basis of liability for all Accused. In the proposed amended Indictment, the Accused Innocent Sagahutu and François-Xavier Nzuwonemeye are no longer charged on the basis of the alternate counts of Genocide and Complicity in Genocide. In addition, substantial new charges based on new facts and evidentiary materials are included in the proposed amended Indictment. The Chamber also notes that there greater brevity, specificity, and clarity in the proposed amended Indictment.
47. The Chamber has identified three errors in the proposed amended Indictment:

¹² *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73, "Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II's Decision of 8 October 2003 Denying Leave to File an Amended Indictment", 19 December 2003, para. 20 (the "*Karemera* Appeals Decision").

¹³ *Bizimungu* Appeals Decision, para. 16.

¹⁴ *Id.* para. 19.

¹⁵ *Bizimungu* Decision, para. 34.

¹⁶ *Bizimungu* Appeals Decision. para. 20.

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- (i) Count 4 should read Crime Against Humanity (Murder).
- (ii) Count 5 should read Crime Against Humanity (Extermination).
- (iii) Count 6 should read Crime Against Humanity (Rape).

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48. The Chamber observes that paragraph 47 of the proposed amended Indictment specifies the Accused Ndindiliyimana's rank as Major, in contrast to his rank of "General" in, *inter alia*, paragraph 55 of the proposed Amended Indictment.
49. The Chamber agrees with the Appeals Chamber in the *Karemera* Appeals Decision that the Prosecutions' contentions on the interests of justice, the rights of victims, the purpose of the Tribunal in adjudicating only the most serious violations of international humanitarian law, the Prosecution's responsibility to seek justice and present all relevant evidence before the Tribunal, without more specific arguments, need be ascribed only a little weight in determining the Motion.¹⁷ In the instant case, the Prosecution has not provided any specificity to its submissions regarding the interests of justice, the rights of victims, and the purpose of the Tribunal. The Chamber, thus, ascribes little weight to these factors.
50. The Chamber notes that delays to the trial's scheduled start date and trial schedule resulting from the proposed amended Indictment, and the cumulative effect on the duration of trial, are important considerations in determining the Motion. These factors need to be considered cumulatively, with "sufficient weight to relevant considerations."¹⁸ In the *Karemera* Appeals Decision, the Appeals Chamber found that the short span of one month before the scheduled start date of the trial was not dispositive in rejecting the amendment because a more succinct Indictment would shorten the total duration of the trial.¹⁹ In the *Limaj* Decision, however, the ICTY Trial Chamber granted leave to amend an indictment because the "trial of the accused [was] not scheduled to start soon."²⁰ In the particular circumstances of this case, the Prosecution and Defence's submissions in relation to delay to trial are not conclusive. The Prosecution claims that the Indictment is more specific, and alternatively, that there is no delay as the trial start day has not been scheduled, a motion for protective witnesses is pending, and all delays must take into account the nature, complexity, and seriousness of the decision. Defence Counsel, for their part, submit correctly, as conceded by the Prosecution, that in accordance with Rule 50(b), a thirty day delay for preliminary motions is inevitable. The Chamber points out, however, that since the filing of the Prosecution's Motion, the President of the Tribunal has confirmed on 10 March 2004 the commencement of the trial on Monday, 13 September 2004.
51. The Chamber has considered all relevant elements to determine whether the proposed amended Indictment was likely to prejudice to the rights of the Accused from the proposed amended Indictment. Although the Motion does not specify the improvements, the Chamber is of the view that the proposed amended Indictment is clearer and more factually precise. The Chamber finds no proof of the Defence' submission that the Prosecution gained any improper tactical advantage by delaying the amendment to the Indictment, or delaying the disclosure of new factual allegations. Although the Defence contends that it understood the Prosecution to have completed its investigation before the filing of the present Indictment, they specify no dates in their submissions, and make no specific allegations of delayed disclosures. The Chamber notes that certain witness statements, as alleged by the Defence, are dated prior to the confirmation of the current Indictment on 28 January 2000, but the majority of the statements are dated after 28 January 2000. The Accused, as indicated by the Defence, have been in pre-trial detention for substantial periods of time. The Chamber notes that the

¹⁷ *Karemera* Appeals Decision, para. 16.

¹⁸ *Id.*

¹⁹ *Id.* para. 5, 13, 15, 19, and 24.

²⁰ *Limaj* Decision para. 24.

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amendments themselves are expansive in scope, with new charges based on new factual evidence. The Motion, however, offers few specifics of the relationship between the factual evidence and the new charges they support.

52. Moreover, the Chamber, considering all circumstances, the Chamber finds that the addition of the following substantially new charges may increase the risk of prejudice to the Accused's rights to a fair trial:

Paragraphs 28, 30, 31, 32, 33, 38, 39, 45, 46, 53, 54, 56, 57, 58, 60, 66, 67, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 95, 96, 97, 98, 101, 112, 113, and 123.

53. The Chamber, however, acknowledges that granting the Accused appropriate time to prepare their defence may cure any prejudice to the rights of the Accused, in light of the totality of circumstances. In the *Limaj* Decision, the Chamber found that additional time to prepare cured prejudice caused by the amended Indictment.²¹ In this case, the Chamber finds that even if there is prejudice to the Accused, it may be cured through the time remaining for the preparation of the Defence until 13 September 2004, the start date of the trial.

54. The Chamber finds that the above reasoning is not applicable with respect to the Accused Protais Mpiranya, who has not yet been arrested. Consequently, the proposed amended Indictment will not prejudice the Accused Mpiranya's rights to a fair trial.

55. The Chamber, on balance, regards any prejudice to the rights of the Accused as insufficient basis to refuse the application of the Prosecution. Indeed, any prejudice to the rights of the Accused to a fair trial arising from the proposed amended Indictment - considering the totality of circumstances, including judicial economy and the interests of justice - is curable considering the time remaining until the scheduled start of the trial on 13 September 2004. This remaining time gives Defence adequate time to investigate the new facts alleged and prepare for the trial based on the proposed amended Indictment. The Chamber, thus, allows the proposed amended Indictment as specified below.²²

56. Finally, the Chamber warns the Prosecution on the lack of full disclosure in the Prosecution's Motion, under Rule 46 (A) which stipulates that a party may be sanctioned for "obstruct[ing] proceedings, or [being] otherwise contrary to the interests of justice [. . .]." As articulated by the Trial Chamber in the *Bikindi* Decision,

"[. . .] it is the Prosecutor's duty to the Chamber and the Defence [. . .] to make explicit any proposed material changes to an indictment. It is to be regretted that the Prosecutor did not explicitly draw the attention of the chamber to these alterations."²³

In particular, the Chamber points out that the Motion fails to provide adequate notice and intertwines amendments that narrow the scope of the Indictment with those that add new charges based on new factual allegations.

FOR THE FOREGOING REASONS, THE TRIBUNAL:

GRANTS leave to the Prosecution to amend the Indictment, in accordance the proposed amended Indictment, and in particular:

- (i) Withdraws Count 2, Genocide, against the Accused Nzuwonemeye and Sagahutu;

²¹ See *Id.*, para. 24.

²² See *Prosecutor v. Bikindi*, Case No. ICTR-2001-72-I, "Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting to the Form of the Indictment and on the Prosecutor's Motion Seeking Leave to File an Amended Indictment", 22 September 2003, para. 27 and 29 (the "*Bikindi* Decision").

²³ *Id.* para. 32.



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- (ii) Withdraws Count 3, Complicity in Genocide, against the Accused Nzuwonemeye and Sagahutu;
- (iii) Combines Count 4 and Count 5 as new Count 4, Crime and Humanity (murder) against all Accused;
- (iv) Withdraws Count 8, Crime Against Humanity (persecution), against all Accused;
- (v) Withdraws Count 9, Crime Against Humanity (inhumane acts), against all Accused; and
- (vi) Combines Count 10 and Count 11 as new Count 7, Violation of Article 3 Common to the Geneva Convention and Additional Protocol II (Murder);

AMENDS the proposed amended Indictment as follows:

- (i) Count 4 to read Crime Against Humanity (Murder);
- (ii) Count 5 to read Crime Against Humanity (Extermination); and
- (iii) Count 6 to read Crime Against Humanity (Rape);

DECIDES that the Prosecution clarify in Paragraph 47 of the proposed Amended Indictment whether Augustin Ndindiliyimana's rank should be Major;

ORDERS that the proposed amended Indictment with the aforementioned corrections, in French and in English, be filed with the Registry on 31 March 2004 and served immediately on the Accused and their Counsel;

DECIDES that in regard to the new charges, since the Accused have already appeared before a Trial Chamber in accordance with Rule 62 of the Rules, a further appearance shall be held as soon as practicable to enable them to enter a plea on the new Charges, pursuant to Rule 50 (B) of the Rules.

Arusha, 26 March 2004



Arlette Ramarason
Presiding Judge



William H. Sekule
Judge



Solomy Balungi Bossa
Judge

