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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

Or: ENG

TRIAL CHAMBER II

Before: Judge Asoka De Silva, Presiding
Judge Flavia Lattanzi
Judge Florence Rita Arrey

Registrar: Mr Adama Dieng

Date: 23 February 2005

The PROSECUTOR

v.

Tharcisse MUVUNYI

Case No. ICTR-2000-55A-PT

JUDICIAL RECORDS/ARCHIVES
ICTR
2005 FEB 23 P 3:23

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

Office of the Prosecutor:
Mr Charles Adeogun-Phillips
Ms Sola Adeboyejo
Ms Renifa Madenga
Mr Dennis Mabura

Defence Counsel:
Mr William Taylor
Mr Jean Flamme
Ms Cynthia Cline

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

SITTING as Trial Chamber II, composed of Judge Asoka De Silva, Presiding, Judge Flavia Lattanzi and Judge Florence Rita Arrey (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Request for Leave to Amend an Indictment Pursuant to Rules 73 and 50 of the Rules of Procedure and Evidence” dated 17 January 2005 and filed on 19 January 2005 (the “Motion”) as modified by the Prosecutor’s Response to the Trial Chamber’s Directive of 1 February 2005 in Relation to the Scheduling Order Pursuant to Rule 47 (F) (i) and 54 of the Rules” filed on 4 February 2005 (“the Prosecutor’s Answer to the Chamber’s Directive”);

CONSIDERING

- (i) The “Accused Tharcisse Muvunyi’s Response to the Prosecutor’s Request for Leave to Amend an Indictment Pursuant to Rules 73 and 50 of the Rules of Procedure and Evidence” filed on 26 January 2005 (“the Defence Response to the Motion”);
- (ii) The Directives contained in the Scheduling Order issued by this Chamber on 1 February 2005;
- (iii) The Prosecutor’s Answer to the Chamber’s Directive in which the Prosecutor attached the Revised Proposed Indictment;
- (iv) The “Accused Tharcisse Muvunyi’s Reply to the Prosecutor’s Response to the Trial Chamber’s Directive of 1 February 2005 in Relation to the Scheduling Order pursuant to Rule 47 (F) (i) and 54 of the Rules and Request for Leave to Amend an Indictment pursuant to Rules 73 and 50 of the Rules of Procedure and Evidence” filed on 9 February 2005 (“the Defence Response to the Prosecutor’s Answer to the Chamber’s Directive”);
- (v) The “Prosecutor’s Reply to the Defence Response to its Motion for Leave to Amend its Indictment pursuant to Rules 73 and 50 of the Rules of Procedure and Evidence” filed on 14 February 2005 (“the Prosecutor’s Reply”); and
- (vi) The “Accused Tharcisse Muvunyi’s Reply to the Prosecutor’s Motion to Amend Indictment—Addendum” filed on 18 February 2005 (“the Defence Rejoinder”);



RECALLING that

- (i) the original indictment was confirmed by Judge Yakov Ostrovsky on 2 February 2000 and filed on 7 November 2000;
- (ii) the Accused made his initial appearance before the Tribunal on 8 November 2000 and entered a plea of not guilty to all counts of the indictment;
- (iii) the Prosecutor requested the severance of the Accused on 5 November 2003¹ which was granted by Trial Chamber III on 11 December 2003;²
- (iv) the Prosecutor filed the current indictment on 23 December 2003;

CONSIDERING the Statute of the Tribunal (the “Statute”), in particular Articles 18 and 20 of the Statute, and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 50 and 47 of the Rules;

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

ARGUMENTS OF THE PARTIES

Prosecutor’s Motion

1. The Prosecutor requests leave, pursuant to Rule 50 of the Rules, to file an amended indictment. The proposed amended indictment is appended to the Motion. The amendment sought by the Prosecutor involves the following:
 - (i) the removal of two counts, namely rape as a crime against humanity and other inhumane acts as a crime against humanity;
 - (ii) the deletion of his general allegations in the “Concise Statement of Facts” which refer to the historical and social contexts of his specific allegations;
 - (iii) various editorial changes; and
 - (iv) the addition of particulars relevant to the remaining charges.
2. He submits that the proposed amendment is justified in law, is in the interest of justice and will not cause delay to the commencement of trial. He avers that the proposed amended indictment (i) does not contain new charges; (ii) contains two counts less than

¹ *Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, and Idelphonse Hategekimana*, Case No. ICTR-2000-55-I, Prosecutor’s Motion for Leave to Sever an Indictment and for Directions on the Trial of Tharcisse Muvunyi, filed 5 November 2003.

² *Prosecutor v. Tharcisse Muvunyi, Idelphonse Nizeyimana, and Idelphonse Hategekimana*, Case No. ICTR-2000-55-I, Decision Regarding the Prosecutor’s Motion for Leave to Sever an Indictment and for Directions on the Trial of Tharcisse Muvunyi (TC), 11 December 2003.



the existing indictment; and (iii) is more streamlined. Accordingly, he submits, the proposed amended indictment would decrease the number of witnesses and therefore lead to a more expeditious trial.

3. The Prosecutor asserts that recent jurisprudence obliges him to state the material facts imputed to the Accused clearly and with sufficient detail.³

4. The Prosecutor suggests that, in determining if leave should be granted under Rule 50 of the Rules, the Rule 47 requirement of evidential support demonstrating a *prima facie* case is not applicable.

5. The Prosecution argues that the proposed amendment relies on supporting materials which have already been disclosed to the Defence. Therefore, argues the Prosecutor, the amendment is neither untimely nor prejudicial.

Defence Response to the Motion

6. By its Response, the Defence requests that the Chamber deny the Motion.

7. The Defence submits that a proposed amendment must be considered against the overall interest of justice,⁴ and that the rights of the Accused guaranteed by Articles 19 and 20 of the Statute need to be respected.⁵

8. Regarding the proposed amendments, the Defence points out that:

(i) most of the deletions concern the historical context and not the material facts necessary for the determination of the guilt or innocence of the Accused;

(ii) the additional particulars as contained in paragraphs 17, 18, 19, 26, and 29 include new factual allegations against the Accused and therefore amount to new charges;⁶

(iii) the additional particulars were already known to the Prosecutor by December 2003 when the indictment was last amended.

9. The Defence asserts that the proposed amendment would cause delay, since it aims at including new charges, and a further opportunity to plead on that indictment would be necessary. It avers that it had no prior notice of the new allegations.

³ *Prosecutor v E. and G. Ntakirutimana*, Case No ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004; *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment (AC), 26 May 2003.

⁴The Defence buttresses this submission with *Prosecutor v. Niyitegeka*, Case No ICTR-96-14-I, Decision on Prosecutor's Request for Leave to File an Amended Indictment (TC), 21 June 2000, 32-33.

⁵ The Defence buttresses this submission with *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-I, Decision on Prosecutor's Motion for Leave to File an Amended Indictment (TC), 6 October 2003, 27.

⁶ This range of impugned paragraphs relate only to the first proposed amended indictment which the Defence was addressing at the time of this Response. As will be seen later, the Prosecution did subsequently submit a second proposed amended indictment encompassing and replacing the first proposed amended indictment and which included additional information. Consequently, as will be seen later, the Defence expanded its range of impugned paragraphs. See paragraphs 15 and 18 of this Decision].

10. The Defence argues that Rule 47 of the Rules requires the Chamber to review the supporting materials when deciding whether to grant leave to amend the indictment.

Prosecutor's Answer to the Chamber's Scheduling Order

11. As indicated earlier, on 1 February 2005, the Chamber issued a Scheduling Order directing the Prosecution to provide the following information, among others, for purposes of determining the Motion:

[...]

(ii) Which types of responsibility under Article 6(1) of the Statute does the Prosecutor intend to rely upon?

(iii) Which factual allegations refer specifically to which type of responsibility under Article 6(1) of the Statute?

(iv) Does the Prosecutor wish to rely solely on responsibility under Article 6(1) of the Statute with respect to the allegations contained in paragraphs 10 to 14 and 26 to 30 of the Proposed Amended Indictment?


(v) Does the Prosecutor wish to rely solely on responsibility under Article 6(3) of the Statute with respect to the allegations contained in paragraphs 15 to 25 of the Proposed Amended Indictment?

(vi) Has the Prosecutor previously disclosed the allegations contained in paragraphs 15, 16, 17, 18, 19, 26, 28 and 29 of the Proposed Amended Indictment to the Defence?⁷ If so, by what means and on which date?

12. On 4 February 2005, the Prosecutor filed his answer to the Chamber's Scheduling Order. In it, the Prosecutor confirmed that he intends to rely on all modes of participation enumerated in Article 6(1) of the Statute.

13. In that regard, the Prosecuting Counsel contend that the Chamber may find the Accused guilty if it determines that he participated in a crime through any action encompassed by the Statute even if it differs from the theory advanced by the Prosecutor in the indictment. The Prosecution argued that, through the general pleading of responsibility under Article 6(1) of the Statute, the Defence is on sufficient notice that any of the forms of responsibility therein contemplated may apply.

⁷ This range of paragraphs relate only to the first proposed amended indictment being the only one before the Chamber at the time of this Scheduling Order. As will be seen later, the Prosecution did subsequently submit a second proposed amended indictment encompassing and replacing the first proposed amended indictment and which included additional information. Consequently, as will be seen later, the Chamber expanded its consideration of the range of paragraphs impugned as containing new charges. See paragraphs 38 and 41 of this Decision].



14. With respect to the pleading of responsibility under Article 6(1) and 6(3) of the Statute, the Prosecuting Counsel contend that the two forms of responsibility are not mutually exclusive. Accordingly, the pleading of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding, additionally or alternatively, responsibility under Article 6(3) of the Statute. They argued that the Chamber can find the Accused guilty of any of the forms of individual criminal responsibility, irrespective of any particular type of responsibility pleaded by the Prosecutor.

15. Along with his Reply to the Chamber's directives, the Prosecutor submitted a new proposed amended indictment which, according to him, contains further and better particulars. He requests the Chamber to accept this new proposed amended indictment in place of the one filed on 19 January 2005. In this second proposed amended indictment, the Prosecutor proposes the following changes which encompassed the changes made in the first proposed amended indictment:

- (i) he adds further and better particulars in paragraphs 9, 16, 17, 23, 25, 26, 27, 33, 34, 35, 36, 40, 41, 42 and 43;
- (ii) he expands the scope of the responsibility of the Accused to include responsibility under Article 6(1) and 6(3) of the Statute for paragraphs 18 to 36;
- (iii) he further defines the mode of individual responsibility of the accused with respect to paragraphs 14, 15, 20, 24 and 25; and
- (iv) he makes additional editorial changes.

Defence Response to the Prosecutor's Answer to the Chamber's Directive

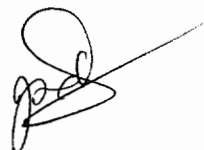
16. The Defence reasserts its objection to the Motion. It emphasizes that the Prosecutor proposes further amendments in his Response to the Chamber's Directive.

17. The Defence evokes the guarantees of Articles 19 and 20 of the Statute, including the right of the Accused to be informed promptly and in detail of the charges against him, the right of the Accused to have adequate time for the preparation of his defence, and the right of the Accused to be tried without undue delay.

18. With respect to paragraphs 9, 15, 17, 19, 20, 21, 22, 25, 26, 27, 32, 33, 34, 35, 36, 38, 41, 42, and 43 of the Prosecutor's latest proposal, the Defence reiterates its claim that the Prosecutor inserts new allegations which he had been aware of for a considerable length of time. The Defence avers that the prior disclosure of witness statements cannot remedy a lack of diligence in pleading the material facts in the indictment.

19. With respect to the Prosecution's submissions regarding the pleading of responsibility under Article 6(1) of the Statute, the Defence submits that under Article 20 of the Statute, the Accused is entitled to know which factual allegations support which types of responsibility. The Prosecutor's failure to provide this information hinders the ability of the Defence to prepare for trial.

20. The Defence contends that the Prosecutor's pleading of responsibility under Article 6(3) of the Statute lacks specificity.



Prosecutor's Reply

21. In reply to the Defence submissions, the Prosecutor avers that:
- (i) The inclusion of additional allegations, such as the Nyakizu commune meeting, is to reflect to the greatest extent possible the full nature of the culpability of the Accused and that doing so is not misleading in any way.
 - (ii) His response to the Scheduling Order provided further and better particulars of benefit to the Accused.
 - (iii) There has been clear and direct disclosure to the Defence in the form of witness statements and, further, the indictment did contain these allegations in the first place. The proposed indictment simply brings it in line with recent jurisprudence of the Appeals Chamber.⁸ Accordingly the Defence is on notice and has no need to "guess" the Prosecutor's strategy.
22. With reference to the Defence submission pertaining to the pleading of Art 6(3), the Prosecutor states that it is apparent which allegations rely on command responsibility.
23. The Prosecutor notes that nothing in the Defence submissions demonstrates any specific prejudice that will be suffered were the Chamber to grant leave to amend the indictment.

Defence Rejoinder

24. The Defence reiterates that the Prosecution's motion is untimely and alleges new matters that are not currently even broadly alleged in the existing indictment. It asserts that the Chamber should deny the motion or, if allowed, the Chamber should allow the Accused to plead again to the new indictment.⁹

⁸ The Prosecutor buttresses this submission with *Niyitegeka v. Prosecutor*, Case No ICTR-96-14-A, Judgment (AC), 9 July 2004 and *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004.

⁹ The Defence buttresses this submission on *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and Andre Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment (TC) 14 February 2005. 43 and 55. In this decision there remained more than 30 days before the trial was due to commence.



DELIBERATIONS

The Law on the Amendment of Indictments Under the Statute and the Rules

25. The Chamber notes that the material provisions regarding the amendment of indictments are essentially Rules 50 and 47 (E), (F) and (G) of the Rules:

Rule 50: Amendment of Indictment

(A)(i) 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 that 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.

(ii) In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, mutatis mutandis, follow the procedures and apply the standards set out in Sub-Rules 47(E) and (F) in addition to considering any other relevant factors.

(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 and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence.

Rule 47: Submission of Indictment by the Prosecutor

(...)

(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.

(F) The reviewing Judge may:

(i) Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;

(ii) Confirm each count;

(iii) Dismiss each count; or

(iv) Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood



is known to the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.

26. As Rule 50(A)(ii) makes clear, the Chamber shall, in deciding an application to amend the indictment, consider “any other relevant factors” besides the requirement to follow the procedures and apply the standards set out in Rule 47(E) and (F). One “relevant factor” which the Chamber must consider as part of this requirement is the interest of justice. This requirement appears now to be settled in the jurisprudence of the Tribunal.¹⁰ In determining whether an amendment is in the interest of justice, the Chamber needs, among other considerations, to bear in mind the rights of the Accused, in particular the rights guaranteed by Articles 19 and 20 of the Statute. Among these are the rights:

- (i) to be informed promptly and in detail of the nature and cause of the charge against him;¹¹
- (ii) to have adequate time and facilities for the preparation of his defence;¹² and
- (iii) to be tried without undue delay.¹³

27. In order to establish that an amendment is in the interest of justice, the onus rests on the Prosecutor to set out the factual basis and legal motivation in support of his request to amend, and it is for the Defence to respond to his arguments.¹⁴

The Prosecutor’s Request to Delete Two Counts and Contextual Information

28. The Prosecutor seeks to withdraw two counts from the current indictment, i.e. count 4 (rape as a crime against humanity) and count 5 (other inhumane acts as a crime against humanity). In certain cases, this may be a gesture inuring to the benefit of the Defence. But this is not always so.

29. In the present case, with just a few weeks left before the trial is due to commence, the Chamber observes that the Defence has likely expended time and resources preparing to defend the charges which are now proposed to be withdrawn. This raises questions of not just inconvenience, but of double jeopardy in the sense of the right of an accused to have cleared, once and for all, any criminal accusation against him or her. The Chamber notes, particularly, that the Defence opposes the Motion in its entirety, including this proposal to withdraw the two counts.

¹⁰ *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*”).

¹¹ See Article 20 4. (a) of the Statute.

¹² See Article 20 4. (b) of the Statute.

¹³ See Article 20 4. (c) of the Statute.

¹⁴ *Prosecutor v. Musema*, Case No ICTR-96-13-I, Decision on the Prosecutor’s Request for Leave to Amend the Indictment, 18 November 1998.



30. The Chamber notes that the Prosecutor has said nothing at all about the reasons for this request to withdraw the two counts at this stage of the proceedings. This particularly leaves the Chamber at a loss as to why the Prosecutor waited until this late hour to make the present Motion, noting that the Prosecution has been in possession of all the statements that the Prosecutor cites in support of his motion when the current indictment was last amended and filed in December 2003. In this connection, the Chamber observes that these charges have been confirmed by a judicial decision of this Tribunal.¹⁵ If the Prosecutor does not seize the Chamber of sufficient reasons or grounds upon which to reconsider the decision confirming the indictment, the Chamber will lack a legal basis upon which to exercise any discretion to depart from that previous decision. It bears saying that once an indictment has been confirmed the Prosecutor cannot obtain an amendment without providing the Chamber with a convincing legal justification.

31. In this regard, it is worth mentioning that a prosecutor who no longer intends to prosecute an accused on certain counts of the indictment needs no amendment of the indictment to achieve that end. He could, instead, simply declare, at the opening of the trial, that he will not present any evidence on those counts. At the eve of trial, as in the present case, such a declaration might prove a more efficient way of achieving what was intended by a motion to amend the indictment.

32. Another motivation for the proposed amendment is so that the Prosecutor may remove information on the historical and social contexts contained in the current indictment.

33. In this regard, the Chamber recalls the jurisprudence saying that to apply for leave for the purpose of, *inter alia*, removing the historical and social contexts and removing charges may not always be in the interests of judicial economy.¹⁶

34. In view of the foregoing, the Chamber finds that Prosecutor's request to amend the indictment in order to withdraw Counts 4 and 5 is unnecessary, and that his request to remove the historical and social contexts is not in the interests of judicial economy.

Are the "New Particulars" Within the Scope of the Confirmed Charges or Do they Constitute New Charges?

35. The Chamber recalls the Tribunal's jurisprudence that a motion to amend an indictment may generally be allowed for any of the following purposes: (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment.¹⁷ The Chamber, however, notes that proposed amendments which add new charges are more problematic and thus require greater scrutiny and analysis in order to avoid prejudice to the rights of the Accused. It bears

¹⁵ *Prosecutor v. Muvunyi, Nizeyimana, Hategekimana*, Case No ICTR-00-55-I, Decision to Confirm the Indictment, 2 February 2000.

¹⁶ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 6 October 2003, 31. Note that this issue was not addressed on appeal.

¹⁷ *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 6 October 2003, 26.



emphasizing that the reason for caution when new charges are added is not merely because the charges are new, for new charges in themselves do not impugn a motion to amend an indictment. It is the interest of justice in the particular circumstances of the case that make it so.

36. In this connection, the Chamber will now address the essential question whether the new information that the Prosecutor has pleaded in his proposed amended indictment contain merely new particulars within the scope of the confirmed charges (as the Prosecutor contends), or rather (as the Defence insists) constitute new charges in the sense of Rule 50(B) of the Rules. Considering that the second proposed amended indictment essentially encompasses the first proposed amended indictment, and considering that the Prosecutor has tendered the second proposed amendment to replace the first, the Chamber will now limit its discussion in this part to the contents of the second proposed amended indictment.

37. The paragraphs which the Defence contests as containing new charges are paragraphs 9, 15, 17, 19, 20, 21, 22, 25, 26, 27, 32, 33, 34, 35, 36, 38, 41, 42, and 43 of the proposed Indictment.

38. In the context of determining whether any of these paragraphs or a combination thereof contains new charges, the Chamber observes that “charge” and “count” are not always coterminous. The word “charge” may sometimes be taken as synonymous with “count” as far as it merely refers to the crime alleged in an indictment. Conversely, the term “charge” as it appears in Rule 50(B) of the Rules may not be limited to this usage. A charge also can have the larger meaning of an allegation leveled against an indicted person. Hence, the Chamber does not limit its evaluation to the question whether the proposal contains new counts, but rather examines whether the proposed amendment includes new allegations that amount to new charges.

39. Thus, in determining whether the new information that the Prosecutor proposes to introduce amounts to new charges in the sense of Rule 50(B) of the Rules, the Chamber considers, among other factors, the following criteria:

- (i) Could the additional allegation by itself, if proven, ground a conviction of the Accused for any crime?
- (ii) Does the additional allegation constitute a material fact which converts what was an unintelligibly vague pleading (which did not engage an issue) into an intelligible factual allegation (which now engages an issue)?
- (iii) Does the proposed change amount to the addition of a level of specificity that radically transforms the existing pleading?
- (iv) Is the additional allegation a fact addressing an element or part of an element of crime?
- (v) Does the additional allegation rebut a defence?
- (vi) Does the additional allegation constitute an aggravating circumstance?
- (vii) Does the additional allegation rebut a plea in mitigation?

40. The Chamber observes that the proposed Amended Indictment contains two types of new material. On the one hand, some of the material contains expanded factual allegations that do in fact amount to new charges. These are based on allegations in witness statements reproduced in the supporting material. The vast majority of those allegations are to be found in statements dated between 1998 and 2002 and disclosed to the Defence between July 2001 and December 2004. On the other hand, there are those facts that merely particularise the allegations already contained in the current indictment. It is the Chamber's view that while introducing the former at this stage of pre-trial proceedings is likely to occasion substantial prejudice to the accused, the latter are unlikely to have that effect.

41. Having reviewed the allegations in the proposed indictment in the light of the existing jurisprudence and the foregoing discussions, the Chamber finds that the following of the Prosecutor's proposed changes amount to new charges:

- (i) The proposed Paragraph 15 alleges that the attacks on wounded Tutsi refugees in the vicinity of University Hospital in Butare occurred between April and May 2004. Previously, the Prosecutor alleged that these attacks occurred on or about 15 April 1994. It is the Chamber's view that the proposed change does broaden the time frame for which the Defence may need to conduct investigations and prepare its case.
- (ii) The proposed Paragraph 16 alleges that the Accused mandated hospital staff to halt treatment of Tutsi refugee patients and later ordered their evacuation with no provision for their care. While the current indictment mentions an attack on wounded Tutsi at the hospital, it says nothing about orders or instructions that the Accused might have given to hospital staff. The proposed Paragraph 16 thus introduces a completely new element and broadens the scope of the legal responsibility of the Accused. It may also raise questions of aggravation of the crime alleged.
- (iii) The proposed Paragraph 17 seeks to change the factual basis of Counts 1 and 2 by reference to the factual allegations in paragraphs 37 to 43 (Count 3). The latter paragraphs contain new charges [See the discussion in clauses (vii) and (viii) below]. The proposed incorporation by reference would therefore also introduce new charges into Counts 1 and 2.
- (iv) The proposed Paragraph 18 alleges that the establishment of roadblocks was ordered by the Interim Government on or about 7 April 1994. The current indictment categorically states that the Interim Government ordered roadblocks to be created on 27 April 1994. The proposed amendment thus expands the period during which roadblocks were ordered to include the period of 7 April to 26 April 1994 and therefore may at least supply new material elements of one or more crimes.
- (v) The proposed Paragraph 25 alleges the Accused's involvement in the abduction of Tutsi civilians from various communes and their torture at the brigade cell or ESO Camp. The proposed Paragraph 26 alleges the Accused's involvement in the abduction of family members of Tutsi soldiers from ESO camp who were later on killed at an unknown location. The current indictment only indicates



one abduction at the Beneberika Convent. This new allegation multiplies the locations and incidence of the alleged abductions.

- (vi) The proposed Paragraph 27 alleges that Jean Baptiste Habyalimana was detained at the brigade cell which was under the control of the Accused. It further alleges that Habyalimana was taken away from the cell and never seen again. The current indictment refers to Habyalimana's dismissal from his position as prefect of Butare, yet no mention is made of the Accused's involvement in his detention or disappearance. Accordingly, this is a completely new allegation that is not contained in the current Indictment.
- (vii) The proposed paragraphs 33 to 36 contain allegations of the Accused's involvement in the training and recruitment of Hutu civilians as militiamen at ESO and other locations in Butare prefecture. The current indictment, in paragraphs 3.11(i) and (ii) makes general allegations about the creation of *Interahamwe* committees at the prefectural level, and that the MRND Party and the Rwandan Armed Forces (FAR) provided support, military training and weapons to those members devoted to their extremist cause. The personal involvement of the Accused in any of these events is not alleged in any part of the current indictment. This new pleading does constitute a material fact, without which a charge in the existing indictment may not be supported and does add specificity that radically transforms the existing pleading.
- (viii) The proposed Paragraph 41 alleges that the Accused himself "provided weapons for local militiamen" at the Nyakizu meeting in April 1994, and that these weapons were later used "to kill Tutsi civilians." Conversely, Paragraph 3.26 of the existing indictment alleges that "during the events referred to in this indictment" the Accused "participated directly in the provision of weapons". The proposed paragraph therefore contains new charges in the sense that it specifically alleges that the Accused supplied weapons which were used to kill Tutsi civilians. There is a difference between this allegation and the version of it in the existing indictment, which merely accused him of participation in the provision of weapons.

42. In the circumstances then, the Chamber is satisfied that the proposed indictment contains new charges. But the point of the foregoing exercise is, of course, not merely to find whether the proposed indictment contains new charges. As stressed earlier, new charges in themselves do not bar the Chamber from granting leave to amend an indictment; it is the interest of justice in the particular circumstances of the case that may stand in the way of an amendment.

The Prosecutor's Diligence and Potential Prejudice to the Accused



43. In order fully to address the implications of the new charges as determined above, the Chamber must consider whether the Prosecutor was diligent in seeking to amend the indictment as he seeks to do at this late stage of the pre-trial proceedings, and whether granting such an amendment could potentially prejudice the rights of the Accused under Article 20 or confer an unfair tactical advantage on the Prosecution.

44. In this connection, the Chamber notes that the Accused has been in detention since February 2000: the initial indictment was filed on 17 November 2000 to which the Accused pleaded not guilty; and the current indictment was filed on 23 December 2003, following an amendment severing the case for the Accused. The Chamber also notes that at the Status Conference held on 7 December 2004, the Chamber announced that the trial would commence on 28 February 2005. Subsequent to this instruction, the Prosecutor filed a motion seeking an amendment on 17 January 2005, which he revised extensively and replaced on 4 February 2005.

45. It is especially of note that by December 2003 when the Prosecutor last modified the indictment, the Prosecutor was ostensibly in possession of most, if not all, the witness statements that he claims to rely upon in support of the amendments sought by the current motion. The Chamber recalls that the Prosecutor has based the additional allegations, including the new charges, on the following witness statements dated between 1998 and 2002 and previously disclosed to the Defence:

- a. Witness statement of Witness CCQ dated 31 January 2001;
- b. Witness statement of Witnesses TQ and QBE dated 28 July 1998 and 20 July 2001 respectively;
- c. Witness statement of Witnesses YAI and CCP, dated 12 May 2000 and 19 October 1999 respectively;
- d. Witness statements of Witness CCR dated 20 July 2001, 23 May 2001 and 16 August 2001;
- e. Witness statements of Witness YAQ dated 4 February 2000 and 20 March 2001;
- f. Witness statement of Witness NN, Witness YAA and Witness KAL dated 16 July 1998, 19 September 2000 and 9 September 2002 respectively;
- g. Witness statement of Witness XV dated 7 December 2000; and
- h. Witness statement of Witness YAN and Witness YAO dated 31 January 2000 and 7 February 2000 respectively.

46. It is the Chamber's view that the Prosecutor has an obligation to satisfy the Chamber that he acted with diligence, both in gathering new evidence and in bringing the motion for amendment in a timely manner. The Prosecutor has failed to articulate any reasons why the amendments that form the subject matter of the current motion were not sought in December 2003 even though the Prosecutor was in possession of all the information necessary to do so. The Chamber concludes that the Prosecutor has failed to



discharge his obligation of due diligence in bringing the Motion for amendment at this stage of pre-trial proceedings.

47. While Rule 50 of the Rules does not require the Prosecutor to move to amend an indictment as soon as new evidence is discovered, the Prosecutor cannot delay giving notice of changes without reason.¹⁸ The Prosecutor does not advance any reason for the delay identified above, but instead claims to rely on “new jurisprudence” which obligates him to plead with sufficient particularity.¹⁹ The Chamber is not convinced by this argument because it relates mainly to the issue of additional specificity, and the jurisprudence relied upon was not actually new, but only affirmed the state of the law existing even well before December 2003 when the indictment was last modified. Having concluded that the Prosecutor was not diligent in bringing his Motion for amendment, the Chamber will now consider whether allowing the proposed amendments is likely to prejudice the rights of the Defence.

48. It may be concluded reasonably that throughout his pre-trial detention, the Accused would have expended time and resources preparing his defence on the basis of the indictments filed. As already stated, the Prosecutor has not given any reason why he did not, in December 2003 or throughout 2004, seek the amendments that form the subject matter of the current Motion, even though he seems to have had all the relevant information at his disposal. The Chamber concludes that to amend the indictment on the eve of trial, and in doing so, introduce new material elements as the Prosecutor seeks to do, is likely to cause substantial prejudice to the right of the Accused to a trial without undue delay as well as to his right to prepare his defence, and is likely to further prolong his pre-trial detention.

49. In this regard, the Chamber is also mindful of the procedural consequences of amending the indictment at this late stage of pre-trial proceedings by the introduction of new charges. Under Rule 50(B) and (C), these include the requirement of a further appearance by the Accused, a period of thirty days to file preliminary motions with respect to the new charges pleaded in the indictment, and the likelihood of the postponement of the trial to allow the Accused adequate time to prepare his defence.

50. Having concluded that substantial prejudice is likely to be occasioned to the rights of the Accused if the amendment sought is granted, the Chamber must also consider whether this prejudice can be cured by other legal mechanisms. Pursuant to the Rules, the only possible cure would be, at the barest minimum, to resort to the procedural mechanisms under Rule 50(B) and (C). It is the Chamber’s view that resort to those provisions will inevitably lead to a postponement of the commencement of trial, possibly for a period longer than the minimum period indicated in Rule 50(C). This will necessarily further prolong the pre-trial detention of the Accused.

¹⁸ *Prosecutor v. Muhimana*, Case No ICTR-1995-1B-I, Decision on Motion to Amend Indictment (TC), 21 January 2004, 8; *Prosecutor v. Karemera et al.*, Case No ICTR-98-44-AR73, Decision on Prosecutor’s Interlocutory Appeal Against Trial Chamber Decision III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003.

¹⁹ Note para 1.2(iv) and 3.8-3.10 of the submission. There he refers to the case of *Prosecutor v. Elizaphan Ntakirutimana* ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004 and *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment (AC), 26 May 2003.

Proper Pleading of Individual Criminal Responsibility

51. Also of note in this connection is the Prosecution Counsel's suggestion that the current Motion is motivated by current advances in the jurisprudence of ICTR and ICTY, and that according to this jurisprudence, the submission goes: (a) the Prosecutor is entitled to rely on all modes of participation enumerated in Article 6(1) of the Statute; (b) the Chamber may find the Accused guilty if it determines that he participated in a crime through any action contemplated by the Statute even if it differs from the theory advanced by the Prosecutor in the indictment; (c) through the general pleading of responsibility under Article 6(1) of the Statute, the Defence is on sufficient notice that any of the forms of responsibility therein contemplated may apply; and (d) responsibility under Article 6(1) and 6(3) of the Statute are not mutually exclusive.

52. The Chamber is rather surprised by this understanding of the current jurisprudence of the Tribunals on pleadings. In *Ntakirutimana*, the Appeals Chamber quoted with approval the *dicta* from the *Aleksovski* case that

the practice by the Prosecution of merely quoting the provisions of Article [6(1)] in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicates in relation to each individual count precisely and expressly the particular nature of responsibility alleged.²⁰

The Chamber also recalls the *dicta* of the ICTY Appeals Chamber in *Krnjelac* where it stated that:

With respect to the nature of the liability incurred, the Appeals Chamber holds that it is vital for the Indictment to specify at least on what legal basis of the Statute an individual is being charged ... Since Article [6(1)] allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial.²¹

The Chamber considers that the manner in which the Prosecution has presented the Accused's responsibility under Articles 6(1) and 6(3) in the proposed indictment does not follow the Appeals Chambers' holdings in relevant respects. Therefore the Chamber is not convinced that, in this regard, the Accused is better informed and could better prepare his defence if the proposed amended indictment was granted.

53. The Chamber therefore rejects the Prosecutor's argument that it may find the Accused guilty of any crime, even if it differs from the particular theory of responsibility advanced by the Prosecutor in the indictment. The Chamber also wishes to re-iterate that what is at stake is not the scope of the judicial powers of the Chamber, but rather, the rights of the Accused to be informed in a timely, clear and consistent manner of the charges against him, and in a manner that is consistent with his right to speedy trial.

²⁰ *Prosecutor v. Ntakirutimana & Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004, 473.

²¹ *Krnjelac* Appeal Judgement, para. 138.



54. In light of the foregoing considerations, the Chamber is of the view that the likely prejudice to the rights of the Accused outweighs any considerations of judicial economy or expediency proffered by the Prosecutor. The Chamber also considers that overall, the foreseeable negative effects of introducing the amendments sought at this stage of the pre-trial proceedings, outweigh the future, possible and uncertain advantages. Granting the amendments sought, at this stage of pre-trial proceedings will not serve the interest of justice in the specific circumstances of the present case.

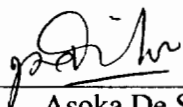
FOR THE ABOVE REASONS, THE TRIBUNAL

DENIES the Motion;

PERMITS the Prosecutor, if he chooses, to file a Schedule of Particulars in order to arrange his current pleading in a clearer manner--provided that no new allegation, as found by the Chamber, is added in this exercise. If the Prosecutor chooses to follow this course, the Chamber directs him to include the following information in the said Schedule:

- (i) the types of responsibility under Article 6(1) or 6(3) of the Statute, as the case may be;
- (ii) the factual allegations which refer specifically to a type of responsibility under Article 6(1) or 6(3) of the Statute, as the case may be.

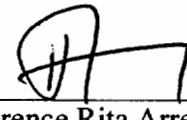
Arusha, 23 February 2005, done in English.



Asoka De Silva
Presiding Judge



Flavia Lattanzi
Judge



Florence Rita Arrey
Judge

[Seal of the Tribunal]

