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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 14 July 2006

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THE PROSECUTOR

v.

Siméon NCHAMIHIGO

Case No. ICTR-2001-63-I

DECISION ON REQUEST FOR LEAVE TO AMEND THE INDICTMENT

The Prosecution
Alphonse Van
Madeleine Schwarz

The Defence
Denis Turcotte

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the “Requête du procureur aux fins d’être autorisé à modifier l’acte d’accusation”, filed on 5 May 2006;

CONSIDERING the Defence Response, filed on 5 July 2006; and the Prosecution Reply, filed on 10 July 2006;

HEREBY DECIDES the motion.

INTRODUCTION

1. The current Indictment of the Accused, dated 29 June 2001, charges the Accused with three counts: genocide, or alternatively, complicity in genocide; extermination, or alternatively, murder, as a crime against humanity; and violations of Article 3 common to the Geneva Conventions and Additional Protocol II.¹ The Prosecution now seeks leave to alter the charges against the Accused and has drawn up a proposed Indictment. The Defence opposes the motion.

2. As a preliminary matter, the Chamber rejects the Defence argument that it should not consider the Prosecution reply to its response. Although such filings are not specifically permitted by the Rules of Procedure and Evidence, nor are they prohibited. The Chamber has discretion to consider such submissions and, in the present instance, chooses to do so.²

SUBMISSIONS

3. The Prosecution proposes the following amendments to the current Indictment:
- (a) separation of extermination as a crime against humanity and murder as a crime against humanity into two distinct and independent counts, rather than as a single count in which the two crimes are pleaded in the alternative;
 - (b) removal of the counts of complicity in genocide and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto, and ~~addition of a count of other inhumane acts as crimes against humanity under Article 3 (i) of the Statute;~~
 - (c) clarification that the Accused is charged with participating in a joint criminal enterprise;
 - (d) insertion of additional details, including names, dates and places with respect to other factual allegations, and removal of some generally phrased material facts; and,
 - (e) addition of new material facts such as, for example, an allegation that the Accused personally killed four Tutsi civilians.

¹ The Accused pleaded not guilty to all three counts at his initial appearance on 29 June 2001.

² *Bagosora et al.*, Decision on Kabiligi Request for Particulars of the Amended Indictment, 27 September 2005 (TC), para. 3.

4. The Prosecution states that many of the changes are justified by the discovery of new information which indicates a "much greater participation by the Accused" in the crimes charged, as well as participation in other inhumane acts as a crime against humanity.³ The proposed Indictment is said to more accurately reflect the totality of the evidence against the Accused and provides more specificity as to the nature and cause of the charges against him. The Accused will suffer no prejudice if leave to amend is granted because, according to the Prosecution, the proposed Indictment is based largely on material which has already been disclosed to the Accused pursuant to Rule 66 (A).⁴ Further, in the absence of any date for the opening of the trial the right of the Accused to be tried without undue delay under Article 20 (4) (c) of the Statute will not be compromised.⁵

5. The Prosecution claims that it has been diligent in moving for the amendments in a timely manner.⁶ The failure to previously propose amendments to the Indictment is justified on the basis that the Prosecution was negotiating for the transfer of the present case to a national jurisdiction. The Prosecution did not consider it necessary to amend the Indictment while such negotiations were ongoing.⁷

6. In its motion, the Prosecution also requests that Witnesses BRG, BRD, BRE, BNB, BRF, BRK, BRH, BRR, BRQ, BRN, BRO, BPA, BRX, BOV, BPX, BRY, BRZ, BOU, and API be granted protective measures under Rules 53 (A), 69 and 75 (A) and that the statements be disclosed to the Defence only in redacted form, pursuant to an order of the Chamber.⁸

7. The Defence opposes the motion. The five-year delay between the filing of the current Indictment and the present amendments is said to be unjustified. Many of the factual elements which the Prosecution now seeks to add to that Indictment were discovered some time ago; the Prosecution must have been aware of these facts, in light of the ongoing *Ntagerura* trial, which involved many of the same factual allegations that are now brought against the Accused.⁹ Moreover, twelve of the new witnesses upon whom the new material facts are based are detainees, who should have been discoverable long before now.¹⁰ Negotiations with a State for the purpose of transferring the case to a national jurisdiction provides no excuse for failing to amend the Indictment in a timely manner.¹¹

8. Granting the Prosecution leave to amend the Indictment under these circumstances, argues the Defence, would be prejudicial to the Accused. The majority of paragraphs in the proposed Indictment contain entirely new information, including four new counts, that, according to the Defence, is not based on information which has already been disclosed.¹² As such, it is claimed that, if the amendment were granted, the Defence would have to start its work anew.¹³ The inclusion of new charges would necessitate a further appearance and plea by the Accused, which would further delay the start of the case.¹⁴ Furthermore, the

³ Motion, para. 6 (iii); Brief in Support of Motion, para. 26.

⁴ Motion, para. 6 (vi).

⁵ Brief in Support of Motion, paras. 41-42, Prosecutor's Reply, para. 8. See also footnote 46 below.

⁶ Motion, para. 6 (vii); Reply, para. 7.

⁷ Brief in Support of Motion, para. 14.

⁸ Motion, para. 7.

⁹ Response, paras. 3, 84, 90-98, 106, 107.

¹⁰ *Id.*, para. 105.

¹¹ *Id.*, paras. 3, 98.

¹² *Id.*, paras. 5, 64, 66-68, 90-91, 156.

¹³ *Id.*, para. 73.

¹⁴ *Id.*, paras. 77, 80, 124, 153, 154.

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ameliorating effect of the amendments is negligible.¹⁵ The proposed Indictment uses cumulative formulations to plead criminal responsibility, creating confusion and leaving doubt as to which forms of responsibility attach to each count.¹⁶ For example, the proposed Indictment does not specify which forms of joint criminal enterprise the Prosecution is alleging.¹⁷ The proposed Indictment would lead to additional contention and conflict between the parties.¹⁸

DELIBERATIONS

9. Rule 50 (A) (i) provides that, after the initial appearance of the Accused, an indictment may only be amended with leave of the Trial Chamber. The Chamber has discretion whether to grant leave on a case-by-case basis.¹⁹ In making its determination, the Chamber must weigh three factors: the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and the likely delay or other possible prejudice to the Defence, if any, caused by the amendment.²⁰ The Chamber must also consider whether a *prima facie* case exists to support any new charges in the proposed amendment.²¹ At the time this motion was filed, no date for trial had been set. However, on 13 July 2006, the trial was scheduled to start on 25 September 2006. The impact of the proposed amendments will be considered in the context of this schedule.

(a) Separation of the Crimes of Extermination and Murder

10. Separation of the crimes of extermination and murder does not prejudice the Accused. As the current Indictment now stands, with the crimes pleaded in the alternative, the Defence would necessarily have had to prepare to meet both charges. Separation of the counts does not expand the legal basis of criminal liability alleged against the Accused, although it does potentially place him in greater jeopardy if convicted of both crimes. In the absence of any discernible prejudice, and in light of the usual practice of pleading these charges as separate crimes, the Chamber considers the amendment to be justified.

(b) Addition and Removal of Counts and Modes of Liability

11. The Prosecution proposes to withdraw two counts: complicity in genocide and violations of Article 3 common to the Geneva Conventions and Additional Protocol II. The consistent jurisprudence of the International Criminal Tribunals holds that, in the absence of

¹⁵ *Id.*, paras. 162, 166.

¹⁶ *Id.*, paras. 142-145.

¹⁷ Response, para. 149.

¹⁸ Response, para. 163.

¹⁹ *Renzaho*, Decision on the Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence (TC), 13 Feb 2006 ("*Renzaho* Trial Chamber Decision"), para. 9; *Ndindiliyimana*, Decision on Prosecutor's Motion Under Rule 50 for Leave to Amend the Indictment (TC), 26 March 2004, para. 41; *Bizimungu et al.*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 12 Feb 2004, para. 27.

²⁰ *Karempera*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003; *Gatete*, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005, para. 3; *Mpambara*, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 4 March 2005, para. 8; *Simba*, Decision on Motion to Amend Indictment (TC), 26 January 2004, para. 9.

²¹ Rule 50 (A) (ii) states: "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".

specific pleading to the contrary, the material elements of complicity and aiding and abetting are substantially identical.²² The removal of the count of complicity in genocide therefore reduces the redundancy in the current Indictment and is, hence, in the interests of justice.

12. The Prosecution submits that lack of evidence justifies removal of the count of violations of Article 3 common to the Geneva Conventions and Additional Protocol II on the basis of lack of evidence to support the count. The Chamber takes note of the Prosecution position and grants the amendment.²³

13. The proposed Indictment adds the new count of other inhumane acts as a crime against humanity. Except as addressed below in paragraph 21 of this Decision, detailed factual allegations supporting the count are provided in paragraphs 72-75 of the proposed Indictment. Some of the material facts alleged in support of the count were already included in the current Indictment in support of all three counts against the Accused.²⁴ Thus, some of the allegations are, in fact, already well-known to the Accused. Other allegations, added in paragraph 73 of the proposed Indictment, are also alleged in paragraph 31, in support of the count of genocide in that Indictment. The Chamber is of the view that the Defence will have sufficient time before the start of trial to conduct investigation into the new material facts in support of this count.

(c) *Joint Criminal Enterprise*

14. The proposed Indictment advances with greater particularity the theory of joint criminal enterprise as a mode of criminal liability.²⁵ Paragraph 21 of the current Indictment refers to this form of criminal responsibility, albeit ambiguously, stating that “Siméon Nchamihigo ordered, directed or acted in concert with administrative and military officials in Cyangugu *préfecture* ... in the planning, preparation or execution of a common scheme, strategy or plan”. The proposed Indictment has clarified the forms and nature of participation alleged.²⁶ Paragraphs 16 and 18 of the proposed Indictment allege that the Accused

²² *Semanza*, Judgement (AC), 20 May 2005, para. 316 (“[i]n reaching this conclusion, the *Krstić* Appeals Chamber derived aiding and abetting as a mode of liability from Article 7(1) of the ICTY Statute, but also considered that aiding and abetting constitutes a form of complicity, suggesting that complicity under Article 2 of the ICTR Statute ... would also encompass aiding and abetting, based on the same *mens rea*”); *Bagosora et al.*, *Decision on Motions for Judgement of Acquittal* (TC), 2 February 2005, para. 21 (“Aiding and abetting genocide and complicity in genocide are substantially overlapping, if not materially identical, forms of criminal conduct”); *Akayesu*, Judgement (TC), 2 September 1998, para. 546 (noting that “aiding and abetting” in Article 6 (1) “are similar to the material elements of complicity”). See also *Krstić*, Judgement (TC), 2 August 2001, para. 640.

²³ In this regard, “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.” *Muvunyi* Decision, para. 31.

²⁴ Compare para. 75 of the proposed Indictment with paras. 14, 20 and 21 of the current Indictment.

²⁵ *Stakić*, Judgement (AC), 22 March 2006, para. 65 (characterizing joint criminal enterprise as “the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute”).

²⁶ *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 463-467 (The “‘basic’ form of joint criminal enterprise ... is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention [The] “systemic” form of joint criminal enterprise ... is a variant of the basic form, characterised by the existence of an organised system of ill-treatment The third category is an “extended” form of joint criminal enterprise. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose”); *Simba*, Decision on the Defence’s Preliminary Motion Challenging the Second Amended Indictment (TC), 14 July 2004, paras. 8-10; *Mpambara*, Decision on the Prosecution’s Request for Leave to File an Amended Indictment (TC), 4 March 2005, para. 12;

knowingly and willfully participated in a joint criminal enterprise The purpose of the joint criminal enterprise was the destruction of the Tutsi racial or ethnic group in Cyangugu prefecture [sic] through the commission of the crimes of genocide, murder as a crime against humanity, extermination as a crime against humanity and other inhumane acts as a crime against humanity [T]hese crimes were the natural and foreseeable consequences of the execution of the common purpose of the joint criminal enterprise.

The specification that the crimes were the “natural and foreseeable consequence” of the common purpose gives notice to the Accused that he is charged not only with the “basic” form of joint criminal enterprise, but also the “extended” form. This precision allows the parties and Chamber to proceed on a clearer and more precise legal footing which is beneficial for the conduct of the trial. The Prosecution’s proposal to integrate the theory of joint criminal enterprise in the proposed Indictment is therefore granted.

(d) *Specification of Material Facts*

15. The proposed Indictment refines the allegations in the current Indictment by, *inter alia*, specifying dates,²⁷ locations,²⁸ names and numbers of victims,²⁹ and names of individuals with whom the Accused allegedly collaborated in a joint criminal enterprise, or whom he allegedly ordered or instigated to attack and kill Tutsis.³⁰ These additional details may require further investigation by the Defence; on the other hand, they also assist in clarifying and narrowing otherwise general allegations. For example, the Chamber notes that the addition of Pierre Munyandamuta, Vincent Mvuyekure, Jean Bosco Habimana, Patrick Nsengumuremyi, Faustin Sinashebeje, and Nehemi Habirora as the Accused’s alleged co-collaborators in the joint criminal enterprise may require additional investigation by the Defence. However, such additions provide a more accurate picture of the case the

Gatete, Decision on the Prosecution’s Request for Leave to File an Amended Indictment (TC), 21 April 2005, para. 5.

²⁷ For example, while the current Indictment refers in paras. 7-8 to the Accused’s involvement “during April 1994” in supervising roadblocks, delivering weapons to men there, and ordering the killing of Tutsis at roadblocks, paragraph 24 of the proposed Indictment specifies one such particular incident in Kamembe which occurred “on or about 15 April 1994”.

²⁸ The proposed Indictment provides details on the locations and attacks in which the Accused was allegedly involved that are not included with such specificity in the current Indictment, including: roadblocks at Gatandara and Cyapa (paras. 22, 28); and attacks at Nyakanyinka school (para. 33), Gihundwe *Secteur* (para. 35); Mibirizi convent (para. 36); and near Cyangugu prison (para. 44). The addition of paragraphs regarding these locations does not constitute the addition of new charges because these allegations clarify incidents taking place in the broader area of Cyangugu *préfecture* as already alleged in the current Indictment.

²⁹ The current Indictment mentions names of victims (*see* paras. 8, 12, 14, 20), but also heavily relies on statements such as that in para. 20 that “Nchamihigo ordered the killing of a number of individuals that were targeted for being Tutsi, or for being accomplices of the Tutsi” to put the Accused on notice of any victims not specifically mentioned. The proposed Indictment adds names and numbers of victims and situates their killing with greater precision: *see, inter alia*, the name of the accountant Canisius Kayihura (para. 53); a list of influential Tutsi or Tutsi accomplices (para. 43); the mention of thirteen FAR soldiers (para. 69); and the killings of Nsengumuremyi (paras. 24-25), Josephine Mukashema, Marie and Helene (para. 37), Gakwandi (para. 52), and Ndayisaba (paras. 63, 73).

³⁰ The proposed Indictment mentions names the Accused’s alleged collaborators as follows: Christophe Nyandwi, Yusuf Munyakazi, Mubiligi Thompson, Pierre Munyandamutsa, Vincent Mvuyekure, Jean Bosco Habimana, Anasthase Bizimungu, Patrick Nsengumuremyi, Faustin Sinashebeje, Nehemi Habirora, Samuel Imanishimwe, Marc Ruberanziza, Vedaste Habimana, and Emmanuel Bagambiki (para. 17). The proposed Indictment also includes the names of *Interahamwe* who were allegedly ordered or instigated by the Accused to kill, including: Martin Ndorimana (para. 26); Joseph Habineza (paras. 32, 50); and Jean Charles Uwimana (para. 34).

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Prosecution intends to present at trial, and as such, have an ameliorating effect on the clarity and precision of the case to be met.

16. The Chamber finds an exception to this conclusion in the Prosecution's insertion of the phrases "throughout the Rwandan territory" in paragraph 46 and "throughout Rwanda" in paragraph 60 of the proposed Indictment. The addition of these phrases reduces the specificity of the Indictment, substantially increases the vagueness in the allegations and prejudices the Defence by vastly expanding the potential geographic scope of events. These amendments are, accordingly, rejected.

17. Some of the allegations in the Indictment are, in the Chamber's view, irrelevant to the charges against the Accused, or are outside the temporal scope of the Tribunal. The allegation in paragraph 58 of the proposed Indictment that the Accused accepted money is extraneous to the counts in both the current and proposed Indictment. The claim included in the proposed Indictment that the Accused warned Hutu boys not to approach Tutsi girls relates to a 1992 event which falls well outside the dates of jurisdiction of the Tribunal.³¹ In the absence of some showing of the relevance of this fact to the charges within the Tribunal's temporal jurisdiction, leave is not granted for this amendment.

18. The Chamber notes that the spelling of the name of the stadium at which an attack is alleged to have occurred is inconsistent as between paragraph 5 ("Karampaka") and paragraph 9 ("Kamarampaka") of the proposed Indictment. The Prosecution is requested to correct the inconsistency.

(e) *New Material Facts*

19. Proposed amendments that add new material facts may be more prejudicial to the Accused and thus require greater scrutiny.³² The Chamber notes that "[n]othing in Rule 50 prevents the prosecution, as a general matter, from offering amendments that are substantial".³³ However, "[o]nce the indictment is confirmed, the Prosecutor's power to amend a confirmed indictment is not unlimited and must be considered against the overall interests of justice as envisioned by Rule 50 (A)".³⁴ "There is no prejudice caused to the accused if he is given an opportunity to prepare a defence to the amended case."³⁵

20. New charges in the proposed Indictment require a further appearance of the Accused under Rule 50 (B) and raise the possibility of preliminary motions and possible postponement of the trial date under Rule 50 (C). A "new charge" arises not only where there is a new count, but where new allegations could lead to criminal liability on a factual basis that was not previously reflected in the Indictment. The key question is whether the amendment introduces a basis for conviction that is factually or legally distinct from those already alleged in the Indictment.³⁶

³¹ Article 7 of the Statute states that the "temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994."

³² *Muvunyi* Decision, para. 35.

³³ *Karemura et al.*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 12 December 2003, para. 11.

³⁴ *Niyitegeka*, Decision on Prosecution Motion for Leave to Amend Indictment (TC), 21 June 2000, para. 32.

³⁵ *Renzaho* Trial Chamber Decision, para. 10, citing *Renzaho*, 18 March 2005, para. 47, citing in turn *Hadzhihasanovic and Kubura* (TC), 17 September 2003, para. 35.

³⁶ See *Halilovic*, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment (TC), 17 December 2004, para. 30; *Stanisic and Simatovic*, Decision on Prosecution Motion for Leave to Amend the Amended Indictment (TC), 16 December 2005. See also *Simba*, Decision on Defence Motion for New Initial Appearance

21. The proposed Indictment alleges in paragraphs 8, 21 (e), 70, and 76 that the Accused himself directly committed killings of Tutsis. These allegations constitute serious new charges, and their nature poses a potentially heavy investigatory burden on the Defence. The allegations, however, lack sufficient detail, such as the date of the alleged killings and the names of the victims, to allow the Defence to focus its investigations of the allegations.³⁷ As such, these new allegations do not improve the clarity of the case to be met, will not serve to streamline the scope of the trial and will result in prejudice to the Accused and undue delay of the proceedings. The following elements are therefore rejected from the proposed Indictment: “Siméon Nchamihigo himself killed Tutsi as well during the same time period, as described below in the concise statement of the facts relating to the charges” in paragraph 8; “and he himself used two of the weapons, particularly an R4 semi-automatic rifle to kill Tutsi and Hutu political opponents” in paragraph 21 (e); and the allegations in paragraphs 70 and 76.

22. The Accused is also now alleged to have personally led attacks in locations within Cyangugu *préfecture*³⁸ whereas the current Indictment alleges only that he ordered, instigated, or facilitated such attacks. Although the Accused’s role in the events has changed, the events themselves are the same as are described in the current Indictment. Thus, although the added allegation does trigger the procedures concerning “new charges” prescribed by Rule 50 (B) and (C), the Defence’s previous investigations should already have substantially addressed the subject-matter concerned. Any additional investigations as may be needed should not prejudice the Defence or cause undue delay of the case.

23. Paragraphs 39 and 59 of the proposed Indictment newly alleged that “[o]n an unknown date in July 1994, while fleeing to Zaire”, the Accused “recognized a Tutsi woman in the pirogue and ordered or instigated the *Interahamwe* to kill her. The *Interahamwe* then allegedly “killed the Tutsi woman and threw her body into the lake.” Permitting the addition of such a seriously incriminating fact at this stage would prejudice the Accused, particularly in the absence of a convincing explanation for not proposing this new allegation earlier. This allegation is, accordingly, rejected.

24. With regard to the temporal scope of the proposed Indictment, the Chamber notes that the Prosecution extends the date range with regard to certain allegations in the proposed Indictment, including: the period during which the Accused is alleged to have acted as *Substitut du Procureur* in paragraph 3, the date range during which the Accused is alleged to have been a member of the *Tuvindimwe* in paragraph 7, and the period during which the Accused is alleged to have been an *Interahamwe* leader in Cyangugu *préfecture* in paragraph 8.³⁹ None of these allegations, however, even with their expanded date ranges, could independently ground a conviction on any of the counts included in the proposed Indictment. They do not constitute new charges and, because these allegations tend to describe the

(TC), 5 March 2004, paras. 6-7; *Kajelijeli*, Decision on Prosecutor’s Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment (TC), 25 January 2001, paras. 29-31; *Krnjelac*, Decision on Prosecutor’s Response to Decision of 24 February 1999 (TC), 20 May 1999, para. 20; *Muvunyi* Decision, para. 35.

³⁷ Paragraphs 70 and 76 only allege a fairly broad range of dates for the incident, or “[o]n an unknown date in April 1994”. Paragraph 21 (e) alleges only that the killings occurred “[b]etween 6 April and 17 July 1994”.

³⁸ See paras. 29, 30, 35, 36, and 47 of the proposed Indictment.

³⁹ The allegation in paragraph 7 of the proposed Indictment that the Accused was a member of the *Tuvindimwe* is itself a new allegation, but one that is sufficiently related to existing allegations of the Accused’s organization and participation in the “political opposition in Cyangugu *préfecture*” that its addition should not prejudice the Accused. Current Indictment, para. 6.

context of the Accused rather than his actions relating to each count, they would not appear to cause prejudice to the Accused nor unduly delay the proceedings.

25. Paragraph 38 of the proposed Indictment extends the geographic scope of the allegations into Kibuye.⁴⁰ That expansion is not prejudicial to the Defence insofar as the allegations of ordering and instigating the *Interahamwe* are otherwise supported by the existing general allegations of paragraphs 5 and 20 in the current Indictment, and the new alleged incident is described with sufficient specificity for the Defence to prepare its case.⁴¹

26. The other additional facts in the proposed Indictment that do not constitute new charges clearly fall within the scope of the current Indictment and further specify its general allegations in paragraphs 5, 20, and 21.⁴² These facts include, *inter alia*, acting as Deputy Prosecutor on the basis of a forged diploma in paragraph 3 of the proposed Indictment; issuing arrest warrants for Tutsi in paragraphs 4-5; the Accused's positions as "zone supervisor" in paragraphs 10 and 21 (a); and the specific locations of attacks and names of victim, as discussed above.

27. In this regard, the Chamber adopts the reasoning of the Appeals Chamber in *Karemera*:

Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.⁴³

Diligence of the Prosecution

28. Rule 50 does not require the Prosecution to amend an indictment as soon as it discovers new evidence supporting the amendment; however, it may not delay giving notice of the changes to the Defence to earn strategic advantage.⁴⁴ The Chamber recalls the *Muhimana* Decision on Motion to Amend Indictment:

The Prosecution argues that these additional details have emerged as a result of ongoing investigations ... The existence of such new evidence, the date of its discovery, and the date of its disclosure to the Defence are important factors in

⁴⁰ In particular, paragraph 38 of the proposed Indictment alleges that the Accused "ordered or instigated the *Interahamwe* in his area ... to go to Kibuye ... and participate in a number of attacks to kill Tutsi who had sought refuge at Bisesero in Kibuye Prefecture."

⁴¹ Similarly, the mention of Bukavu in paragraph 32 of the proposed Indictment flows from the event in paras. 8 and 20 (c) of the current Indictment; however, as the Accused's driving to Zaire does not constitute a separate basis for criminal liability, this allegation does not constitute a new charge.

⁴² Namely, as stated in the current Indictment, that the Accused "organized and participated in the campaign against the Tutsi and the political opposition in Cyangugu *prefecture*" (para. 5); "ordered the killing of a number of individuals that were targeted for being Tutsi, or for being accomplices of the Tutsi" (para. 20); and "ordered, directed or acted in concert with administrative and military officials ... in the planning, preparation or execution of a common scheme, strategy or plan ... leading to the deaths of hundreds of persons" (para. 21).

⁴³ *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 15.

⁴⁴ *Karemera et al.*, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 20.

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weighing both whether Prosecution has acted diligently, and also whether there is surprise to the Defence that would justify a postponement of the schedule for trial, and which might raise the prospect of undue delay in the trial of the Accused.⁴⁵

29. On 19 May, 2006, a status conference was held, with a view to setting a possible trial date. The conclusion was that the trial would begin sometime between September and November 2006.⁴⁶ That the trial date was not indicated when the present motion was brought, does not suffice to explain the Prosecution's timing of its motion to amend the Indictment. Aside from its assertions that the proposed Indictment is the product of ongoing investigations and derived from information "not available at the time the Indictment against the Accused was confirmed",⁴⁷ the Prosecution has provided little information regarding its diligence and timeliness in bringing this motion. This lack of information is especially notable, given that the current Indictment was confirmed on 29 June, 2001, more than five years ago. Nearly half of the witness statements submitted by the Prosecution in support of the proposed Indictment are dated June 2001 or earlier.

30. The Prosecution's reference to its efforts to refer the current Indictment to a national jurisdiction as provided in Rule 11 *bis*⁴⁸ has limited weight. The Prosecution should have continued efforts to avoid undue delay and move the case forward, regardless of 11 *bis* initiatives undertaken. However, this shortcoming in the Prosecution's motion is outweighed by other factors as described above, including the ameliorating effect of the amendments on the clarity and precision of the case to be met, and their tendency to streamline the judicial process, and by the fact that the Accused will have an adequate opportunity to prepare his defence.

Witness Protection

31. The Chamber authorizes the Prosecution to disclose witness statements in support of the proposed Indictment, as required by Rule 66 (A)(i), in redacted form so as to delete information which would reveal the witness's identity. However, should the Prosecution wish to be relieved of any other disclosure obligation, it must make an appropriate motion.

⁴⁵ *Muhimana*, Decision on Motion to Amend Indictment (TC), 21 January 2004, para. 8.

⁴⁶ T. 19 May 2006 p. 13. As mentioned above (para. 9) the trial is now scheduled to commence on 25 September 2006.

⁴⁷ Motion, para. 26.

⁴⁸ Motion, para. 6 (vii).

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FOR THE ABOVE REASONS, THE CHAMBER

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GRANTS the motion in part, allowing the Prosecution leave to amend the current Indictment in accordance with its motion, except as to the following phrases in the proposed Indictment: “Siméon Nchamihigo himself killed Tutsi as well during the same time period, as described below in the concise statement of the facts relating to the charges” in paragraph 8; the second sentence of paragraph 11 relating to a 1992 event; “and he himself used two of the weapons, particularly an R4 semi-automatic rifle to kill Tutsi and Hutu political opponents” in paragraph 21 (e); paragraph 58; “throughout the Rwandan territory” in paragraph 46 and “throughout Rwanda” in paragraph 60; paragraphs 70 and 76; and

GRANTS the Prosecution’s request for witness protection measures, authorizing the Prosecution to file any witness statements in accordance with Rule 66 (A)(i) in redacted form to conceal the identities of the makers thereof.

Arusha, July 2006



Erik Møse
Presiding Judge



Jai Ram Reddy
Judge



Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

