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NATIONS UNIES

ICTR-01-70-PT
28-09-2006
(543-533)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER II

Before: Judge Asoka de Silva, designated pursuant to Rule 73(A)

Registrar: Mr Adama Dieng

Date: 28 September 2006

THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-PT

JUDICIAL RECORDS/ARCHIVES
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UNICTR

2006 SEP 28 P 4: 17

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

Office of the Prosecutor

Mr William Egbe
Mr Patrick Gabaake
Ms Veronic Wright
Mr Sulaiman Khan
Ms Amina Ibrahim

Defence Counsel

Ms Aïcha Condé

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

SITTING as Trial Chamber II composed of Judge Asoka de Silva, designated pursuant to Rule 73(A);

BEING SEIZED OF the "Prosecutor's Request for Leave to File an Amended Indictment" filed on 25 November 2005 (the "Motion");

HAVING RECEIVED AND CONSIDERED the

- (i) "Brief in Support of the Prosecutor's Request for Leave to File an Amended Indictment" filed on 29 November 2005 (the "Support Brief");
- (ii) "*Réponse du Père Emmanuel Rukundo à la* Prosecutor's Request for Leave to File an Amended Indictment" filed on 01 December 2005 (the "Response");
- (iii) "Prosecutor's Response (*sic*) to Emmanuel Rukundo's Response to the Prosecutor's Request for Leave to File an Amended Indictment" filed on 12 December 2005 (the "Reply");
- (iv) "*Réplique à la* 'Prosecutor's Response to Emmanuel Rukundo à la Prosecutor's Request for Leave to File an Amended Indictment'" filed on 15 December 2005 (the "Rejoinder"); and
- (v) "*À Messieurs les Président et Juges composant la Chambre de première instance III du Tribunal pénal international pour le Rwanda*" filed on 2 March 2006 (the "Further Submission" by the Defence Counsel)

NOTING that the original Indictment against Emmanuel Rukundo was dated 22 June 2001 and filed with the Registry on 25 June 2001;

RECALLING that the Confirming Judge partially confirmed the Indictment in a Decision dated 5 July 2001; rendered an Additional Act of Confirmation on 12 September 2001; and a Second Additional Act of Confirmation on 21 September 2001;

RECALLING FURTHER that in compliance with Trial Chamber III's "Decision on Preliminary Motion" dated 26 February 2003, the Prosecution submitted an Amended Indictment dated 27 March 2003 and filed on 31 March 2003;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

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

INTRODUCTION

1. On 25 November 2005, the Prosecution submitted a Motion for Leave to File an Amended Indictment, followed by a Support Brief and a translation into French of the proposed Amended Indictment. The Accused, working *pro se*, filed a Response, to which the Prosecution sent a Reply and the Accused then filed a Rejoinder. After her appointment as Counsel for the Accused, Ms Condé also made a Further Submission addressing the issue. The case was formally transferred from Trial Chamber III to Trial Chamber II on 14 September 2006¹ and the trial is scheduled to commence in November 2006.

¹ See Interoffice Memorandum from the President of the Tribunal to the Chief of the Court Management Section dated 14 September 2006.

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SUBMISSIONS OF THE PARTIES**THE PROSECUTION**

2. Relying on Rule 50 of the Rules, the Prosecution requests leave of the Chamber to file an Amended Indictment. It argues that since Rule 50 does not explicitly prescribe a time-limit within which the Prosecution may move to amend an indictment, this leaves open the possibility of amending the indictment at any time in light of the circumstances of each individual case.
3. The Prosecution submits that its Motion is justified in law and on the evidence and that the proposed Amended Indictment should be granted for the following reasons: it is based on the same charges and no substantial changes have been made to the initial counts of the current Indictment; it sets forth the facts and charges with greater particularity and captures the nature of the Accused's culpability with greater clarity; it brings the existing Indictment in accordance with the jurisprudence of the ICTR and current charging practices of the Office of the Prosecutor; it will not prejudice the rights of the Accused to a fair trial and it will, on the contrary, expedite the trial; it expands and elaborates on the factual basis of the existing charges against the Accused; it is based on a substantial volume of the evidence that has already been disclosed to the Accused under Rule 66(A); any new allegations are supported by the same factual elements pleaded in the original Indictment thus mitigating any prejudice or surprise to the Accused; and it does not amount to a "substitution" of the existing Indictment.
4. The Prosecution further submits that it has deleted some paragraphs from the current Indictment and consolidated others, so that each charge is now pleaded with greater particularity and specificity in respect of the involvement of the Accused. It argues that the proposed Amended Indictment will give the Accused the ability to better prepare a defence and will allow the trial to proceed more expeditiously. Additionally, the Prosecution submits that in the proposed Amended Indictment there are new allegations that nevertheless do not alter the crimes charged, so the possibility of prejudice to the Accused is greatly reduced. Finally, the Prosecution argues that it is not acting maliciously and that the arguments raised by the Accused concerning this Motion are matters of evidence that will be dealt with at trial.

THE DEFENCE

5. The Accused submits, first of all, that the Amended Indictment dated 27 March 2003 has never been "ratified" by the Chamber. He further submits that the proposed amendment of 25 November 2005 does not add any clarity to the existing charges but substantially alters the spirit and the letter of the Indictment. According to the Accused, the Motion is merely an attempt by the Prosecution to reintroduce the charge of superior responsibility that had been rejected by the Confirming Judge in July 2001. He argues that as a chaplain he had no authority over any soldiers or armed civilians and therefore that it is unfair to hold him responsible for any crimes allegedly committed by them. Finally, the Accused submits that the repeated attempts to modify the Indictment suggest that there is no evidence against him. He therefore prays the Chamber not only to deny the Motion but also to order the Prosecution to withdraw the Indictment.
6. Counsel for the Defence endorses the Accused's submissions, but adds that should the Chamber be minded to grant the Motion, it should direct the Prosecution to specify

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which communal office in Gitarama *préfecture* is referred to at paragraph 10(iv) of the proposed Amended Indictment.

DELIBERATIONS

7. The Chamber recalls the provisions of Rule 50 of the Rules, pursuant to which it may grant leave to amend an indictment. While the Rule does not establish the criteria for granting such leave, the jurisprudence of the Tribunal unambiguously places the onus on the Prosecution to demonstrate the factual and legal justifications for any amendment sought. In determining whether to grant leave to amend an indictment, a Trial Chamber may take the following factors into consideration: the interests of justice;² judicial economy;³ the likely prejudice to an accused's right to a fair and expeditious trial;⁴ the existence of newly discovered evidence that was unknown to the Prosecution at the time the initial indictment was drafted and confirmed;⁵ the nature and scope of the proposed amendment;⁶ and whether the proposed changes more accurately describe "the totality of the criminal conduct of the accused."⁷ The Chamber will evaluate the Parties' submissions on the basis of this jurisprudence.
8. Having compared the contents of the proposed Amended Indictment to those of the current Indictment, the Chamber finds that paragraphs 10(ii), 10(iii), and 10(iv) of the proposed Amended Indictment contain new factual allegations that were not included in the current Indictment. The Chamber notes, for instance that whereas the current Indictment at paragraphs 9 through 12 makes a general reference to "attacks against the Tutsis" at various locations in Gitarama *préfecture* during the months of April and May 1994, the proposed Amended Indictment goes further by providing greater particulars on the venues, the criminal conduct alleged and the victims. Thus, while the substantive charge of genocide remains the same in both versions of the Indictment, the amendment provides more specifics. Under the Tribunal's jurisprudence, the Prosecution is required to plead the material facts upon which it relies to establish its counts or charges in the indictment. However, a failure to plead those material facts may, in certain limited circumstances, be remedied by clear and timely notice to the Defence.⁸

² *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-PT, "Decision on the Prosecutor's Motion for Leave to File an Amended Indictment", 23 February 2005, para. 26.

³ *The Prosecutor v. Augustin Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, "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", 26 March 2004, paras. 40-44.

⁴ *The Prosecutor v. Bizimungu et al.*, Case No. ICTR-1999-50-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 6 October 2003, para. 28.

⁵ *The Prosecutor v. Emanuel Ndinabahizi*, Case No. ICTR-2001-71-I, "Decision on Prosecution Motion for Leave to Amend Indictment", 20 August 2003, para. 4;

⁶ *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.

⁷ *The Prosecutor v. Anatole Nsengiyumva*, "Decision on the Prosecutor's Request for Leave to Amend the Indictment", 2 September 1999, p. 4; *The Prosecutor v. Jean Bosco Barayagwiza*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, p. 4.

⁸ *The Prosecutor v. Kupreskic et al.*, Case No. IT-95-16, Judgement (AC), 23 October 2001, para. 114.



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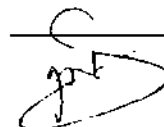
9. The Chamber is of the view that these allegations are merely additional material facts underpinning the already-existing charges against the Accused⁹ and is therefore satisfied that no new charges have been added and that the proposed changes plead the facts with greater specificity and clarity. As the Appeals Chamber has stated,

There is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts). The distinction between the two is one that is quite easily drawn.¹⁰

10. The Chamber notes that the Prosecution has charged the Accused for the same crimes in both the current Indictment and the proposed Amended Indictment, namely, genocide, murder as a crime against humanity, and extermination as a crime against humanity. In both versions of the Indictment, the Prosecution has charged the Accused with individual criminal responsibility pursuant to Article 6(1) of the Statute for all three counts. In the Chamber's view, although the Accused is being charged with individual criminal responsibility for his alleged direct participation in the crimes or for aiding and abetting others in the commission of a crime, the language of the proposed Amended Indictment still makes reference to the Accused's "authority over soldiers and armed civilians". This is ambiguous and could be interpreted as if the Prosecution is also charging the Accused with superior responsibility pursuant to Article 6(3). The Chamber therefore calls on the Prosecution to clarify this ambiguity by explicitly indicating the forms of responsibility with which the Accused is being charged.
11. At the same time, the Chamber observes that the Prosecution alleges criminal conduct falling outside the Tribunal's temporal and territorial jurisdiction. At paragraphs 5 through 8 of the proposed Amended Indictment, for instance, there are repeated references to events that occurred prior to 1 January 1994. Unless such passages fall within the recognised and applicable exceptions, the Chamber will consider them as background or context material and not as substantive charges against the Accused. Similarly, at paragraph 23, there is a reference to an event that allegedly occurred in Switzerland in 1996. The Chamber urges the Prosecution to delete that passage as it refers to events falling outside both the temporal and territorial jurisdiction of the Tribunal. Additionally, the Chamber agrees with the Defence that the Indictment needs to specify which one of the several communal offices in Gitarama *préfecture* is referred to at paragraph 10(iv) of the proposed Amended Indictment.
12. Moreover, it is alleged at paragraph 15 of the proposed Amended Indictment that the Accused "and other authorities" instigated and ordered militiamen to kill several persons and to commit other crimes. However, it is not clear who those "other authorities" might have been and if the Accused is being charged with a form of joint criminal enterprise. The Prosecution should clearly state what form of responsibility is being pleaded under paragraph 15 of the proposed Amended Indictment. In particular,

■ *The Prosecutor v. E. Niyitegeka*, Case No. ICTR-96-14-I, "Decision on the Prosecutor's Request for Leave to File an Amended Indictment", 21 June 2000.

¹⁰ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR73, "Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005", 12 May 2005, para. 19.



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the Prosecution should ensure that no new charge against the Accused is being introduced.

13. Furthermore, at paragraph 18 of the proposed Amended Indictment, the Accused is being charged with genocide for denouncing one Father Alphonse MBUGUJE who was later killed. In the same paragraph, it is alleged that *Kangura* newspaper and radio RTLM also denounced Father Alphonse MBUGEJE (*sic*) thereby causing his death. The same allegations are repeated at paragraph 25 under the murder charge. It remains unclear to the Chamber if it is the same victim who is mentioned in both instances and whether it was the denunciation by the Accused or by the media outlets that led to the death of the victim. The Chamber instructs the Prosecution to clarify this ambiguity.
14. In a similar vein, the Chamber notes that the Prosecution frequently uses different terms to refer to apparently the same venue. For example, the terms "*petit séminaire*" and "minor seminary" appear to refer to the same place while "*grand séminaire*" and "major seminary", or "*Collège Saint Joseph*" and "St. Joseph College" also seem to indicate the same venue. In the interests of clarity and uniformity, the Chamber urges the Prosecution to harmonise the names of the various locations throughout the Indictment.
15. In conclusion, the Chamber is satisfied that the proposed Amended Indictment does not amount to a substitution of the current Indictment, does not introduce any new charges against the Accused, contains no substantial changes in comparison to the current Indictment, sets forth the facts and allegations with greater particularity, and will not prejudice the rights of the Accused to a fair and expeditious trial.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS in part the Prosecution's request for leave to file an Amended Indictment and:

ORDERS the Prosecution to specify which communal office of Gitarama *préfecture* is referred to at paragraph 10(iv) of the proposed Amended Indictment;

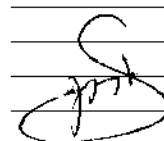
ORDERS the Prosecution to delete from the proposed Amended Indictment the reference to an event that allegedly occurred in Switzerland in 1996;

ORDERS the Prosecution to clarify the ambiguity surrounding the reference to the Accused's alleged "authority over soldiers and armed civilians" and the presumed existence of a superior-subordinate relationship;

ORDERS the Prosecution to clearly indicate the form of responsibility being pleaded at paragraph 15 and throughout the proposed Amended Indictment;

ORDERS the Prosecution to clarify the allegations contained at paragraphs 18 and 25 of the proposed Amended Indictment;

ORDERS the Prosecution to harmonise the names of the various locations referred to in the proposed Amended Indictment";

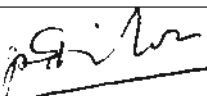


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ORDERS the Prosecution to file a new Amended Indictment in French and English reflecting the above Orders no later than Friday, 6 October 2006;

FURTHER ORDERS the Registry to immediately serve the new Amended Indictment, in French and English, on the Accused and his Counsel.

Arusha, 28 September 2006



Joseph Asoka de Silva

Presiding Judge

