



UNITED NATIONS
NATIONS UNIES

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, Presiding
Inés Mónica Weinberg de Roca
Dennis C. M. Byron

Registrar: Adama Dieng

Date: 30 November 2006

THE PROSECUTOR

v.

Michel BAGARAGAZA

Case No. ICTR-2005-86-I

**DECISION ON THE PROSECUTOR'S APPLICATION FOR LEAVE
TO AMEND THE INDICTMENT**

Rule 50 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Hassan Bubacar Jallow
Stephen Rapp

Defence Counsel
Geert-Jan Alexander Knoops

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

SITTING as Trial Chamber III ("Chamber"), composed of Judges Khalida Rachid Khan, Presiding, Inés Mónica Weinberg de Roca and Dennis C. M. Byron;

SEIZED OF the "Prosecutor's Application for Leave to Amend the Indictment" ("Motion"), filed on 1 November 2006;

CONSIDERING the "Defence Response to Prosecutor's Application for Leave to Amend the Indictment" ("Response"), filed on 7 November 2006; the "Prosecutor's Reply to the Defence Response to the Application for Leave to Amend the Indictment" ("Reply"), filed on 8 November 2006;

HEREBY DECIDES the Motion, pursuant to Rules 50 and 73 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. The current Indictment against Michel Bagaragaza was confirmed by Judge Sergei Alekseevich Egorov on 28 July 2005 and charges the Accused with Conspiracy to Commit Genocide, Genocide, and alternatively, Complicity in Genocide.¹ The Accused made an initial appearance before the Tribunal on 16 August 2005, where he pleaded not guilty to all Counts. The Prosecution now requests leave to amend the Indictment against Michel Bagaragaza, principally by adding a new, fourth Count against the Accused pursuant to Article 4 of the Tribunal's Statute for killing and causing violence to health and physical or mental well-being as a serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977 ("War Crimes"). The Prosecution also proposes other changes to the Indictment, namely deletion of one paragraph which the Prosecution has since discovered was not supported by the evidence, a few additions to reflect changes in recent jurisprudence, several additions to make the details of the existing factual allegations more precise, and a few other corrections of a grammatical or typographical nature. The Prosecution stresses that the proposed amendments are not adding any new factual allegations of a substantial nature, an assertion with which the Defence does not take issue.

2. The Defence agrees to the granting of this Motion, provided that the newly proposed fourth Count, War Crimes, is charged only in the alternative to the Genocide Counts.² In the Reply, the Prosecution accedes to the Defence stance, and amends its application accordingly.

DISCUSSION

Preliminary Matter: Confidential submissions to be reclassified as public documents

3. The Motion and the Reply were filed by the Prosecution as confidential documents. The Prosecution requests that these proceedings remain confidential until the Chamber renders a decision on the Motion, in order to "avoid speculation" on any cooperation

¹ Indictment, filed 28 July 2005; *Prosecutor v. Bagaragaza*, Case No. ICTR-2005-86-I, Decision on Confirmation of an Indictment against Michel Bagaragaza, 28 July 2005.

² The three Genocide Counts are Count I: Conspiracy to Commit Genocide; Count II: Genocide; and alternatively, Count III: Complicity in Genocide.

provided by a State in connection with any possible referral of the Indictment to another Court, pursuant to Rule 11*bis* of the Rules.

4. In the Chamber's view, the Prosecution's Motion and Reply do not contain information that, if disclosed, would cause any prejudice to the Parties in the case or be contrary to the interests of justice. There was no good reason to file these as confidential documents. The Chamber therefore directs that the Motion and Reply be reclassified as public documents.

On the Merits

Addition of the War Crimes Count

5. The Prosecution submits that "the addition of the war crimes count is appropriate in view of the evidence, and with this count included, the Indictment better reflects the criminal liability of the Accused".³ It also emphasises that its request to amend the Indictment by adding a War Crimes Count is mainly motivated by its intent to seek the transfer of this case to a national jurisdiction under Rule 11 *bis* of the Rules.⁴

6. In the Chamber's view and according to the Statute, the Rules and the established jurisprudence, the purpose of encouraging a State to accept a possible transfer of an Accused under Rule 11 *bis* of the Rules is not a relevant factor to be taken into consideration by a Chamber when deciding whether to grant leave to amend an Indictment. In that respect, the Chamber notes that the Prosecutor "shall act independently as a separate organ of the International Tribunal for Rwanda" and shall not seek or receive instructions from any government or from any other source.⁵

7. Rule 50(A)(i) of the Rules prescribes that after the initial appearance of the accused, an amendment of an Indictment may only be made by leave granted by a Trial Chamber. In deciding whether to grant leave to amend the indictment, the Chamber 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.⁶ The Chamber shall therefore examine the proposed amendments to the Indictment, and any supporting materials the Prosecution has provided, to determine whether a *prima facie* case exists against the Accused.⁷ Pursuant to the jurisprudence, other relevant factors include the Accused's right to be tried without undue delay, and to be promptly informed and in detail of the nature and cause of the charges against him or her.⁸ In that respect, Chambers have taken into consideration whether the proposed changes more accurately describe the totality of the criminal conduct of the

³ Motion, paragraph 9.

⁴ "[W]ithin [the proposed state's] jurisdiction prosecutors have considerable experience in prosecuting war crimes cases and have expressed a desire to pursue a war crimes count against the Accused in addition to the genocide counts. It is with respect for the judgment and experience of these national authorities that the Prosecutor seeks to amend the Indictment to include a charge of war crimes." Motion, paragraph 6.

⁵ See Tribunal's Statute, Art. 15(2).

⁶ Rule 50(A)(ii) of the Rules.

⁷ Rule 47(E) of the Rules.

⁸ *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.

accused,⁹ the ameliorating effect of the changes on the clarity and precision of the case to be met,¹⁰ newly discovered evidence,¹¹ and the diligence of the Prosecution in bringing the amendment in a timely manner.¹²

8. The Chamber notes that the supporting materials have already been reviewed by the confirming Judge who determined that a *prima facie* case exists against the Accused for the Counts of Conspiracy to Commit Genocide, Genocide, and Complicity in Genocide. The Chamber further notes that the proposed War Crimes Count is based on the same material facts, and having also reviewed the supporting materials, is satisfied that a *prima facie* case exists against the Accused for this Count as well.

9. Since the Defence agrees to the amendment, no date has yet been set for trial, and the additional War Crimes Count does not include any new material facts, granting leave to amend will not negatively impact the rights of, or otherwise prejudice the Accused. The Chamber therefore grants the Prosecution leave to amend.

10. The Chamber notes that according to the jurisprudence, even in the absence of new factual or evidentiary material, charges in the alternative or additional legal theories of liability are considered new charges.¹³ Since the addition of the War Crimes Count amounts to alleging a new legal theory of liability of the Accused and therefore a new charge, a further appearance of the Accused is required as soon as practicable to enable the accused to enter a plea on the War Crimes Count, in accordance with Rule 50(B) of the Rules.¹⁴

The Chamber's Directions on Specificity, Consistency, and Clarity of Charging

11. According to Article 20 of the Statute and Rule 47(C) of the Rules, the Prosecution must state the material facts underpinning the charges in the indictment: the indictment has to fulfil the fundamental purpose of informing the accused of the charges against him with sufficient particularity to enable him to mount his defence. The Prosecution's characterisation of the alleged criminal conduct and the proximity of the accused to the underlying crime are decisive factors in determining the degree of specificity with which the Prosecution must plead the material facts of its case in the indictment in order to provide the accused with adequate notice. The practice by the Prosecution of merely quoting the provisions of Article 6(1) of the Statute in the indictment is likely to cause ambiguity, and it is preferable that the

⁹ *Prosecutor v. Anatole Nsengiyumva*, Decision on the Prosecutor's Request for Leave to Amend the Indictment, 2 September 1999, para. 4; *Prosecutor v. Jean Bosco Barayagwiza*, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, 11 April 2000, para. 4.

¹⁰ *Prosecutor v. Muhimana*, Case No. ICTR-1995-1B-I, Decision on Motion to Amend Indictment, 21 January 2004, para. 6.

¹¹ *The Prosecutor v. Emanuel Nindabahizi*, Case No. ICTR-2001-71-I, Decision on Prosecution Motion for Leave to Amend Indictment, 20 August 2003, para. 4.

¹² *The Prosecutor v. Augustin Nindiliyimana 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.

¹³ *Prosecutor v. Eliezer Niyitegeka*, Case no. ICTR-96-14-I, Decision on Prosecutor's request for leave to file an amended indictment, 21 June 2000, par. 33; *Prosecutor v. M. Naletilic and Martinovic*, Case No. IT-98-34PT, Decision on Vinko Martinovic's Objection to the Amended Indictment and Mladen Naletilic's Preliminary Motion to the Amended Indictment, 14 February 2001.

¹⁴ Rule 50(B) reads: 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.

Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged.¹⁵ If the Prosecution relies on a theory of joint criminal enterprise, then the Prosecutor must plead the purpose of the enterprise, the identity of the participants, and the nature of the accused's participation in the enterprise. The Prosecution should also specify the form of joint criminal enterprise it intends to rely on.¹⁶ The Chamber has reviewed the details of the proposed Amended Indictment in light of these principles.

12. Paragraphs 17 through 20, 26, and 28 through 30 of the proposed Amended Indictment allege, *inter alia*, the Accused's participation in a joint criminal enterprise with the common purpose of (i) committing Genocide¹⁷ and/or (ii) killing, and causing violence to health and physical or mental well being against the Tutsi.¹⁸ The Prosecution does not specify which form of joint criminal enterprise it intends to rely on. Paragraph 26 alleges that, in addition to a small group of named individual participants, the joint criminal enterprise included "members of the *Interahamwe* and Presidential Guard, and other unknown participants", whereas paragraph 17 says only "other participants", despite the fact that the events alleged in support of these crimes are the same. Paragraphs 28 through 30 specify that the *Interahamwe* and Presidential Guard who allegedly carried out the attacks at Kesho Hill, Nyundo Cathedral and in Rubaya were members of the joint criminal enterprise, whereas paragraphs 18 through 20 do not. The Chamber directs the Prosecution to make the following changes to the proposed Amended Indictment:

- (i) the Prosecution should specify the form of joint criminal enterprise it intends to rely on;
- (ii) where possible, the Prosecution should identify individual members of the *Interahamwe* and Presidential Guard who allegedly participated in the joint criminal enterprise;
- (iii) if further specificity regarding the names of the individual *Interahamwe* and Presidential Guard allegedly involved in the joint criminal enterprise is not possible, the Prosecution should replace the phrase "other participants" in paragraph 17 with the phrase "members of the *Interahamwe* and Presidential Guard, and other unknown participants" from paragraph 26, as the latter phrase adds some specificity;
- (iv) the Prosecution should add the allegation that the *Interahamwe* and Presidential Guard who allegedly carried out the attacks at Kesho Hill, Nyundo Cathedral and in Rubaya were members of the joint criminal enterprise, as is already alleged in paragraphs 28, 29 and 30, to paragraphs 18, 19, and 20 for the purposes of adding specificity to those paragraphs as well as consistency.

13. Introductory Paragraphs 17 and 26 of the proposed Amended Indictment allege that Michel Bagaragaza is individually responsible under Article 6(1) of the Statute for Genocide and War Crimes, respectively. Both paragraphs allege that the Accused "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of" these crimes, but the particular paragraphs that follow only allege that Michel Bagaragaza

¹⁵ *Prosecutor v. Ntakirutimana*, Judgement (AC), 13 December 2004, para. 473.

¹⁶ *Prosecutor v. Krnojelac*, Judgement (AC), 17 September 2003, paras. 138-145; *see also* *Prosecutor v. Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 475-484.

¹⁷ Counts II and III of the proposed Amended Indictment, paras. 17-20.

¹⁸ Count IV of the proposed Amended Indictment, paras. 26, 28-30.

aided and abetted the crimes.¹⁹ In the Chamber's view, it is preferable that the Prosecution indicate precisely in relation to each individual count the particular nature of the responsibility alleged, rather than simply quoting the provisions of Article 6(1). The Prosecution should therefore amend Introductory Paragraphs 17 and 26 so that the particular nature of responsibility alleged is consistent with the more particular paragraphs that follow them.

14. Paragraphs 23 and 34 of the proposed Amended Indictment refer to "the chief of the plantation of the Nyabihu tea factory in Gisenyi prefecture" without specifying his name. If possible, the Prosecution should specify this name.

15. Paragraph 30 of the proposed Amended Indictment alleges, "On or about 9 April 1994, at his home in Rambura, Michel BAGARAGAZA ordered a driver called NSANZIMANA to transport a group of *Interahamwe* [...]", whereas paragraph 20 states, "On or about 9 April 1994, Michel BAGARAGAZA order a driver [...] to transport a group of *Interahamwe* [...]". The underlying events are the same, but paragraph 30 alleges particulars that are not alleged in paragraph 20 — specifically, that the Accused was at his home in Rambura and that the driver was called Nsanzimana. For the purpose of consistency, these particulars should be added to paragraph 20.

16. Paragraph 31 of the proposed Amended Indictment alleges that Michel Bagaragaza is responsible for War Crimes as a superior pursuant to Article 6(3) of the Statute. The Prosecution alleges that, in addition to those individually named or identified, "members of the *Interahamwe*" were subordinates of the Accused. Paragraph 21, which alleges Michel Bagaragaza's responsibility as an Article 6(3) superior for Genocide or Complicity in Genocide, does not include "members of the *Interahamwe*" among the list of subordinates. The material facts alleged in support of the Genocide and War Crimes Counts are identical. Therefore, the Chamber is of the view that, for the purposes of consistency and particularity, the Prosecution should, depending on what it intends to prove at trial, either include "members of the *Interahamwe*" among the list of subordinates in paragraph 21, or remove "members of the *Interahamwe*" from the list of subordinates in paragraph 31.

17. Paragraph 35 of the proposed Amended Indictment alleges that "On or about 8 or 9 April 1994, Emmanuel MBARSHIMANA, a driver at the tea factory of Nyabihu, transported a truck full of *Interahamwe* to Nyundo ...", whereas, paragraph 25, which deals with the same allegation, says "On or about 7-9 April 1994." The Prosecution should amend these paragraphs so that the dates alleged are consistent, and, if possible, should provide more specific dates. In addition, paragraph 35 does not clearly allege which subordinate's actions Michel Bagaragaza had reason to know of and failed to prevent or punish. Both Mbarshimana and members of the *Interahamwe* are alleged to be subordinates of the Accused elsewhere in the proposed Amended Indictment. Paragraph 25, which concerns the same material facts, clearly alleges that Mbarshimana was a subordinate of Michel Bagaragaza. If the Prosecution is also referring to Mbarshimana as the subordinate in paragraph 35, then this should be clearly specified.

¹⁹ Paragraphs 18 through 20 of the proposed Amended Indictment set forth the particulars for Count II: Genocide, and Count III: Complicity in Genocide. Paragraphs 27 through 30 set forth the particulars for the new War Crimes Count.

18. The Prosecutor seeks to delete paragraph 14 of the current Indictment, as further investigations have revealed that the factual allegation contained therein is an inaccurate repetition of the allegation contained in paragraph 11 of the current Indictment (now renumbered as paragraph 15). The Chamber considers that the proposed deletion causes the Accused no prejudice, and is consistent with his right to be informed of the nature and cause of the charges against him. The Chamber therefore allows the proposed change.

19. The Chamber has identified typographical errors and other minor issues that should be corrected:

- (i) In paragraph 18 of the proposed Amended Indictment the second sentence of the paragraph includes the phrase "of the tea" twice in immediate succession.
- (ii) In paragraph 28 of the proposed Amended Indictment the Prosecution should change the internal reference from paragraph number 27, which is incorrect, to paragraph number 26, which is the correct number of the paragraph it is referring to.
- (iii) Paragraph 35 of the proposed Amended Indictment includes the following sentence: "These Tutsi civilians were taking no active part in the non-international armed conflict referred to in paragraph 6 above but were perceived to be sympathizers or accomplices of the RPF. but hundreds of them were killed and seriously injured as a result." These sentences are not clear and should be amended in a comprehensible way.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS leave to amend the Indictment to add an additional, and in the alternative with the Genocide Counts, Count pursuant to Article 4 of the Tribunal's Statute for killing and causing violence to health and physical or mental well-being as a serious violation of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977, subject to the above-mentioned directions; and,

II. ORDERS the Prosecution to file an Amended Indictment with the Registry and the Chamber, including the directions on specificity, consistency, and clarity as outlined above within three (3) days from the service of this Decision; and

III. ORDERS that a further appearance shall be held as soon as practicable, and, accordingly, requests that the Registrar make further arrangements.

Arusha, 30 November 2006.

Khalida Rachid Khan
Presiding Judge

Inés Mónica Weinberg de Roca
Judge

Dennis C. M. Byron
Judge

[Seal of the Tribunal]