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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Mr. Adama Dieng

Date: 29 January 2009

JUDICIAL RECORDS ARCHIVES
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The PROSECUTOR v. Augustin NGIRABATWARE

Case No. ICTR-99-54-T

**DECISION ON PROSECUTION MOTION FOR LEAVE TO AMEND
THE INDICTMENT**

Office of the Prosecutor
Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Counsel for Ngirabatware
Mr. David Thomas

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramarosan and Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Motion for Leave to Amend the Indictment,” filed on 23 October 2008 (“Prosecution’s Motion”);

CONSIDERING the:

- i. “Defence Opposition to Prosecutor’s Motion to Amend Indictment,” filed on 5 January 2009 (“Ngirabatware’s Response”);
- ii. “Prosecutor’s Response to the Defence Opposition to Prosecutor’s Motion for leave to Amend Indictment,” filed on 8 January 2009 (“Prosecution’s Reply”);
- iii. “Disclosure of the Relevant Supporting Material,” filed by the Prosecution on 7 January 2009 (“Witness ANAP’s Statement”);
- iv. “Further Disclosure of Two Witness Statements,” filed by the Prosecution on 19 January 2009 (“Witnesses ANAO’s and ANAI’s Statements”);
- v. “Further Disclosure of Witness Statement,” filed by the Prosecution on 22 January 2009 (“Witnesses ANAF’s and ANAP’s Statements”);

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

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

INTRODUCTION

1. The 27 September 1999 indictment against Jean de Dieu Kamuhanda and Augustin Ngirabatware was confirmed on 1 October 1999. On 7 November 2000, Trial Chamber II granted the Defence for Kamuhanda’s request for severance of the trial and ordered the Prosecution to file a separate indictment pertaining to Kamuhanda. On 17 September 2007, Ngirabatware was arrested in Germany and on 8 October 2008 he was transferred to the Seat of the Tribunal in Arusha. On 30 September 2008, the Ngirabatware case was assigned to Trial Chamber II as a Pre-Trial Chamber. On 10 October 2008, Ngirabatware made his initial appearance before Judge De Silva and pleaded not guilty to all ten counts on the basis of the 27 September 1999 indictment.

2. On 23 October 2008, the Prosecution filed the current Motion. The proposed Amended Indictment is annexed to the Motion. On 27 October 2008, the Chamber instructed the Prosecution to file the proposed annotated indictment with the relevant supporting documents with the Chamber and with the Defence in a redacted form. On 10 November 2008, the Prosecution disclosed supporting material under Rule 66 (A) (i). On 13 November 2008, the Prosecution disclosed the annotated indictment and additional supporting material. On 3 December 2008, Mr. David Thomas was appointed Defence Counsel for Ngirabatware. On



30 December 2008, the Chamber granted a Defence request for extension of time to respond to the Motion until 5 January 2009.

SUBMISSIONS OF THE PARTIES

Prosecution's Motion

3. The Prosecution moves the Chamber for leave to amend the indictment against Ngirabatware as proposed in Annex B; to direct the Registrar to transmit the Amended Indictment to the Accused and his Counsel as soon as possible; to maintain the legal effect of the indictment confirmed on 1 October 1999; and to grant any further relief that the Trial Chamber may deem fit to make in the interests of justice.

4. The Prosecution submits that the amendment is sought in order to:

- a. Remove Counts 5, 8, 9 and 10 from the indictment;¹
- b. Sever the name, charges and allegations in respect of Jean de Dieu Kamuhanda from the indictment;
- c. Remove the allegations in respect of Article 6 (3) responsibility from all counts except Genocide;
- d. Re-arrange the setting and numbering of the charges and paragraphs in the existing indictment;
- e. Supply additional facts yielded by the Prosecution's ongoing investigation in relation to the remaining counts in respect of the Accused;
- f. Capture more accurately and specifically the Accused's culpability by, *inter alia*, supplying names, dates and the number of victims;
- g. Bring the current indictment in accordance with the jurisprudence of the Tribunal and the current charging practices of the Office of the Prosecutor;
- h. State more particularly the modes of liability that give rise to the Accused's individual criminal responsibility;
- i. Elaborate that the Accused is responsible as a participant in a joint criminal enterprise.

5. The Prosecution submits that after an accused's initial appearance, an indictment may be amended if leave is granted by the Trial Chamber pursuant to Rule 50 (A).

6. The Prosecution submits that issues for consideration under Rule 50 include whether the proposed amendments are justified in law and on the evidence available against the accused; whether the amendment will occasion any undue delay and whether such delay will prejudice the rights of the accused to be tried pursuant to Articles 19 (I) and 20 (4) (c) of the Statute of the Tribunal.

7. The Prosecution submits that the amendments sought in the instant case are based on additional evidence that became available to the Prosecution after the confirmation of the present indictment. This evidence is in support of the existing charges and reflects more fully the scope of the Accused's alleged criminal conduct. More particularly, the additional evidence details more fully the role of the Accused as Minister of Planning, as well as his role in the *préfecture* of Gisenyi, where he is alleged to have planned, encouraged, condoned,

¹ Count 5: Murder as a crime against humanity; Count 8: Inhumane Acts as a crime against humanity; Counts 9,10: Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II.



instigated or failed to halt the massacres in Gisenyi. Because of the complex nature of the crimes committed in Rwanda, the investigations into these crimes must be ongoing. The right and duty of the Prosecutor to charge an accused person with offences based on all the information and evidence available to him is not stopped by the passage of time after confirmation of the indictment.

8. According to the Prosecution, the amendment of the indictment will not violate the rights of the Accused to be tried without undue delay and to a fair and expeditious trial as provided for in Articles 19 (1) and 20 (4) (c) of the Statute. No significant delay will be caused, since this application for leave to amend the indictment is being made only a few days after the Accused made his initial appearance and no date for the trial has been set yet. Furthermore, the Accused had been in custody at the United Nations Detention Facility for only 15 days when the Motion was filed, since he was transferred from Germany on 8 October 2008.

9. The Prosecution urges the Trial Chamber to consider that the complexity and intricacy of the crimes committed throughout Rwanda during 1994 and the difficulties inherent in investigating and presenting the evidence of the Accused's culpability in such circumstances should be factors in considering the reasonableness of any delay caused by the amendment of the indictment. Furthermore it is in the interests of justice that the Prosecution presents all the relevant available evidence to prove the case against the Accused and any delay caused by this amendment must be viewed against this background.

10. The Prosecution submits that, according to ICTR jurisprudence, an amended indictment, through more specificity and accuracy, may allow the accused to better respond and prepare for trial, or may shorten the length of the trial proceedings, thus protecting rather than prejudicing the accused person's right to a fair trial. Such amendments may result in a more expeditious trial. The Prosecution submits that the Accused is thereby better enabled to prepare his defence.

Ngirabatware's Response

11. The Defence opposes the Motion and submits that the proposed Amended Indictment dated 23 October 2008 was issued over nine years after the original indictment and alleges an entirely new case against the Accused. Many of the supporting materials for the proposed Amended Indictment post-date the old one by a period of several years. The Defence submits that the expanded factual allegations in the proposed Amended Indictment constitute "new charges".

12. The Defence further submits that the Prosecution failed to amend the indictment with due diligence because most of the supporting materials for the proposed Amended Indictment had been in the Prosecution's possession since April 2005.

13. The Defence requests that the proposed Amended Indictment be subject to the review requirements provided in Rule 47 (E) and (F). The Defence further requests that the Accused should be released from custody during the review of the proposed Amended Indictment arguing that because the Prosecution has abandoned the original indictment, it retains no legal effect. The Defence adds that in case of a provisional release, the Accused would agree to remain in Arusha and to any other restrictions which the Chamber should see fit to impose.



14. Alternatively, if the Motion is granted, the Defence requests a significant amount of time to prepare for trial to meet the new allegations.

Prosecution's Reply

15. The Prosecution replies that the proposed Amended Indictment has an ameliorating effect and may increase the fairness and efficiency of the proceedings, as it will result in a more expeditious trial fostering judicial economy and ensuring the right of the Accused to be tried without undue delay.

16. According to the Prosecution, the need to amend the original indictment became apparent during the trial preparation and ongoing investigations which revealed that several prospective witnesses were untraceable, dead, or unwilling to testify. The Prosecution asserts that it acted diligently in proposing the Amended Indictment at this pre-trial stage and that it is not attempting to gain any strategic advantage through this amendment.

17. The Prosecution finally submits that the Accused will not suffer grave prejudice if the amendment is granted. The amendments will not unduly delay the proceedings or otherwise prejudice the Defence as no trial date has been set. Any possible prejudice arising during the course of the trial from the amendment may be substantially mitigated by methods other than denying the amendment, such as granting adjournments or permitting the Accused to recall witnesses for cross-examination.

DELIBERATIONS

Applicable Law

18. Rule 50 (A) provides that after the initial appearance of an accused, the Trial Chamber may grant leave to amend the indictment pursuant to Rule 73. The Trial Chamber exercises its discretion by determining the matter on a case-by-case basis, applying the standards set out in Sub-Rules 47 (E) and (F) in addition to considering any other relevant factors.²

19. The Appeals Chamber has clearly stated that the "difference between an 'amended' indictment and a 'new' indictment is not useful."³ Nothing in Rule 50 prevents the Prosecution from offering amendments that are substantial. The relevant criterion is whether or not the amended indictment contains new charges, in which case Rule 50 (B) applies.⁴ In ICTR and ICTY jurisprudence, the concept of a new charge as mentioned in Rule 50 (B) has been held to also include the addition of an underlying offence without changing the crime that is alleged under the Statute, in particular if the new allegation could be the sole basis for conviction. One essential criterion is whether the proposed amendment introduces a basis for

²*The Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence, 13 February 2006, para. 9 citing *The Prosecutor v. Bizimungu, et al.*, Case No. ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment (AC), 12 February 2004, para. 27.

³ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 denying Leave to File an Amended Indictment, 19 December 2003, paras. 11, 12.

⁴ *Idem.*



conviction that is factually and/or legally distinct from any fact alleged in the original indictment.⁵

20. As established in the jurisprudence, there are several factors to be weighed in determining whether to grant leave to amend the indictment: 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.⁶ The Chamber must also consider whether a *prima facie* case exists with respect to any new charges in the proposed amendment.⁷

21. Where the Prosecution has delayed unnecessarily in bringing particular allegations, and this delay has caused undue delay to the proceedings or prejudice to the accused, it is within the Trial Chamber's discretion to find that this delay constitutes sufficient ground to refuse an amendment to an indictment.⁸ In assessing whether any delay resulting from the amendment of an indictment would be undue, the Chamber must examine the effect that the amended indictment would have on the overall proceedings. A clearer and more specific indictment benefits the accused not only because it may result in shorter proceedings, but also because the accused can tailor his preparations to an indictment that more accurately reflects the case he or she will have to meet thus resulting in a more effective defence.⁹

22. Further issues to be considered in determining whether the accused may suffer prejudice by the amendments are whether any additional time can be granted to the accused for the preparation of his defence, the reasonableness of any resulting delay in the scheduled start day of trial, the length of the trial itself and the effect on the time spent by the accused in pre-trial detention.

23. The Chamber will now evaluate each of the proposed amendments in accordance with these principles.

⁵ *The Prosecutor v. Gotovina*, Case No. ICTY- IT-0690-PT, 14 February 2008 para. 21, citing *The Prosecutor v. Halilovic*, Case No. ICTY-IT-01-48-PT, Decision on Prosecutor's Motion Seeking Leave to Amend the Indictment, 17 December 2004, paras. 26-35.

⁶ *The Prosecutor v. Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecutor's Application for Leave to Amend the Indictment Pursuant to Rule 50 (A) of the Rules of Procedure and Evidence, 13 February 2006, para. 10 citing further case law; *The Prosecutor v. Setako*, Case No. ICTR-04-81-1, Decision on Prosecutor's Request to Amend the Indictment, 18 September 2007, para. 10.

⁷ Rule 50 (A)(ii) of the Rules.

⁸ *The Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal against Trial Chamber II Decision of 23 February 2005, para. 51; *The Prosecutor v. Setako*, Case No. ICTR-04-81-1, Decision on Prosecutor's Request to Amend the Indictment, 18 September 2007, para. 10.

⁹ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 denying Leave to File an Amended Indictment, 19 December 2003, para. 15; *The Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-2000-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment (TC), 26 March 2004, para. 42.

Evaluation of the Proposed Amendments

Proposed Removals, Restructuring and Legal Update of the Indictment

24. The Chamber considers that the proposed removal of Counts 5, 8, 9 and 10¹⁰; the proposed removal of the allegations in respect of Article 6 (3) responsibility from all counts except Genocide; the proposed removal of the name, charges and allegations in respect of Jean de Dieu Kamuhanda; and the re-arrangement of the setting and numbering of the charges and paragraphs in the existing indictment in accordance with the requested removals will have an ameliorating effect on the indictment. These amendments will narrow down the indictment and may increase the fairness and efficiency of the proceedings. Furthermore, they will contribute to the specificity and accuracy of the indictment thus allowing the Accused to better respond and prepare for trial and protecting the accused person's rights to a fair trial. For these reasons, the Chamber grants these Prosecution requests.

25. The Prosecution seeks leave to bring the current indictment in line with the jurisprudence of the Tribunal and the current charging practices of the Prosecution and to state with more specificity the modes of liability that give rise to his individual criminal responsibility.¹¹ The Chamber considers that these requests will likely result in a more expeditious trial and contribute to the specificity and accuracy of the indictment thus allowing the Accused to better respond and prepare for trial and protect his rights to a fair trial. Therefore, the Chamber grants these Prosecution requests.

Proposed Additional Facts

26. The Chamber considers that the Prosecution does not appear to have exercised due diligence in bringing forth the proposed additional facts more than nine years after confirmation was originally sought. Although the Prosecution contends that some allegations came to light in the course of its trial preparation and ongoing investigations, it has not convincingly demonstrated that the materials underlying the amendments could not have been discovered and submitted to the Chamber earlier in time. The Chamber observes that many statements relied on by the Prosecution date from 2005 or before, i.e. at least three years before the amendment was sought. Some of the statements date from before September 1999 when the original indictment was filed.¹²

27. The Chamber recalls that where the Prosecution has delayed unnecessarily in amending the indictment it is within the Trial Chamber's discretion to find that this delay constitutes sufficient ground to refuse an amendment, taking into account the effect of the Amended Indictment on the overall proceedings. The Chamber considers that while most of the proposed amendments contain new factual allegations, they concretise broad and vague allegations made in the original indictment in support of the Counts by listing particular acts

¹⁰ Count 5: Murder as crimes against humanity under Article 3(a) of the Statute; Count 8: Inhumane acts as crimes against humanity under Article 3(i) of the Statute; Count 9: Outrages upon personal dignity as serious violations of Article 3 Common to the Geneva Conventions and of additional Protocol under Article 4 (e) of the Statute; Count 10: Killing as serious violations of Article 3 Common to the Geneva Conventions and of additional Protocol under Article 4 (a) of the Statute.

¹¹ See for example Amended Indictment para. 19: "In April 1994, after the death of President HABYARIMANA, Augustin NGIRABATWARE transported weapons to Nyamyumba commune, [...] In so doing, Augustin NGIRABATWARE instigated and aided and abetted the genocide of the Tutsi."

¹² See for example Statements of ANAD (17 June 1999), ANAF (30 July 1999), ANAG (31 July 1999), ANAH (14 April 1999).



or omissions by the Accused; by describing specific and detailed events; and by supplying names and dates.¹³ Furthermore, several broad and vague factual allegations have been deleted in the proposed Amended Indictment.¹⁴ The Chamber considers that these additional factual allegations are described with sufficient specificity to permit focused investigations by the Defence.

28. The Chamber notes that while the proposed amendments do not contain any new counts, they add details about underlying incidents which were not at all or only vaguely mentioned in the original indictment and which did not specify Ngirabatware's involvement in them. Recalling that the concept of a new charge as mentioned in Rule 50 (B) includes the addition of an underlying offence without changing the crime that is alleged under the Statute, the Chamber considers that the incidents alleged in the following paragraphs appear to introduce new allegations distinct from any fact alleged in the original indictment. Concerning Count 1: Paragraphs 10-17;¹⁵ Counts 2 and 3: Paragraphs 19, 22-43;¹⁶ Count 4: Paragraphs 46- 55;¹⁷ Count 5: paras. 56-66;¹⁸ and Count 6: Paragraphs 67-69.¹⁹ These factual allegations amount to new charges. Therefore, they may be included in the Amended Indictment only if the requirements of Rules 47 and 50 have been met.

29. The Chamber has considered the material submitted by the Prosecution in support of its Motion, and finds that a *prima facie* case has been established with respect to the factual

¹³ The original indictment and the proposed Amended Indictment match only with respect to a few specific allegations: paras. 6.66 and 6.67 of the original indictment are equivalent to paras. 20 and 21 of the proposed Amended Indictment; para. 6.65 of the original indictment is equivalent to para. 45 of the proposed Amended Indictment; Some incidents which were put vaguely in the original indictment are given further specificity in the proposed Amended Indictment, mentioning names and dates. (see for example para. 5.1 of the original indictment and para. 11 of the proposed Amended Indictment); See also para. 6.65 of the original indictment; and paras. 15 and 39 of the proposed Amended Indictment.; Counts 2 and 3: paras. 4.3, 6.68 and 6.88 of the original indictment are similar to paras. 18 and 44 of the proposed Amended Indictment; paras. 20 and 21 of proposed Amended Indictment are equivalent to paras. 6.66 and 6.67 of the original indictment; para. 44 of the proposed Amended Indictment is similar to paras. 4.5 and 6.31 of the original indictment:

¹⁴ For example Chapter 1-3 of the original indictment; Allegations concerning Ngirabatware's involvement in RTL M radio, see for example para. 5.12.

¹⁵ Count 1 of the proposed Amended Indictment: para. 10 (meeting at Ntezimana's house); paras. 11 (drawing up lists); para.13 (meeting at Gersom Nzabahiranya's house); para. 14 (meeting at Cenge's house); para. 15 (meeting at MRND Palace)..

¹⁶ Under counts 2 and 3 of the proposed Amended Indictment: paras. 19, 22 and 23 (distribution of weapons); para. 24 (creating *Interahamwe* group); para. 25 (distribution of weapons); para. 26 (instigation); para. 27 (giving 30,000 Francs to *Interahamwe*); para. 28 (instigation to kill Tutsi at Pfunda tea factory.); para. 29 (instigation to kill ten Tutsi including Myamunini); para. 30 (order Bagango to distribute weapons); para. 31 (giving car key to support killings); para. 32 (instigation to kill Tutsi); para. 33 (weapon distribution at *Centre de Bruxelles* roadblock); para. 34 (participation in killing of Dusabe); para. 36 (killing persons from list drafted by Ngirabatware); para. 40 (killing of persons listed by Ngirabatware).

¹⁷ Under count 4 of the proposed Amended Indictment: para. 46 (instigating at Kanyabuhumbo School); para. 47 (30,000 Francs); para. 48 (Pfunda tea factory); para. 49 (kill ten Tutsi); para. 50 (giving Bagango car keys); (instigation to kill Tutsi); para. 53 (distribution of weapons at *Centre de Bruxelles* roadblock); para.53 (instigation to kill Dusabe); para. 54 (instigating to kill at *electrogaz* roadblock); para. 55 (giving 30,000 Francs).

¹⁸ Under count 5 of the proposed Amended Indictment: para.56 (weapon distribution); para. 57 (Pfunda tea factory); para. 58 (handing out hand grenades); para. 59 (providing *Interahamwe* with vehicles); para. 60 (killing of Dusabe); para. 61 (instigating *Interahamwe*); paras. 62 and 63 (preparing of a list Ngirabatware adding specific names); para. 64 (execution of person on the list); para. 65 (meeting at Gershom's house); para. 66 (killing of further persons mentioned on the list).

¹⁹ Whereas para. 6.68 of the original indictment only makes a general reference to members of government instigating rape by subordinates, the proposed Amended Indictment is more specific: para. 67 (rape of Bonishance); para. 68 (rape of Nyirabunori); para. 69 (rape of Murazemariya).

allegations underlying the Amended Indictment except with respect to proposed paragraphs 12, 16, 17, 41, 42 and 43. With respect to Paragraph 12, the Chamber has not found supporting material for the 27 February 1994 meeting allegedly attended by Ngirabatware at the Rebero Hotel in Kigali.²⁰ With respect to Paragraph 16, the Chamber has not found any support for the 25 April 1994 meeting allegedly attended by Ngirabatware at the Meridien Hotel in Gisenyi.²¹ Paragraphs 17 and 41 about a meeting at Umuganda stadium in mid-May 1994 attended by Ngirabatware and others are not supported by any witness.²² The Chamber has not found any support for the allegations in Paragraphs 42 and 43 regarding Ngirabatware's alleged provision of financial and logistic support to the *Interahamwe* militia to kill the Tutsi in Gisenyi in the last half of May 1994.²³ Therefore, the Chamber denies the Prosecution request to add these paragraphs to the indictment as they are not supported by the material provided.

30. In the Chamber's view, after careful consideration of all the factors discussed above, the proposed changes have the overall effect of simplifying the proceedings by focussing the scope of allegations, streamlining the indictment and thus improving the Tribunal's and Accused's understanding of the Prosecution's case and contributing to judicial economy. Moreover, the Chamber considers that the addition of the new charges will not unduly delay the proceedings or otherwise prejudice the Accused. The Chamber also notes that the Accused was arrested on 17 September 2007, only transferred to the Seat of the Tribunal in Arusha on 8 October 2008 and his initial appearance was on 10 October 2008. Further, the Chamber observes that the trial is expected to start by May 2009, giving the Defence ample time for preparation. Therefore, the Chamber grants these Prosecution requests.

31. However, the Chamber considers that a further initial appearance is necessary to enable the Accused to enter a plea on these new charges. The Chamber orders that this further appearance shall be held as soon as practicable and 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.

Elaboration on the Accused's Responsibility as a Participant in a Joint Criminal Enterprise ("JCE").

32. The Prosecution seeks leave to elaborate on the Accused's participation in a JCE and to rely on the first category of JCE with regard to Counts 2 and 5²⁴ and on the third category of JCE with regard to Count 6.²⁵

²⁰ The Prosecution relied on the statements of Witnesses ANAI and ANAO as per the Annotated Amended Indictment.

²¹ The Prosecution relied on the statements of Witnesses ANAI and ANAO as per the Annotated Amended Indictment.

²² The Prosecution relied on the statements of Witnesses ANAI and ANAO for paragraph 17 and ANAI and ANAM for paragraph 41 as per the Annotated Amended Indictment.

²³ The Prosecution relied on the statements of Witnesses ANAI and ANAO as per the Annotated Amended Indictment.

²⁴ See for example Amended Indictment Counts 2/3 : The particulars that give rise to his individual criminal responsibility, including his participation in the joint criminal enterprise (category 1), are set forth in paragraphs 18 to 43.

²⁵ See Amended Indictment Count 6: "The risk of rapes of female members of the Tutsi population was a natural and foreseeable consequence of the execution of the common design and Augustin NGIRABATWARE and his co-perpetrators were reckless or indifferent to that risk. The particulars that give rise to the Accused person's criminal responsibility, including his participation in the joint criminal enterprise (category 3) are set forth above..."



33. The Chamber notes that in the current indictment, the concept of JCE was not mentioned and it is therefore misleading to present this addition as an elaboration. However, the Chamber recalls that the Appeals Chamber held that an indictment may be amended by pleading JCE liability. Furthermore it held that particularised notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair but enhances the ability of the accused to prepare its case.²⁶

34. The Chamber considers that the proposed Amended Indictment pleads the allegations of JCE with sufficient specificity. According to the jurisprudence, what is required to be pleaded by the Prosecution with respect to added allegations of JCE is the purpose and period of the enterprise, the identity of the participants²⁷ and the nature of the participation of the accused in that enterprise.²⁸ The Chamber is satisfied that the Prosecution has met these requirements to specify the relevant aspects of JCE in the proposed Amended Indictment.²⁹ The Chamber further notes that the proposed Amended Indictment clearly indicates the form of JCE charged against the Accused along with the required criteria. Under Counts 2 and 3, the Accused is charged with the "basic" form of JCE whereas in Count 6, he is charged with the "extended" form.

35. For these reasons and considering that the trial is expected to start by May 2009, the Chamber considers that the Defence will have time to investigate and that the Accused will not suffer any unfair prejudice from the addition of allegations linked to participation in a JCE. The Chamber grants this Prosecution request.

Misspellings/Mistakes in the Proposed Amended Indictment

36. The Chamber notes that in Paragraph 10 of the proposed Amended Indictment, the name "Captain NTEZIMANA" is mentioned while in the supporting material the name is spelled as "Captain Nizeyimana".³⁰ The Prosecution should rectify this element in the revised Amended Indictment.

²⁶ *The Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 denying Leave to File an Amended Indictment, 19 December 2003, paras. 26, 27.

²⁷ The formulation "such actions being taken either directly or through subordinates" is specific enough, see *The Prosecutor v. Brdanin*, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007, paras. 366, 367.

²⁸ *The Prosecutor v. Karemera et al*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 denying Leave to File an Amended Indictment, 19 December 2003, paras. 26, 27.

²⁹ See concerning Count 2/3. "In addition, Augustin NGIRABATWARE willfully and knowingly participated in a joint criminal enterprise whose common purpose was the commission of genocide against members of the Tutsi ethnic or racial group, and persons identified as Tutsi or presumed to support the Tutsi in Gisenyi and Kigali prefectures as well as throughout Rwanda. In order to fulfill this criminal purpose, Augustin NGIRABATWARE acted with Felicien KABUGA, Théoneste BAGOSORA, Colonel Anatole NSENGIYUMVA, Felix NIYONIRINGIYE, Bourgmestre Faustin BAGANGO, Conseiller for Rushubi secteur Jean SIMPUNGA, Sectoral level MRND President GAHAMANGO, Sectoral level CDR [...] and other unknown participants, all such actions being taken either directly or through subordinates for at least the period of 1 January through 17 July 1994. The particulars that give rise to his individual criminal responsibility, including his participation in the joint criminal enterprise (category 1), are set forth in paragraphs 18 to 43.

³⁰ ANAI (statement 2002) p.4 (K0506969).

37. Furthermore, the factual allegations concerning Count 4 listed in Paragraphs 47 and 55 of the proposed Amended Indictment appear to be repetitious. If this is the case, the repetition should be removed in the revised Amended Indictment.

38. The Chamber notes that Paragraph 58 of the proposed Amended Indictment reads "Around mid-April 1994, Augustin NGIRABATWARE brought twenty five (25) hand grenades to the *Interahamwe* militia...", while the supporting material seems to suggest that hand grenades were distributed to 25 members of the *Interahamwe*.³¹ This error should also be corrected in the revised Amended Indictment.

39. The Chamber observes that Witness ANAL is listed to testify about Paragraphs 48 and 49 in the Annotated Amended Indictment. However the Chamber notes that this Witness' statement does not appear to address the two paragraphs, instead Witness ANAG's statement appears to address them. This error should also be noted.

40. Finally, the Chamber considers that the Defence request for provisional release pending the determination of the Prosecution Motion is without merit as the original indictment remains in force.

FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS in part the Motion to amend the Indictment as envisaged in the proposed Amended Indictment, and in particular;

- I. **GRANTS** the Prosecution request to withdraw counts 5, 8, 9 and 10 of the indictment and remove the allegations in respect of Article 6(3) responsibility from all counts except Genocide;
- II. **DENIES** the addition of Paragraphs 12, 16, 17, 41, 42 and 43 of the Amended Indictment as they lack *prima facie* support;
- III. **ORDERS** the Prosecution to file the Amended Indictment in both French and English within one week of the filing of this Decision;
- IV. **ORDERS** that a further appearance shall be held as soon as practicable as provided for under Rule 50 (B);
- V. **ORDERS** the Prosecution to make timely disclosures of any further relevant supporting material under Rule 66 (A);
- VI. **REMINDS** the Accused that he is entitled, within 30 days, to file preliminary motions pursuant to Rule 72 of the Rules with respect to the new charges as provided for under Rule 50 (C).





³¹ ANAG (statement 2002) para. 6 (K0247098).

Arusha, 29 January 2009



William H. Sekule

Presiding Judge


(read and approved)
Arlette Ramarosan
Judge
(absent at the time of
signature)
(read and approved)
Solomy Balungi Bossa
Judge
(absent at the time of
signature)

[Seal of the Tribunal]