



UNITED NATIONS  
NATIONS UNIES

ICTR-05-82-T  
26-06-2009  
(1310 - 1307)

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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Khalida Rachid Khan, presiding  
Lee Gacuiga Muthoga  
Aydin Sefa Akay

**Registrar:** Mr. Adama Dieng

**Date:** 26 June 2009

JUDICIAL NOTICE RECEIVED

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**THE PROSECUTOR**

v.

**DOMINIQUE NTAWUKULILYAYO**

Case No. ICTR-05-82-T

**DECISION ON DEFENCE MOTION ALLEGING NON COMPLIANCE OF THE  
AMENDED INDICTMENT WITH THE CHAMBER'S DECISION OF 18 MAY 2009**

*Rule 54 of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Charles Adeogun-Phillips  
Ibukunolu Alao Babajide  
Thembile Segoete

**Counsel for the Defence:**

Maroufa Diabira  
Dorothee Le Fraper du Hellen

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## INTRODUCTION

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1. On 1 June 2009, the Defence filed a Motion<sup>1</sup> alleging that the Prosecution had failed to comply with the Chamber's Decision of 18 May 2009, which among other things, ordered the Prosecution to either provide a more specific date range for the meeting mentioned in paragraph 30 of the Indictment, or to remove the allegation.<sup>2</sup> The Defence requests that the Chamber order the Prosecution to comply with its Decision and file a further amended Indictment removing paragraph 30.

2. On 8 June 2009, the Prosecution filed its Response to the Defence Motion submitting that it inadvertently removed paragraph 29 instead of paragraph 30 of the Amended Indictment and that it would not rely on paragraph 30 in seeking a conviction for the charge of Direct and Public Incitement to Commit Genocide.<sup>3</sup>

## BACKGROUND

3. On 28 April 2009, this Chamber issued a Decision on a Defence preliminary motion alleging defects in the Indictment, ordering the Prosecution to file an amended Indictment.<sup>4</sup> Following this Decision the Prosecution filed an amended Indictment on 1 May 2009 ("First Amended Indictment").

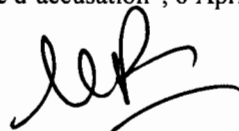
4. On 4 May 2009, during a status conference, the Prosecution acknowledged that it had removed the pleading of Joint Criminal Enterprise ("JCE") in some paragraphs of the Indictment, but not others. The Chamber notes that in fact the Prosecution had removed the pleading of JCE from chapeaux paragraphs 5 and 23 concerning the modes of liability, but had left reference to it and its participants in subsequent paragraphs 8, 10, 11, 12, 15, 25, 26, 29, 30, 31 detailing the specific factual allegations against the Accused. As a result, during this status conference, the Chamber ordered the Prosecution to "review the amended indictment in view of the rulings given by this Chamber and file...the new indictment, by the

<sup>1</sup> *The Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-T, Requête de la Défense sur la non-conformité à la décision de la Chambre du 18 mai 2009 de l'acte d'accusation amendé déposé par le Procureur le 19 mai 2009, 1 June 2009 ("Motion").

<sup>2</sup> *Ntawukulilyayo*, Decision on Defence Motion Alleging Non Compliance of the Amended Indictment with the Chamber's Decision of 28 April 2009, 18 May 2009 ("Second Defects Decision"). See also, *Ntawukulilyayo*, "Requête de la Défense sur la non-conformité de l'acte d'accusation amendé déposé par le Procureur à la décision de la Chambre du 28 avril 2009, 6 May 2009"; *Ntawukulilyayo*, Prosecutor's Response to the Defence Motion that the Amended Indictment did not conform to the Chamber's Decision of 28 April 2009, dated 11 May 2009, filed 12 May 2009.

<sup>3</sup> *Ntawukulilyayo*, Prosecution's Response to Requête de la Défense sur la non-conformité à la décision de la Chambre du 18 mai 2009 de l'acte d'accusation amendé déposé par le Procureur le 19 mai 2009, 8 June 2009, ("Prosecution Response"), paras. 7, 9.

<sup>4</sup> *Ntawukulilyayo*, Case No. ICTR-05-82-PT, Decision on Defence Preliminary Motion Alleging Defects in the Indictment, 28 April 2009 ("First Defects Decision"). See also, *Ntawukulilyayo*, Exceptions préjudicielles de la Défense fondées sur les vices de forme de l'acte d'accusation, filed 20 March 2009, stamped by CMS at 5.43pm that day and circulated/served on 23 March 2009; *Ntawukulilyayo*, Prosecutor's Reply to the Defence Motion Titled Exceptions Préjudicielles de la Défense Fondées sur les Vices de Forme de L'Acte de L'Accusation, 27 March 2009; *Ntawukulilyayo*, Réplique de la Défense à la réponse du Procureur à la requête "Exceptions préjudicielles de la Défense fondées sur les vices de forme de l'acte d'accusation", 6 April 2009.



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close of business today.” Due to the necessity for the Prosecution to file a further amended indictment, the Chamber adjourned the proceedings until 6 May 2009.<sup>5</sup>

5. Later on 4 May 2009, the Prosecution filed a second amended Indictment pursuant to the Oral Order made by the Chamber earlier that day. (“Second Amended Indictment”).

6. On 5 May 2009, the Prosecution filed a third amended Indictment (“Third Amended Indictment”) due to further errors it noticed in the Second Amended Indictment in respect of the pleading of JCE. Specifically, some of the paragraphs still made reference to JCE.

7. On 6 May 2009, during the status conference held that morning, this Chamber issued an oral warning to the Prosecution pursuant to Rule 46 (A) of the Rules of Procedure and Evidence (“Rules”).<sup>6</sup> The Chamber noted that it was the third time that proceedings had been delayed due to the Prosecution’s lack of diligence and found that the Prosecution’s filing of three amended indictments since the First Defects Decision demonstrated “a serial carelessness”. It warned the Prosecution that its conduct was obstructive to proceedings and that any such further conduct might result in sanction.<sup>7</sup> The Chamber then adjourned the proceedings until 2.30 pm that day to allow the Defence sufficient time to discuss the Third Amended Indictment with its client.<sup>8</sup>

8. On 18 May 2009, this Chamber issued its Second Defects Decision. In this Decision, the Chamber ordered the Prosecution to file a further amended Indictment which complied with the First Defects Decision, and, among other things, to provide a more specific date range for the meeting alleged in paragraph 30 of the Indictment, or remove the allegation. Pursuant to this Decision, on 19 May 2009, the Prosecution filed its fourth amended Indictment since 1 May 2009 (“Fourth Amended Indictment”).<sup>9</sup>

## DISCUSSION

### *Date of meeting in paragraph 30 of Fourth Amended Indictment*

9. The Chamber recalls that in its Second Defects Decision it found that the date range contained in paragraph 30 of the Third Amended Indictment, “[b]etween 1 May and 17 July 1994”, was overly broad and that the inability of the Prosecution to provide greater specificity in relation to this date was fatal to the allegation contained in that paragraph. Accordingly, it ordered the Prosecution to provide a more specific date range for the meeting mentioned in paragraph 30 or remove the allegation.<sup>10</sup> In its Fourth Amended Indictment, the

<sup>5</sup> Ntawukulilyayo, T. 4 May 2009, pp. 16, 19.

<sup>6</sup> Rule 46 (A) provides: “A Chamber may, after a warning, impose sanctions against a counsel if, in its opinion, his conduct remains offensive or abusive, obstructs the proceedings, or is otherwise contrary to the interests of justice. This provision is applicable *mutatis mutandis* to Counsel for the prosecution.”

<sup>7</sup> Ntawukulilyayo, T. 6 May 2009, pp. 1-2.

<sup>8</sup> Ntawukulilyayo, T. 6 May 2009, p. 8.

<sup>9</sup> The Fourth Amended Indictment is dated 18 May 2009, but filed on 19 May 2009.

<sup>10</sup> Second Defects Decision, paras. 10-11; *see also*, para. 6.



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Prosecution failed to provide a more specific date range for the meeting in paragraph 30 or to remove the allegation, in breach of the Chamber's Order.<sup>11</sup>

10. The Chamber notes the Prosecution submission that, in the Fourth Amended Indictment, it inadvertently removed paragraph 29,<sup>12</sup> instead of paragraph 30 as it was not in a position to provide a more specific date range for the meeting. The Chamber further notes that the Prosecution "regrets the inconvenience caused" by this error, and its submission that it will not rely on the allegations in paragraph 30 in seeking a conviction against the Accused for the charge of Direct and Public Incitement to Commit Genocide.<sup>13</sup>

11. While the Chamber notes that the Prosecution mistakenly removed paragraph 29, it observes that the Prosecution had one week to rectify this error before the close of its case on 26 May 2009. During this period, and up until the filing of the Prosecution's Response, which was almost two weeks after the close of the Prosecution case, the Accused was led to believe that he was no longer charged with the allegations contained in paragraph 29. Accordingly, in view of the Accused's right, pursuant to Article 20 (4) (a) of the Tribunal's Statute, to be informed promptly and in detail of the nature and cause of the charges against him, the Chamber will continue to treat the Fourth Amended Indictment filed on 19 May 2009 as the live Indictment in this case.<sup>14</sup>

12. In respect of paragraph 30 of the Fourth Amended Indictment, in view of the failure of the Prosecution to comply with the Chamber's Order contained in its Second Defects Decision, and its submission that it will not be seeking a conviction based on allegations in that paragraph, the Chamber strikes paragraph 30 of the Fourth Amended Indictment.

**FOR THE ABOVE REASONS, THE CHAMBER**

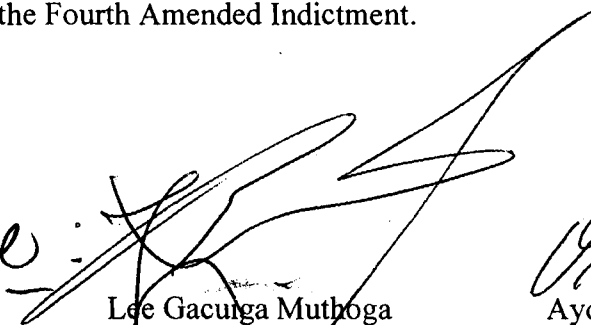
**DENIES** the Defence Motion; and

**STRIKES** paragraph 30 of the Fourth Amended Indictment.

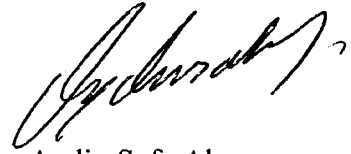
Arusha, 26 June 2009



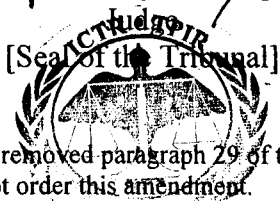
Khalida Rachid Khan  
Presiding Judge



Lee Gacunga Muthoga  
Judge



Aydin Sefa Akay  
Judge



<sup>11</sup> The Chamber notes that the Prosecution removed paragraph 29 of the Third Amended Indictment in its Fourth Amended Indictment. The Chamber did not order this amendment.

<sup>12</sup> Paragraph 29 of the Third Amended Indictment concerns an alleged meeting the Accused called at about the end of May or early June 1994 at the Gisagara centre.

<sup>13</sup> Prosecution Response, paras. 7-9.

<sup>14</sup> Article 20 (4) (a) of the Statute provides: In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

