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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before Judge: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 25 February 2010

JUDICIAL
FILED
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[Signature]

THE PROSECUTOR

v.

Idelphonse NIZEYIMANA

CASE NO. ICTR-2001-55-PT

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

Rule 50 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Richard Karegyesa
Drew White
Yasmine Chubin
Astou Mbow

Defence Counsel for Idelphonse Nizeyimana:
John Philpot

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INTRODUCTION

1. On 2 November 2000, the Indictment was confirmed against Idelphonse Nizeyimana, containing four counts (genocide; or in the alternative complicity in genocide; rape as a crime against humanity and other inhumane acts as a crime against humanity). Nizeyimana pled not guilty to all counts during his initial appearance on 14 October 2009.¹ A date for the commencement of trial has not yet been set.
2. The Prosecution filed a motion for leave to amend the Indictment on 18 December 2009, which seeks to: (i) add five new counts, many new charges and a number of new factual allegations in support of the proposed and existing charges, (ii) add joint criminal enterprise ("JCE") as a mode of liability, (iii) remove the count of other inhumane acts as a crime against humanity, and (iv) remove paragraphs unrelated to Idelphonse Nizeyimana.²
3. Idelphonse Nizeyimana opposes most of the amendments.³

DELIBERATIONS

4. The Defence puts forward five challenges to the proposed Amended Indictment: (i) many new charges are alleged, (ii) the Accused will not have adequate time to prepare his case, (iii) there is insufficient supporting material in relation to the new charges, (iv) there is unclear or imprecise pleading of (a) JCE, (b) superior responsibility and (c) direct and public incitement to genocide, and (v) paragraphs 25 and 28 and certain phrases are impermissibly vague.
5. Rule 50 of the Rules of Procedure and Evidence (the "Rules") allows an indictment to be amended after the initial appearance of the Accused with leave of a Trial Chamber. In deciding whether to grant leave to amend the Indictment, the Trial Chamber shall examine each of the counts in the Indictment and any supporting materials provided by the Prosecution to determine whether a case exists against the Accused.⁴ Other factors to be considered include: (i) the ameliorating effect of the changes on the clarity and precision of

¹ T. 14 Oct. 2009, p. 13.

² Prosecutor's Request for Leave to File an Amended Indictment, 18 December 2009 (the "Motion") with the proposed amended indictment as an annex to the Motion (the "Amended Indictment"); Prosecutor's Reply to the Defence's Response to the Prosecutor's Request for Leave to File an Amended Indictment, 25 January 2010 (the "Reply").

³ Defence Response to the Prosecutor's Request for Leave to File an Amended Indictment, 19 January 2010 (the "Response"); Defence Additional Arguments to its Response of 28 January 2010 to the Prosecution's Request for Leave to Amend the Indictment, 2 February 2010 (the "Additional Arguments").

⁴ Rule 50(A)(ii) and Rule 47 (E) and (F) of the Rules; Article 18 of the Statute; *See also Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007 ("*Setako Decision*"), para. 6.

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the case to be met, (ii) the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage, and (iii) the likely delay or other prejudice to the Defence, if any, caused by the amendment.⁵

Are New Charges Alleged?

6. The Defence contends that many new charges have been alleged in the proposed Amended Indictment.⁶ The Prosecution does not dispute this. Rule 50 (B) provides that if the amended indictment includes new charges and the Accused has already appeared before a Trial Chamber, a further appearance shall be held as soon as practicable to enable the Accused to enter a plea on the new charges. 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).⁷

7. There are 5 new counts and the Chamber has identified 18 new charges in the proposed Amended Indictment.⁸ The Defence also contends that the addition of JCE and superior responsibility under Article 6(3) of the Statute as modes of liability constitute new charges.⁹ The Chamber considers that JCE and superior responsibility, as modes of liability, do not constitute new charges.¹⁰ However, as was decided in *Simba* with respect to the addition of JCE, "it would be in the interests of a fair trial for the Accused that he be allowed to plead to the new allegations in a further appearance."¹¹

8. Therefore, because new charges and counts are pled as well as the introduction of new modes of liability, the Chamber considers that, pursuant to Rule 50 (B) as well as in the interests of a fair trial, a further appearance of Idelphonse Nizeyimana should be held.

⁵ See generally *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-AR5, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended Indictment (AC), 12 February 2004 ("*Bizimungu et al.* Appeal Decision") para. 16; *Setako* Decision, para. 6.

⁶ Response, para. 35.

⁷ *Prosecutor v. Tharisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC), 12 May 2005, para. 19. See also *Kalimanzira*, para. 189.

⁸ See Amended Indictment paras. 8, 25-29, 31 discuss allegations of rape (a new legal prohibition infringed) which were not in the original Indictment; paras. 9, 10 and 32 discuss new allegations of killings (new legal prohibition infringed) and paras. 19-24, 35-36 discuss new allegations of the killing of named individuals (new legal prohibition infringed).

⁹ Response, para. 11.

¹⁰ *Prosecutor v. Simba*, Case No. ICTR-01-76-I, Decision on Defence Motion for New Initial Appearance (TC), 5 March 2004, para. 7

¹¹ *Ibid.*, para. 7

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Will the Accused Have Adequate Time to Prepare His Case?

9. The Defence contends that if the new counts and charges are allowed, there will not be sufficient time to prepare and Idelphonse Nizeyimana will be prejudiced if the case is to be tried in 2010.¹² In support of its contention, the Defence alleges that since the Completion Strategy of the Tribunal states that all trials are to be finished by 31 December 2010 the Defence will not have adequate time to investigate.¹³

10. The Chamber recalls that contrary to the submissions of the Defence, the Completion Strategy did not purport to schedule any cases. Moreover, it clearly emphasised that rights to a fair trial will not be compromised.¹⁴ The Chamber will ensure that pursuant to Article 20(b) of the Statute Idelphonse Nizeyimana is guaranteed adequate time and facilities for the preparation of his defence.¹⁵ Nizeyimana will not suffer prejudice as a result of the amendment of the Indictment.

Are there Sufficient Supporting Materials?

11. Idelphonse Nizeyimana contends that: (i) will-say statements, and (ii) statements taken by Rwandan and Belgian judicial authorities should not be accepted as supporting materials. Further, Nizeyimana alleges that many other paragraphs are not supported by materials provided by the Prosecution.

12. The Chamber is required to review any supporting materials provided by the Prosecution to determine whether a case exists in relation to each count in the Indictment, in accordance with Article 18 of the Statute and Rule 47 (E). The concept of supporting materials is not defined and the Chamber considers that no formal requirements have been prescribed by the Rules.

13. The Chamber notes that the will-say statements are records of interviews with potential witnesses made by the interviewer, without being signed by the witness. The statements taken by the Rwandan and Belgian judicial authorities were taken under oath from potential witnesses and were signed by them. There was no challenge to the authenticity of these records. The information in the will-say statements and the judicial records implicate Nizeyimana in the commission of the crimes charged in the proposed Amended Indictment.

¹² Response, para. 37-42.

¹³ See United Nations International Criminal Tribunal for Rwanda Completion Strategy, 3 December 2009.

¹⁴ *Ibid.*

¹⁵ *Prosecutor v. Karemera*, Case No. ICTR-98-44-AR73, Decision on Appeals Pursuant to Rule 15bis(D) (AC), 20 April 2007, para. 24.

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The Chamber has reviewed these and other supporting materials, consisting of statements recorded from witnesses by ICTR investigators and signed by the witnesses which were submitted by the Prosecution, and is satisfied that a *prima facie* case exists against Nizeyimana for all of the counts and charges in the proposed Amended Indictment.

Are the Pleadings of Joint Criminal Enterprise, Superior Responsibility and Direct and Public Incitement to Commit Genocide Clear and Precise?

Joint Criminal Enterprise

14. In relation to joint criminal enterprise ("JCE"), Idelphonse Nizeyimana submits that the proposed Amended Indictment does not contain material facts relating to JCE nor of any criminal conduct by the alleged participants.¹⁶ The Chamber recalls that in order for JCE to be properly pled, the following three factors consisting of the *actus reus* must be established:

First, a plurality of persons is required Second, the existence of a common plan, design or purpose, which amounts to, or involves, the commission of a crime provided for in the Statute, must be established Third, the accused must have participated in the common purpose, either by participating directly in the commission of the agreed crime itself, or by assisting or contributing to the execution of the common purpose.¹⁷

15. The Chamber notes that a plurality of persons is listed in paragraphs 5, 33, 39, 43, 47 and 51 of the proposed Amended Indictment. Further, those paragraphs discuss a common object, purpose and foreseeable outcome which are the commission of a crime provided for in the Statute. Moreover, Idelphonse Nizeyimana is alleged to have participated directly in the crimes as is listed in paragraphs 7, 9, 12, 13, 14, 16, 17, 23, 24, 29 and 35 of the proposed Amended Indictment where it is alleged that members of the JCE were acting upon the orders of Nizeyimana. These paragraphs connect the JCE to material facts in the proposed Amended Indictment by alleging that the JCE participants engaged in the criminal acts described in the paragraphs above. Therefore, the Chamber finds that JCE has been sufficiently pled.

¹⁶ Response, para. 58.

¹⁷ *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgement (TC), December 18, para. 338. *See also, Prosecutor v. Stakić*, Case No. IT-97-24, Judgement (AC), 22 March 2006, para. 64; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgement (TC), 13 December 2005, para. 387.

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Superior Responsibility

16. The Defence contends that superior responsibility has not been pled with sufficient material facts.¹⁸ The Chamber notes that in order for superior responsibility to be properly pled the following four elements must be established:

(1) that the accused is the superior of subordinates, sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct - and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom [the accused] is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.¹⁹

17. The Chamber will now examine each of the four elements. The proposed Amended Indictment makes clear that Idelphonse Nizeyimana was the superior of the subordinates pled by virtue of his military rank. However, with respect to the subordinates being sufficiently identified, the Appeals Chamber has found that while subordinate groups may be identified broadly in an indictment they must be pled with sufficient identifying information so as to know that they were under Nizeyimana's command.²⁰ In this respect, the pleading of groups such as "soldier",²¹ "civilian militia" or "armed civilians"²² without further identifying detail, for example, regarding their particular camp, does not provide sufficient information to show that they were allegedly under Nizeyimana's command. The Chamber finds that the proposed Amended Indictment should be clarified with respect to the pleading of groups of subordinates.

18. With respect to the criminal conduct of the subordinates, nine persons named in paragraphs 30, 37, 41, 45, 49 and 53 of the proposed Amended Indictment are not further discussed in the material allegations sections. The Chamber considers that the Prosecution should specify what criminal activities those subordinates, who are not mentioned in the

¹⁸ See Response, Annex A. See also Amended Indictment paras. 30, 37, 41, 45, 49 and 53.

¹⁹ *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008 ("*Muvunyi*"), para. 19; *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 26.

²⁰ See *Muvunyi*, para. 55 ("The Appeals Chamber is not satisfied that Muvunyi has shown that [. . .] the Indictment fails to sufficiently identify his subordinates. A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6(3) of the Statute. Paragraph 3.34(i) refers to 'soldiers from the ESO' and Count 1 states that the allegation in this paragraph would be pursued under Article 6(3) of the Statute. In addition[. . .] the Indictment specifies that ESO soldiers were under Muvunyi's command. On the basis of the Indictment, therefore, Muvunyi would have known that he was being charged as a superior for the criminal acts of ESO Camp soldiers at the University of Butare.").

²¹ Amended Indictment, paras. 5, 6, 10, 18, 20, 21, 22, 33, 39, 47 and 51.

²² Amended Indictment, paras. 4, 9, 5, 33, 39, 41, 45, 47 and 53.

material allegations section of the proposed Amended Indictment engaged in, or remove their names.

19. Idelphonse Nizeyimana is alleged to have known or had reason to know that crimes would be committed in Butare by his subordinates as he exercised control over his subordinates as described in paragraph 2 of the proposed Amended Indictment. Nizeyimana is alleged to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them as his subordinates were "under his command [and] he could order such persons to commit or to refrain from committing unlawful acts and could discipline or punish them for unlawful acts or omissions."²³ Therefore, the Chamber finds that superior responsibility is sufficiently pled in the proposed Amended Indictment.

Direct and Public Incitement to Commit Genocide

20. The Defence alleges that Count II is not properly pled because the incitement alleged in paragraphs 31 and 32 of the proposed Amended Indictment is not public.²⁴ Count II which charges Idelphonse Nizeyimana with direct and public incitement to commit genocide consists of allegations, in paragraphs 31 and 32, that Nizeyimana convened meetings of soldiers at the ESO where he ordered and incited them to kill and rape Tutsi. The Chamber notes that the same factual allegations are contained in paragraphs 8 and 10 under Count I charging Nizeyimana with genocide. These charges are seeking either cumulative or alternative convictions.

21. The Prosecution argues that the meetings were public in nature because they were "convened and authorized by public officials, in a government facility, and attended by government soldiers[.]"²⁵ Further, the Prosecution contends that the determination of whether the meetings were public is a question of mixed law and fact and is to be proven at trial.²⁶

22. The Chamber recalls that in order to evaluate whether a meeting is public, two factors are to be considered: whether the place where the incitement occurred is public or a medium targeted at the public was used, and whether the audience was selective or limited.²⁷ Incitement is public when conducted through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the

²³ Amended Indictment, para. 2.

²⁴ Response, paras. 118-127.

²⁵ Reply, para. 31.

²⁶ Reply, para. 31.

²⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (TC) ("*Akayesu*"), para. 556



public display of placards or posters, or through any other means of audiovisual communication.²⁸ Because of the crime's inchoate nature, even the possibility of private incitement to commit genocide is ruled out; only truly and unequivocally public forms of incitement may be punished under Article 2(3)(c) of the Statute.²⁹

23. The Chamber notes that the place where the alleged incitement occurred is at the ESO, a military camp. The proposed Amended Indictment does not contain any indication that, although it was a government facility, the public did or could have access to it, or that it was open to persons other than ESO soldiers. The Chamber does not accept that it is a public place. Further, paragraphs 31 and 32 allege that Idelphonse Nizeyimana allegedly convened a meeting of soldiers. Soldiers are a select or limited group. Based upon the material facts in the proposed Amended Indictment, the meetings alleged are not in a public place, nor given to a public audience. Therefore, the Chamber finds that Count II should be struck from the proposed Amended Indictment.

Are Certain Paragraphs and Phrases Impermissibly Vague?

24. The Defence contends that paragraph 25 is impossible to investigate because the time period it covers is spread over more than three months with no specific details.³⁰ The Appeals Chamber has found that "a broad date range, in and of itself, does not invalidate a paragraph of an indictment."³¹ Moreover, the Appeals Chamber has stated that "in light of the events that occurred in Rwanda in 1994...it is not always possible to be precise as to the specific date on which the crimes charged were committed." However, the date range should be "balanced with the accused's right to be informed in detail about the nature and cause of the charge against him in order to allow a comprehensive defence to be raised."³² The Chamber considers that given the paragraph contains a broad range of dates and uncertain locations, standing alone, the paragraph would not provide Idelphonse Nizeyimana with sufficient notice as to details of the rapes alleged. Therefore, the Chamber finds that the Prosecution should make clear that either paragraphs 26-29 are the specific instances of the rapes alleged in paragraph 25 or provide greater detail as to the alleged victims, dates, locations and perpetrators of the rapes if the Prosecution intends for paragraph 25 to constitute a charge by itself.

²⁸ *Akayesu* Judgement, para. 556 and 559.

²⁹ *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgement (TC), 22 June 2009 ("*Kalimanzira*"), para. 515. See also *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgement (TC), 11 February 2010, para. 27.

³⁰ Response, Annex A.

³¹ *Muvunyi*, para. 58.

³² *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 20.

25. Paragraph 28 of the proposed Amended Indictment charges the rape of two unidentified girls in an unidentified house in Butare by unidentified soldiers. The Prosecution replies that "specific names of victims are not required in the international criminal context due to the large scale and widespread nature of the crimes involved."³³ While large scale acts do not require specificity as to names of victims, acts such as those described in paragraph 28 should be pled with more specificity given that they concern an alleged crime committed against two specific persons rather than a crime committed against a large scale group of victims. The Chamber considers that this paragraph is impermissibly vague because the victims, place of the alleged rape, and identity of the rapists are not stated. The Prosecution should provide more details as to the location or identities (with the use of pseudonyms) of the two unnamed girls and the soldiers or strike this paragraph.

26. With respect to the paragraphs in the proposed Amended Indictment³⁴ where pseudonyms are used to identify victims, the Defence contends that those paragraphs should not be authorized because they do not identify the victims.³⁵ The Chamber notes that in most cases these refer to victims of sexual violence. While Idelphonse Nizeyimana has a right to sufficient detail as to the charges against him, the privacy and security of victims and witnesses are subject to protection pursuant to the Rules.³⁶ At the appropriate stage of the proceedings, the Chamber will address this issue to ensure that Nizeyimana has proper access to the identities of victims in order to ensure that he can prepare his case.

27. The Defence contends that where a victim's ethnic group is not stated, the paragraph cannot form part of the genocide count.³⁷ The Chamber agrees that for the crime to be genocide the victim must be a member of a protected group. The Chamber notes that the Indictment should be read as a whole and the *chapeau* paragraph to Count I discusses the "killing or causing serious bodily or mental harm to members of the Tutsi ethnic group."³⁸ Reading the paragraphs that discuss the killings of individuals without an ethnic identification in conjunction with the *chapeau* paragraph of Count I provides Idelphonse Nizeyimana with enough information to know that those allegedly killed were Tutsi. However, for the avoidance of doubt, the Prosecution should clarify these paragraphs by specifically stating the ethnicity of the referenced victims.

³³ Reply, para. 28.

³⁴ See Amended Indictment, paras. 20, 26, 27 and 29.

³⁵ Response, paras. 82-83, 102-105, 106-109 and 114-117.

³⁶ See Rule 75.

³⁷ Amended Indictment, paras. 21, 22, 23 and 24.

³⁸ Amended Indictment, Count I.

28. The Chamber notes that the Prosecution has requested certain clarifying changes be made to the proposed Amended Indictment in response to the Defence's pleadings.³⁹ The Chamber finds that those changes have an ameliorating effect. The Chamber also notes that throughout the proposed Amended Indictment, the word "*Préfecture*" should be spelled in lower case.

Conclusion

29. Based upon the analysis of the proposed Amended Indictment, the Chamber finds that, except for certain instances described above, the new charges and factual allegations have an ameliorating effect on the Indictment which enables the Defence to better prepare its case by providing added clarity and precision as to the alleged criminal conduct of Idelphonse Nizeyimana. Further, the Prosecution has shown diligence in bringing the Motion less than two-weeks after Nizeyimana's Lead Counsel was appointed. Lastly, Nizeyimana will not suffer prejudice as the Chamber will provide him with adequate time to prepare his case.

FOR THESE REASONS, THE CHAMBER

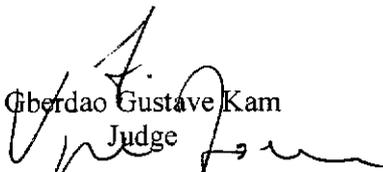
- I. **GRANTS** the Prosecution's motion to amend the Indictment in part including the clarifications included in the Prosecution's Reply;
- II. **ORDERS** the Prosecution to further identify the individuals or groups referred to as "soldier", "civilian militia" or "armed civilians" in the material allegations sections of the Indictment;
- III. **ORDERS** the Prosecution to specify what criminal activity the alleged subordinates not mentioned in the material allegations section of the Indictment engaged in or remove their names from paragraphs 30, 37, 41, 45, 49 and 53 of the proposed Amended Indictment;
- IV. **ORDERS** the Prosecution to provide further details concerning: (i) the alleged dates, location, victims and perpetrators of the rapes mentioned in paragraph 25 of the Indictment and (ii) the alleged location, identities (with the use of pseudonyms) of the two unnamed girls and soldiers in paragraph 28 of the Indictment or strike paragraph 28;
- V. **ORDERS** the Prosecution to strike Count II from the Indictment;
- VI. **ORDERS** the Prosecution to make the amendments described in paragraph 27 above;

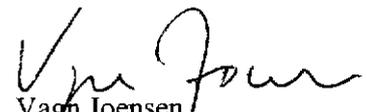
³⁹ Reply, para. 10.

- VII. **ORDERS** the Prosecution to file the Indictment as amended in accordance with this decision in English by 2 March 2010 and in French by 3 March 2010;
- VIII. **ORDERS** that a further appearance shall be held 4 March 2010 at 4 p.m. as provided for under Rule 50 (B);
- IX. **REQUESTS** that the Registrar make arrangements for a further appearance to be held 4 March 2010;
- X. **REMINDS** the Accused that, according to Rule 50(C), he is entitled to file preliminary motions pursuant to Rule 72 within 30 days of the filing of the Amended Indictment;

Arusha, 25 February 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge
[Seal of the Tribunal]


Vagn Joensen
Judge

