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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 Judges:** Dennis C. M. Byron, Presiding  
Gberdao Gustave Kam  
Vagn Joensen

**Registrar:** Adama Dieng

**Date:** 9 June 2010

**THE PROSECUTOR**

v.

**Ildephonse NIZEYIMANA**

**CASE NO. ICTR-2001-55-PT**

9-06-2010  
6:00 p.m.

**DECISION ON NIZEYIMANA'S PRELIMINARY MOTION ON DEFECTS  
IN THE AMENDED INDICTMENT**

*Rule 72 of the Rules of Procedure and Evidence*

**Office of the Prosecution:**  
Richard Karegyesa

**Defence Counsel for Ildephonse Nizeyimana:**  
John Philpot  
Cainnech Lussiaâ-Berdou

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## INTRODUCTION

1. On 18 March 2010, Ildephonse Nizeyimana filed a motion alleging defects in the Amended Indictment dated 1 March 2010.<sup>1</sup> The Prosecution opposes the Motion.<sup>2</sup>
2. In the Motion, Ildephonse Nizeyimana argues there are defects in the pleading of individual responsibility, superior responsibility and joint criminal enterprise ("JCE"). He also alleges that many of the charges are not specific enough with respect to the names of victims, the names of subordinates and accomplices, the locations, and the dates of the alleged events.
3. On 25 February 2010, the Chamber rendered its Decision on the Prosecution's Request for Leave to File an Amended Indictment.<sup>3</sup> On 18 March 2010, Ildephonse Nizeyimana filed a motion alleging that the Prosecution had not complied with the Decision.<sup>4</sup> The Prosecution opposes Nizeyimana's Motion to Comply.<sup>5</sup>
4. In the interest of judicial economy, the Chamber will address both Motions in the present decision.

## DELIBERATIONS

5. As a preliminary matter, Ildephonse Nizeyimana restricts his arguments to Count I, genocide, and requests that the orders granted be applied *mutatis mutandis* to Counts II to VI of the Amended Indictment. The Chamber applies its conclusions *mutatis mutandis* to Counts II to VI of the Amended Indictment.

### *Alleged Defects in the Pleading of Individual Responsibility under Art. 6(1) of the Statute*

6. Ildephonse Nizeyimana contends that the paragraphs in the Amended Indictment charging that he ordered, authorized or instigated crimes are not sufficiently specific and therefore result in the defective pleading of Nizeyimana's individual responsibility.<sup>6</sup> Nizeyimana requests that the Prosecution provide further material facts: where and when the

<sup>1</sup> Defence Preliminary Motion on Defects in the Indictment pursuant to Rule 72, filed on 18 March 2010 ("Motion"); Reply to Prosecutor's Response to Defence Preliminary Motion on Defects in the Indictment pursuant to Rule 72, filed on 29 March 2010 ("Nizeyimana's Reply").

<sup>2</sup> Prosecutor's Reply to Defence Preliminary Motion on Defects in the Indictment pursuant to Rule 72, filed on 25 March 2010 ("Prosecution's Reply").

<sup>3</sup> *Prosecutor v. Ildephonse Nizeyimana*, Case No. ICTR-2001-55-PT, Decision on Prosecutor's Request for Leave to File an Amended Indictment (TC), 25 February 2010 ("Decision").

<sup>4</sup> Defence Motion to Order the Prosecution to Comply with a Trial Chamber Decision pursuant to Rule 54, filed on 18 March 2010 ("Motion to Comply").

<sup>5</sup> Prosecutor's Reply to Defence Motion to Order the Prosecution to Comply with a Trial Chamber Decision pursuant to Rule 54, filed on 24 March 2010 ("Prosecution's Reply to Motion to Comply").

<sup>6</sup> See paras. 6, 7, 9, 11-18, and 22-29 of the Amended Indictment.

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order, authorization, or instigation took place; by what means it was transmitted (for example, in person, or by telephone); and to whom it was transmitted.<sup>7</sup>

7. The Prosecution argues that the charges in the Amended Indictment which describe Ildephonse Nizeyimana's individual responsibility<sup>8</sup> are sufficiently precise for him to conduct his investigations and that further details are not required in an indictment.<sup>9</sup> Moreover, the Prosecution states that it will provide greater specifics in the Pre-Trial Brief.<sup>10</sup>

8. The Chamber recalls that the Prosecution has an obligation to state the material facts underpinning the charges in the Indictment, although not the evidence by which such material facts are to be proven.<sup>11</sup> In order to plead an indictment with sufficient particularity, the Prosecution must set out the material facts with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.<sup>12</sup> The Indictment must delve into enough particulars to explain the Accused's role in the alleged crime.<sup>13</sup> Further, the Indictment, not the Pre-Trial Brief, should be the primary instrument to provide notice to Ildephonse Nizeyimana of the charges against him.

9. The Chamber finds that, where it is alleged that the Accused ordered, authorized or instigated under Article 6(1) of the Statute, the Prosecution must identify the particular acts or the particular course of conduct on the part of the Accused which forms the basis for the charges in question.<sup>14</sup> The Prosecution must fully set out where and when the order,

<sup>7</sup> Nizeyimana requires similar precision to that provided in paragraphs 8, 9 and 19: "On or about 7 April 1994, ... Nizeyimana convened a meeting of FAR officers"; "On or about 20 April 1994, ... Nizeyimana ... authorized or convened a meeting of soldiers at the ESO"; and "In late April or early May 1994, Ildephonse Nizeyimana ordered Innocent Nkuyubwatsi to kill a Tutsi girl ...".

<sup>8</sup> See paras. 6, 7, 9, 11 to 19, 22-29, and 35 of the Amended Indictment.

<sup>9</sup> Prosecution's Reply, paras. 41-44.

<sup>10</sup> Prosecution's Reply, para. 22.

<sup>11</sup> *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 21 ("*Ntagerura Appeals Judgement*"); *Prosecutor v. Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, para. 470 ("*Ntakirutimana Appeals Judgement*"). See Article 17 (4) of the Statute; Rule 47 (C) of the Rules of Procedure and Evidence; and Articles 20 (4)(a) and (b) of the Statute.

<sup>12</sup> *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Šantić*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 88 ("*Kupreškić Appeals Judgement*").

<sup>13</sup> *Ibid.*, para. 98.

<sup>14</sup> *Ntagerura Appeals Judgement*, para. 25; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement (AC), 29 July 2004, paras. 213-14 ("*Blaškić Appeals Judgement*"); *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement (AC), 24 March 2000, para. 171, n. 319: "[t]he practice by the Prosecution of merely quoting the provisions of Article 7(1) [ICTY Statute, the equivalent of Article 6(1) of the ICTR Statute] in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged." Pleading the particular form of participation is required to avoid ambiguity with respect to the exact nature and cause of the charges against the Accused and to enable the Accused to effectively and efficiently prepare his defence.

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authorization or instigation took place; by what means it was transmitted; and to whom it was transmitted.<sup>15</sup>

10. Ildephonse Nizeyimana contends that the Prosecution must state for each charge whether liability is based on an order, an authorization, or instigation.<sup>16</sup> The Chamber recalls that it is possible to charge more than one mode of responsibility under Article 6(1) in relation to a crime if this is necessary to reflect the totality of the Accused's conduct.<sup>17</sup> Since Nizeyimana's alleged conduct can be described using two or more verbs, such as both ordering and instigating, the Chamber dismisses Nizeyimana's contention.

***Alleged Defects in the Pleading of Superior Responsibility under Art. 6(3) of the Statute***

11. Ildephonse Nizeyimana argues that the pleading of superior responsibility is defective in that: (i) two of the required elements are not pled; (ii) the pleading of the same facts with respect to Article 6 (1) and 6 (3) is not permitted; and (iii) the pleading in paragraph 2(C) has already been pled in another case but was rejected in that case and should be struck; Nizeyimana also alleges it lacks particularity.

12. Ildephonse Nizeyimana contends that the pleading of superior responsibility in paragraph 30 of the Amended Indictment is defective because two of the four required elements<sup>18</sup> are not pled: (i) the conduct of Nizeyimana 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 (ii) the conduct of Nizeyimana 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.<sup>19</sup> Nizeyimana requests the Prosecution to specify elements (i) and (ii) for each act for which Nizeyimana would incur command responsibility.

<sup>15</sup> For example, paragraph 9 of the Amended Indictment explains what Ildephonse Nizeyimana's subordinates did, but is ambiguous as to what Nizeyimana himself did. The Indictment must state how and when Nizeyimana ordered, authorized or instigated.

<sup>16</sup> See paras. 14-18, 28, and 29 of the Amended Indictment, and the corresponding paragraphs in the Motion.

<sup>17</sup> *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 483 ("*Nahimana*, Appeals Judgement"); *Prosecutor v. Dominique Ntawukulilyayo*, Case No. ICTR-05-82-PT, Decision on Defence Preliminary Motion Alleging Defects in the Indictment (TC), 28 April 2009, paras. 28-29.

<sup>18</sup> The four required elements – of which the two listed form numbers (3) and (4) – are given in *Prosecutor v. Muvunyi* ("*Muvunyi*"), Case No. ICTR-2000-55A-A, Judgement (AC), 29 August 2008 ("*Muvunyi* Appeals Judgement").

<sup>19</sup> Motion, para. 161.

13. The Chamber recalls that it already decided that “superior responsibility is sufficiently pled in the proposed Amended Indictment.”<sup>20</sup> The Chamber finds that paragraphs 2 to 29 sufficiently describe details of elements (i) and (ii).<sup>21</sup>

14. Ildephonse Nizeyimana also alleges that Articles 6(1) and 6(3) are improperly pled by repeating the same factual allegations for individual and superior responsibility.<sup>22</sup> The Chamber recalls that the Appeals Chamber has acknowledged that an Accused's responsibility can be pled pursuant to both Articles for the same counts and the same set of facts.<sup>23</sup> Therefore, the Chamber dismisses this contention.

15. Ildephonse Nizeyimana further argues that the *Akazu* related issue raised in paragraph 2(C) was pled in the *Zigiranyirazo* trial and there was no finding of malfeasance, anti-Tutsi attitudes, extremist views or conspiracy to kill Tutsi by any group.<sup>24</sup> Therefore, Nizeyimana contends that the allegation that Nizeyimana was “a member of a group of persons from Gisenyi *préfecture* who formed an influential corps aligned with the interests of northerners focused around former President Habyarimana” should be struck or further details should be provided.<sup>25</sup>

16. The Prosecution argues that the lack of particularity in paragraph 2(C) of the Amended Indictment is permissible because the paragraph forms part of a background description of Ildephonse Nizeyimana, and not part of the material facts of the crime.<sup>26</sup> The high threshold of particularity, it argues, only applies in relation to material facts and not to background information.<sup>27</sup>

17. The Chamber considers that it is open to the Prosecution to prove the existence of this group as this fact has not yet been litigated in this case. However, the Chamber finds that paragraph 2 contains material facts regarding Ildephonse Nizeyimana's command responsibility of the group, which is the basis for concluding that he had superior responsibility over the other groups referenced in paragraphs 2(C) and 2(D). Therefore, Ildephonse Nizeyimana is entitled to greater particularity and the Chamber orders the

<sup>20</sup> Decision, para. 19.

<sup>21</sup> Ildephonse Nizeyimana is alleged to have ordered, instigated or authorised subordinates to commit the alleged crimes.

<sup>22</sup> Motion, paras. 34-38 and 158.

<sup>23</sup> *Nahimana* Appeals Judgement, para. 487. (However, an Accused can only be convicted under *either* Article 6(1) or 6(3).)

<sup>24</sup> Motion, para. 42.

<sup>25</sup> *Ibid.*, para. 43.

<sup>26</sup> Prosecution's Reply, para. 40.

<sup>27</sup> *Idem.*

Prosecution to plead the names of the members of the "group of persons from Gisenyi *préfecture* who formed an influential corps aligned with the interests of northerners focused around former President Habyarimana" and their interests or strike this phrase from the Amended Indictment.

***Alleged Defects in the Pleading of JCE under Art. 6(1) of the Statute***

18. Ildephonse Nizeyimana requests that the names "Civil Defence Forces", "Alphonse Higaniro" and "Vincent Ntezimana" be struck from the Amended Indictment, as he alleges that it contains no material facts regarding them.<sup>28</sup> The Prosecution did not address this argument in its reply. The Chamber considers that the Prosecution should specify what criminal activities those subordinates engaged in, who are not mentioned in the material allegations section of the Amended Indictment, or remove their names.<sup>29</sup>

19. Ildephonse Nizeyimana understands that all material facts from which inferences that the Prosecution may rely upon to prove JCE are pled in the current Amended Indictment and, therefore seeks confirmation that the Prosecution will not be allowed to add material facts from which it will make inferences on the elements of the charge of JCE.<sup>30</sup> While the Chamber acknowledges that the Indictment (as well as the Pre-Trial Brief) must put Nizeyimana on adequate notice of the case against him,<sup>31</sup> Rule 50 allows the Prosecution to apply for leave to amend the Indictment; therefore, the Chamber cannot rule on hypothetical inferences and future amendment applications.

***Alleged Vagueness in the Pleadings of the Victims, Subordinates, Co-Perpetrators, Locations and Dates***

***(a) Alleged Vagueness in the Identification of Victims and Circumstances Surrounding their Deaths or Rapes***

20. Ildephonse Nizeyimana contends that paragraphs 6, 11 and 12 as well as 18, 23, 35 and 36 of the Amended Indictment do not provide him with sufficient notice as the paragraphs are impermissibly vague with respect to the identification of the victims.<sup>32</sup>

<sup>28</sup> Motion, para. 52. Ildephonse Nizeyimana indicates that the only mention of Vincent Ntezimana refers to his house in paragraph 19 of the Amended Indictment.

<sup>29</sup> Decision, para. 18.

<sup>30</sup> Motion, para. 51.

<sup>31</sup> *Kupreškić Appeals Judgement*, para. 95.

<sup>32</sup> See paragraphs 6, 11, 12, 18, 23, 35 and 36 of the Amended Indictment and their corresponding paragraphs in the Motion.

21. The Chamber recalls that the degree of specificity for identification of victims depends on the alleged proximity to the Accused.<sup>33</sup> Further, where the Prosecution is not in possession of more information, identification of the victims individually is not always necessary.<sup>34</sup> The Chamber also notes that the Prosecution submitted that it has already given the names or circumstances where they are known.<sup>35</sup>

22. The Chamber finds that paragraphs 6, 11 and 12, though they contain or incorporate broad identifications of the victims,<sup>36</sup> are not defective as the alleged victims were less proximate to Ildephonse Nizeyimana. They were allegedly killed, not by Nizeyimana himself, but by his subordinates. The charges also specify the location where the victims were allegedly killed. In paragraph 6, Nizeyimana was alleged to have set-up roadblocks whose alleged purpose was to identify and kill Tutsi civilians in named locations. In paragraphs 11 and 12, Nizeyimana is alleged to have ordered and instigated soldiers to kill Tutsi civilians in Butare.

23. Further, paragraphs 18, 23, 35 and 36 are not defective as these paragraphs identify the victims through their families or family names/associations.<sup>37</sup> The Chamber finds that describing the victims by their families or family names/associations is sufficiently clear, and allows Nizeyimana to prepare his defence.<sup>38</sup>

24. Ildephonse Nizeyimana also contends that the Prosecution should give greater details as to the circumstances surrounding the victims' alleged deaths or rapes,<sup>39</sup> and, in paragraph 6, the names of the Tutsis identified on lists to be killed. Pursuant to Rule 47 (C), the Indictment should set forth a "concise statement of the facts of the case." To provide details regarding the circumstances or the contents of the lists is a matter of evidence, not the Indictment. The Chamber dismisses Nizeyimana's contention.

*(b) Alleged Vagueness in the Identification of Co-Perpetrators and Subordinates Pled*

<sup>33</sup> *Blaškić* Appeals Judgement, para. 210.

<sup>34</sup> *Kupreškić* Appeals Judgement, para. 90.

<sup>35</sup> Prosecution's Reply, para. 38.

<sup>36</sup> "Tutsi civilians", "Tutsi civilians throughout Butare *préfecture*" and "Tutsi civilians living in Buye Commune in Butare *préfecture*".

<sup>37</sup> The victims are described as: "members of the Ruhutinyanya family"; "members of the Karenzi family"; "Jean-Marie Vianey Maniraho and members of his family"; and "Jean-Baptiste Matabaro, Zephane Nyirinkwaya and their families".

<sup>38</sup> Ildephonse Nizeyimana does not contest the description of the victim in paragraph 19: "a Tutsi girl at the home of Vincent Ntezimana".

<sup>39</sup> See paragraphs 12, 18, 23, 24, 35 and 36 of the Amended Indictment and their corresponding paragraphs in the Motion.

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25. Ildephonse Nizeyimana contends that certain paragraphs of the Amended Indictment do not sufficiently identify certain groups of co-perpetrators, and subordinates.

26. The Prosecution alleges that the pleading of the alleged JCE co-perpetrators in paragraph 5 is sufficiently precise and does not prejudice the preparation of Ildephonse Nizeyimana's defence.<sup>40</sup> The Chamber recalls that, where possible, names or identifying information ought to be pled but, on account of the large-scale nature of the crimes prosecuted, it is sufficient to name the co-perpetrators "by category" or "as a group."<sup>41</sup> Ildephonse Nizeyimana contends that the Prosecution must provide the names, postings and positions of the "communal police" and "local administrative officials".<sup>42</sup> The Chamber disagrees with Nizeyimana's contention as the names of these officials are not necessary in the Amended Indictment as long as their category or group is pled with sufficient identifying information.

27. However, the Chamber finds that several phrases used to identify co-perpetrators are vague. The expressions "communal police" and "local administrative officials" are insufficiently detailed for Ildephonse Nizeyimana to conduct investigations. The expression "communal police" should list the *commune* or *communes* where the police are based and "local administrative officials" should describe what locality the administrative officials are allegedly from.

28. The Chamber further orders the Prosecution to provide unambiguous identification of, or to strike the expressions "militias acting as a group in loose organisation" and "other soldiers and militiamen" as they do not sufficiently identify the co-perpetrators by group. Moreover, when describing acts committed by members of the JCE, in paragraphs 6, 9, 11, 20, 21, and 35, the Chamber finds that the Prosecution must change the overly broad terms "soldiers" and "militiamen" to identifiable categories or groups.

29. Ildephonse Nizeyimana alleges that the Prosecution must provide the names of: certain FAR or ESO soldiers;<sup>43</sup> the people manning the roadblock in paragraph 6; those who received weapons or training in paragraph 7; and those who attended the meeting in paragraph 11. The Chamber recalls that it is sufficient for the Prosecution to provide identification by group, such as FAR or ESO soldiers and names are not required.

<sup>40</sup> Prosecution's Reply, para. 34-35.

<sup>41</sup> *Blaškić Appeals Judgement*, para. 217.

<sup>42</sup> Motion, para. 55.

<sup>43</sup> See paras. 12, 13, 14, 17, 18, 22, 23, 24, and 26 to 29, and the corresponding paragraphs of the Motion.

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(c) *Alleged Vagueness in Specificity of the Locations Pled*

30. Ildephonse Nizeyimana contends that certain paragraphs are vague with respect to the pleading of locations. Nizeyimana requests that the Prosecution plead the locations of the meetings in paragraph 11, and of the killings in paragraphs 11 and 12. The Prosecution did not address this argument in its Response.

31. The Chamber recalls that the degree of specificity of location required in the Indictment will depend on the nature of the Prosecution's case.<sup>44</sup> Where crimes are alleged to have been perpetrated by subordinates in multiple locations, provision of location is not always possible.<sup>45</sup> However, with respect to the meetings that Ildephonse Nizeyimana allegedly attended himself, Nizeyimana will need to know the location so that he may investigate these allegations.<sup>46</sup> Therefore, the Chamber orders the Prosecution to provide the locations of the meetings in paragraph 11. Conversely, the Chamber finds that, in relation to the alleged killings, paragraphs 11 and 12 are sufficiently precise with respect to location, given that they were allegedly carried-out by subordinates in multiple locations.

32. In paragraph 12 of the Amended Indictment, it is pled that orders were given to "kill Tutsi civilians living in Buye Commune." Ildephonse Nizeyimana alleges that there is no *commune* called Buye in Rwanda, but only a *cellule* named Buye and a *commune* named Huye.<sup>47</sup> The Prosecution did not respond to this contention. The Chamber orders the Prosecution to clarify which location it intended.

(d) *Alleged Vagueness in the Specificity of the Dates Pled*

33. Ildephonse Nizeyimana argues that certain paragraphs do not provide sufficient specificity with respect to the dates of the alleged crimes: (i) the roadblocks in paragraph 6; (ii) the distribution of weapons and training in paragraph 7; (iii) the meeting in paragraph 11; and (iv) the alleged murders in paragraphs 12 and 24. The Prosecution contends that greater precision is not required with respect to dates. It argues that the dates in the current Amended Indictment are sufficient to put Nizeyimana on notice of the charges against him.<sup>48</sup>

34. The Chamber recalls that in its previous Decision, it quoted the Appeals Chamber stating that "a broad date range, in and of itself, does not invalidate a paragraph of an

<sup>44</sup> Kupreškić, Appeals Judgement, para. 89.

<sup>45</sup> As stated in *Ntakirutimana*, Appeals Judgement, para. 75 ("there may well be situations in which the specific location of criminal activities cannot be listed, such as where the accused is charged as having effective control over several armed groups that committed crimes in numerous locations").

<sup>46</sup> *Id.*

<sup>47</sup> Motion, para. 83.

<sup>48</sup> Prosecution's Reply, para. 32.

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Indictment.”<sup>49</sup> Furthermore, “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.”<sup>50</sup> 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.”<sup>51</sup>

35. Paragraphs 6, 7 and 11 provide start dates but no end dates for the alleged crimes. The Chamber finds that the Prosecution must narrow the range of possible dates in order to provide Nizeyimana with sufficient notice as to the dates the crimes were allegedly committed. In paragraph 24, the entire month of April is given as the range for the alleged murder of a family. The Chamber considers that the dates need to be more precise because the alleged crime is the murder of specific individuals.<sup>52</sup>

***Alleged Non-Compliance of the Amended Indictment with the Chamber’s Decision***

36. Ildephonse Nizeyimana argues that the Prosecution did not comply with the Decision the Chamber rendered on 25 February 2010 in two respects: (i) the Prosecution added an entirely new charge in paragraph 16, whereas the Chamber simply ordered further clarification of subordinates pled; and (ii) the additions to paragraphs 2(C) and 2(D) broaden the scope of the subordinates allegedly under Nizeyimana’s command, rather than clarifying who the subordinates are.

37. The Prosecution argues that the last sentence of paragraph 16 of the Amended Indictment submitted after the Decision stating that Ildephonse Nizeyimana “personally shot and killed ... four women,” is not a new charge. The Prosecution contends that it is a clarification of the material facts stated in the earlier sentences in paragraph 16, and that it is consistent with the Chamber’s order to clarify the groups of subordinates and their activities.<sup>53</sup>

38. With respect to what constitutes a new charge, the Chamber recalls that the Appeals Chamber has articulated that

[t]he count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions

<sup>49</sup> *Muvunyi*, Appeals Judgement, para. 58.

<sup>50</sup> *Ndindabahizi* Appeals Judgement, para. 20.

<sup>51</sup> *Idem*.

<sup>52</sup> *Kupreškić* Appeals Judgement, para. 89; *Blaškić* Appeals Judgement, para. 213.

<sup>53</sup> Prosecution’s Reply to Motion to Comply, para. 14. The Prosecution states the clarifications include: “the Accused’s personal attendance with the soldiers and Interahamwe and the shooting of four female Tutsi victims”. The Prosecution’s choice of words downplays the fact that the new sentence alleges “[Nizeyimana] personally shot and killed ... four women.”

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of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts).<sup>54</sup>

39. The Chamber recalls that paragraph 16 of the proposed Amended Indictment dealt solely with Ildephonse Nizeyimana ordering or instigating others. However, the amended sentence does not concern Nizeyimana's subordinates or their activities; it alleges that Nizeyimana himself killed four women. Direct participation by ordering or instigating is substantially different from direct participation by commission. Shooting and killing is an act that gives rise to a new legal prohibition infringed upon under Articles 2 (a) of the Statute and constitutes a new charge.

40. The Chamber further recalls that in its Decision, with respect to the pleading of superior responsibility, the Chamber ordered the Prosecution to provide further identifying details of groups such as "soldier", "civilian militia" or "armed civilians".<sup>55</sup> The inclusion of a new charge expands the Amended Indictment rather than clarifying it. The Prosecution cannot include a new charge without first requesting leave from the Chamber to amend the Indictment pursuant to Rule 50. Since the Prosecution did not seek leave to add Ildephonse Nizeyimana's alleged personal liability for killing four women at Butare University in the application to amend the Indictment,<sup>56</sup> the Chamber finds that the last sentence of paragraph 16 must be struck.

41. The Prosecution argues that amended paragraphs 2(C) and 2(D) conform to the Chamber's Decision.<sup>57</sup> However, the Chamber recalls that the Decision, which found the pleading of certain groups of superiors impermissibly vague, ordered the Prosecution only to "further identify individuals or groups referred to as 'soldier', 'civilian militia' or 'armed civilians'".<sup>58</sup> The Chamber finds that the insertion that Ildephonse Nizeyimana had *de facto* control over "all armed forces ... and armed civilians in the region" expands the description of the subordinates in the Amended Indictment rather than further clarifying it. Further, the Prosecution has not pled how, as a Captain in FAR and S2/S3 at the ESO, Nizeyimana could have had control over all armed forces in the region. Therefore, the Chamber orders the Prosecution to strike the phrase "but also *de facto* control, authority or influence over all

<sup>54</sup> *Muvunyi*, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC), 12 May 2005, para. 19. See also *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgement (TC), 22 June 2009, para. 189.

<sup>55</sup> Decision, para. 17. (The Chamber said that identifying details such as their particular camp should be provided for clarification.)

<sup>56</sup> Prosecutor's Request for Leave to File an Amended Indictment, 18 December 2009 with the proposed amended indictment is attached as an annex to the Motion.

<sup>57</sup> Prosecutor's Reply to Motion to Comply, para. 4.

<sup>58</sup> Decision, Order II.

armed forces in the region, including the *Interahamwe*, militia and armed civilians in the region, each of whom were under his command, control, authority or influence” and replace it with “and *Interahamwe* and other militia who were under his command”.

**FOR THESE REASONS, THE CHAMBER**

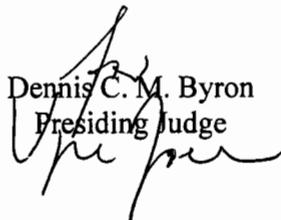
- I. **GRANTS** Ildephonse Nizeyimana's Motions in part;
- II. **ORDERS** the Prosecution to state where and when the order, authorization or instigation took place; by what means it was transmitted; and to whom it was transmitted, where this information is known, in paragraphs 6, 7, 9, 11 to 18, and 22 to 29 of the Amended Indictment;
- III. **ORDERS** the Prosecution to specify what criminal activities Civil Defence Forces, Alphonse Higaniro and Vincent Ntezimana allegedly participated in, or to strike their names from paragraphs 5, 33, 39, 43 and 47 of the Amended Indictment;
- IV. **ORDERS** the Prosecution to identify the group of persons and their interests in paragraph 2(C) or strike this phrase from the Amended Indictment;
- V. **ORDERS** the Prosecution to provide further clarification regarding, or to strike, the expressions “communal police”, “local administrative officials”, “militias acting as a group in loose organisation”, and “other soldiers and militiamen” in paragraphs 5, 33, 39, 43 and 47 of the Amended Indictment;
- VI. **ORDERS** the Prosecution to further identify in paragraphs 6, 9, 10, 12-18, 20-25, 27-29 and 35 which group in particular it is referring to when describing militiamen, armed civilians and soldiers who are members of the joint criminal enterprise referred to in paragraph 5;
- VII. **ORDERS** the Prosecution to specify which location it intends in paragraph 12 of the Amended Indictment;
- VIII. **ORDERS** the Prosecution to give a narrower range of dates in paragraphs 6, 7, 11 and 24 of the Amended Indictment.
- IX. **ORDERS** the Prosecution to strike the last sentence from paragraph 16 of the Amended Indictment;
- X. **ORDERS** the Prosecution to strike from paragraph 2(D) the phrase “but also *de facto* control, authority or influence over all armed forces in the region, including the

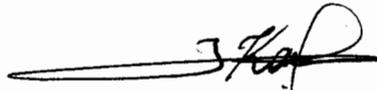
*Interahamwe*, militia and armed civilians in the region, each of whom were under his command, control, authority or influence” and replace it with “and *Interahamwe* and other militia who were under his command”;

XI. **ORDERS** the Prosecution to file a corrected Amended Indictment within ten days of the date of this Decision; and

XII. **DENIES** Ildephonse Nizeyimana's Motions in all other respects.

Arusha, 9 June 2010, done in English.

  
Dennis C. M. Byron  
Presiding Judge

  
Gberdao Gustave Kam  
Judge

  
Vagn Joensen  
Judge

[Seal of the Tribunal]

