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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 22 September 2010

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THE PROSECUTOR

v.

Ildephonse NIZEYIMANA

CASE NO. ICTR-2001-55-PT

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

Rules 50(A) and 70 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Drew White
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Defence Counsel for Ildephonse Nizeyimana:
John Philpot

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INTRODUCTION

1. At his initial appearance on 14 October 2009, Ildephonse Nizeyimana pled not guilty to all four counts in the Indictment (genocide; or in the alternative complicity in genocide; rape as a crime against humanity and other inhumane acts as a crime against humanity).
2. On 25 February 2010, the Chamber granted the Prosecution leave to amend the Indictment whereupon the Prosecution filed an Amended Indictment on 1 March 2010. Ildephonse Nizeyimana pled not guilty to the new charges brought against him in a further appearance on 5 March 2010. On 29 March 2010, the Chamber partially granted a motion by Nizeyimana alleging defects in the Amended Indictment
3. On 31 August 2010 the Prosecution filed this motion to further amend the Indictment. ("Proposed Indictment"). Ildephonse Nizeyimana opposes the amendments.
4. At the Status Conference of 10 June 2010 the Chamber advised the Parties to be prepared for the trial to commence in the beginning of November 2010.

DELIBERATIONS

5. Rule 50 of the Rules of Procedure and Evidence 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.¹ The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will unfairly prejudice an accused.² Other factors to be considered include: (i) the ameliorating effect of the changes on the clarity and precision of 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 possible prejudice to the defence, if any, caused by the amendment.³ Amendments to an indictment can particularize allegations already contained in the current indictment but can

¹ 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.

² *The Prosecutor v. Édouard Karemera, Matthieu Ngirumpatse and Joseph Nzirorera* ("*Karemera et al.*"), Case No. ICTR-98-44-T, Decision on Severance of André Rwamakuba and Leave to File Amended Indictment, 14 February 2005 (TC), para. 35.

³ 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.

also contain expanded factual allegations that amount to new charges in the sense of Rule 50 (B). However, amendments which add new charges require greater scrutiny and analysis in order to avoid prejudice to the rights of the accused.⁴

Ameliorating Effect

6. The Prosecution submits that the Proposed Indictment better particularizes its theory of the case and corrects and improves the material facts alleged and will streamline the trial process.⁵ In reviewing the Proposed Indictment, the Chamber agrees that the re-organisation makes the Indictment more readable and logical. Also, the deletions of subjects which the Prosecution does not intend to adduce evidence upon before the start of trial is helpful to both the Chamber and the Accused.

7. The Prosecution correctly points out that it is charged with a positive obligation to give all particulars of the identity of alleged subordinates who perpetrate crimes which an accused could be liable for under Article 6(3) of the Statute.⁶ Furthermore, the Chamber recalls that the specificity of the Indictment, or the lack thereof, has been the subject of multiple motions by the Defence who have consistently argued that the current Indictment and its previous versions were too vague to allow meaningful investigations into the crimes and incidents alleged. Therefore, the Proposed Indictment with respect to the added specificity and clearer enunciation of the Prosecution's theory of the case will have an ameliorating effect on the proceedings.

Timeliness of the Prosecutor's Application

8. The timeliness of a request for leave to amend an indictment must be assessed within the Chamber's obligation to ensure that the trial is fair.⁷ The Chamber notes that this application to amend the Indictment was brought while the case is still in its the pre-trial phase and that the Prosecution, at the pre-trial conference on 10 June 2010, advised the Tribunal and the Accused of its intent to file a request for leave to further amend the Indictment.⁸

⁴ *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-PT, Decision on Prosecution's Motion for Leave to Amend the Indictment (TC), 23 February 2005, para. 35.

⁵ Motion, paras. 29, 43.

⁶ Motion, para. 24, 25 and sources cited therein.

⁷ *Karemera et al.*, Decision of 19 December 2003 (TC), 19 December 2003, para. 13; *Nchamihigo*, Case No. ICTR-2001-63-A, Appeal Judgement (AC), 18 March 2010, para. 23.

⁸ T. 10 June 2010, submission of 28 June 2010, para. 15.

9. For these reasons the Chamber deems this application to be timely given the overall context of the stage of the proceedings.

Absence of Undue Delay or Unfair Prejudice to the Accused

10. The Defence contends that if the new counts and charges are allowed, there will not be sufficient time to prepare and Ildephonse Nizeyimana will be prejudiced if the case is to be tried in 2010.⁹ However, as Nizeyimana's counsel points out, "throughout the pre-trial process the Accused has requested clarification as to his particular alleged actions and course of conduct but had little success."¹⁰ Given that the Accused has sought exactly the sort of information now provided in the Proposed Indictment, the Chamber believes that it is appropriate to grant leave to amend the Indictment with a view towards remedying the defects that Nizeyimana has complained of throughout the pre-trial process.

11. However, the Chamber is mindful that, as will be discussed in greater length below, the Proposed Indictment raises new charges that Ildephonse Nizeyimana must defend himself against. The Chamber is satisfied that the Trial Bench, when appointed, will ensure that, pursuant to Article 20(4)(b) of the Statute, Nizeyimana is guaranteed adequate time and facilities for the preparation of his defence.¹¹

Alleged New Charges and Supporting Materials

12. To determine whether new information added to the Indictment amounts to new charges the Chamber must consider several criterion; including: (i) whether the allegation, by itself if proven, can be grounds for a conviction; (ii) whether the allegation converts a general allegation into a live factual issue; (iii) whether the increased specificity radically transforms the existing pleading; (iv) whether the additional allegation refers to the element or part of an element of a crime or rebuts a defence; and (v) whether the allegation constitutes an aggravating circumstance or rebuts a plea in mitigation.¹²

13. The Defence contends that many new charges have been alleged in the Proposed Indictment that do not have adequate supporting materials. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge)

⁹ Response, para. 25.

¹⁰ Response, para. 23.

¹¹ *Karemera et al.*, Decision on Appeals Pursuant to Rule 15bis(D) (AC), 20 April 2007, para. 24.

¹² *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-PT, Decision on the Prosecutor's Motion for Leave to Amend the Indictment ("*Muvunyi* Trial Chamber Amendment Decision"), 23 February 2005, paras. 39-39.

and the acts or omissions of the accused that give rise to that allegation of infringement of a legal prohibition (material facts).¹³

14. Mindful of the Chamber's reasoning in *Kajelijeli*, this Chamber is of the view that expanding the factual allegations can amount to "new charges" even if no counts are added to the indictment, as a count or charge is the legal characterisation of the material facts which support that count or charge.¹⁴ Similarly, charges of additional legal theories of liability are considered new charges.¹⁵ Some changes requested by the Prosecution are objected to by the Defence but do not rise to the level of new charges. The Chamber notes that for all the reasons stated above and further expounded upon below, it is in the interests of justice to allow the amendments and that there will be no undue delay or prejudice to the Accused by allowing these amendments.

Paragraph 2(D)

15. Ildephonse Nizeyimana argues that because the Chamber struck this paragraph from the earlier Amended Indictment, it should not be allowed to remain in the Proposed Indictment. The Chamber recalls that it did indeed previously remove this language from the earlier Amended Indictment. However, that was in the context of a Defence challenge relating to defects in the first revision of the Amended Indictment and the Chamber found that the language was an expansion of the charges rather than a clarification. That determination is not relevant in this context, as now the Prosecution is asking to expand the allegations in the Indictment, rather than attempting to clarify them.

16. The Prosecution argues that this amendment should be allowed as the Accused had notice of this allegation six months before the request for leave was formally filed. The Defence argues that this addition creates a new basis for criminal liability for all the allegations of command responsibility. The Chamber notes that proposed additions to this paragraph contain an expanded description of the Accused's subordinates as well as adding a new basis for criminal liability and adds specificity to the pleadings. While additional investigations may be required for the Defence to prepare its case for this expanded theory of

¹³ *Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 ("Muvunyi Appeal Chamber Amendment Decision") (AC), 12 May 2005, para. 19. See also *Kalimanzira*, para. 189.

¹⁴ *Prosecutor v. Juvenal Kajelijeli*, Case No. ICTR-98-44-A-T, Decision on Prosecutor's Motion to Correct the Indictment Dated 22 December 2000 and Motion for Leave to File an Amended Indictment: Warning to Prosecutors Counsels Pursuant to Rule 46(A) (AC), 25 January 2001, para. 30; *Muvunyi Appeal Chamber Amendment Decision*, para. 19.

¹⁵ *Prosecutor v. Michel Bagaragaza*, Case No. ICTR-05-86-I, Decision on the Prosecutor's Application for Leave to Amend the Indictment (TC), 30 November 2006, para. 10.

criminal responsibility and expanded descriptions of subordinates, it cannot be said that it would cause undue prejudice to allow the amendment of this paragraph, particularly in light of the stage of the proceedings, and the ability of the Trial Bench, when appointed, to allow additional time for investigations if they are necessary.

Paragraph 7

17. The Prosecution seeks to further clarify paragraph 7 of the Indictment to specify the people involved in the allegations. The Chamber agrees with the Defence that the proposed additions to this paragraph constitute new material facts which would amount to a new charge requiring a further appearance. However, the Chamber believes that the further specificity in the proposed paragraph will help the Accused focus his investigations and streamline the trial proceedings wherefore the Chamber finds the amendment of this paragraph would not unduly prejudice the Accused.

Paragraph 12

18. The Chamber notes that despite the Defence's claims that this paragraph adds many details, the broad allegations underlying the new details are contained in the current Indictment. In this case, the added details explicitly state places where crimes are alleged to have been committed in Butare, which provides the Defence with a degree of specificity that it has been seeking since the proceedings commenced. The Chamber finds that this paragraph is introductory in nature and these allegations are referred to in the Pre-Trial Brief. Furthermore, on 14 September, the Prosecution disclosed the supporting materials. As such, the Chamber deems it appropriate to allow this amendment to the Indictment.

Paragraph 13

19. The Defence argues that the addition of Jean-Baptiste Habyalimana to this paragraph constitutes a new charge and also a new material fact.¹⁶ The Prosecution admits that this information only became known to it after it last made an application to the Chamber to amend the Indictment.¹⁷ The Chamber finds that the proposed paragraph, if accepted, would add a new material fact (alleged visit to Cyahinda Parish by Ildephonse Nizeyimana with Habyalimana) and a new potential basis for criminal liability (in the alleged decision made after the visit to send soldiers to the parish).

¹⁶ Response, paras. 47, 48.

¹⁷ Motion, para 64.



20. The Chamber finds the additions will clarify the charges against the Accused and provide detail which will assist them in investigations and trial preparation. It will also aid the Trial Bench in streamlining the trial process and clarify the issues to be adjudicated at trial. Furthermore, new charges supported by *prima facie* evidence should be allowed in the interests of justice. The Chamber notes that a will-say statement from Witness AZM provides *prima facie* evidence for this amendment. Consequently, the Chamber deems it appropriate to allow this amendment to the Indictment.

Paragraphs 14, 15, and 27

21. The Chamber agrees that this paragraph provides much new information about the allegations in Paragraph 14 against Ildephonse Nizeyimana concerning Butare University, and that the allegations of lists and targeting of females, sexual violence, and a murder are new. The Defence again notes the lack of any evidentiary basis for the proposed amendments.¹⁸

22. The Prosecution seeks to amend Paragraph 15 to include additional details and new murder charges faced by the Accused through his participation in the alleged joint criminal enterprise regarding Butare Hospital. The Accused argues that he will have to revisit his potential witnesses.¹⁹ Similarly, the Prosecution seeks to add additional details to Paragraph 27 including new material facts and the new claim that Ildephonse Nizeyimana was present at the scene.²⁰

23. The Chamber believes that the added specificity in proposed paragraphs 14, 15, and 27 will help the Accused focus his investigations and streamline the trial proceedings as to these allegations. The Chamber also finds that these amendments are supported by *prima facie* evidence in the statements of ZBH, TQ, ZBI and Dr. Rony Zachariah. Because of this, and the timing of the amendment, the Chamber finds that the amendment of this paragraph in the interests of justice and will not unduly prejudice the Accused.

Paragraphs 22 and 40

24. The Prosecution seeks to include two paragraphs previously pled in relation to Count II (Extermination) and Count I (Genocide) because they explain that, while the families described in these counts were Hutu, they were actually thought to be Tutsi and therefore can

¹⁸ Response, para. 56.

¹⁹ Response, para. 58, 59.

²⁰ Response, paras. 67-69.

be used as a material fact that supports Counts I and II.²¹ The Prosecution argues that the inclusion of these paragraphs will not cause prejudice to the Accused because Ildephonse Nizeyimana was fully informed that he was facing this allegation.²² Ildephonse Nizeyimana argues that the proposed amendment of paragraph 22 contains both new charges and new material facts, and that the scope of the alleged crimes is multiplied with the additional deaths alleged.²³ The Prosecution also seeks to add the expanded factual additions into the relevant section under Count II, and the Defence objects for the same reasoning as under Count I.

The Chamber is cognizant that the addition of additional families in paragraphs 22 and 40 could be grounds for a conviction and therefore that there are new charges and new material facts in the proposed amended paragraphs. The amendment of the paragraphs is supported by the *prima facie* evidence of AZM. However, given the fact that Ildephonse Nizeyimana was informed of this allegation in the current Indictment, the new basis for criminal liability and the addition of new material facts is in the interests of justice and is not unduly prejudicial to him at this stage of the proceedings and will aid in streamlining investigations, the trial, and the presentation of his Defence. As such, the Chamber allows the amendment of these three paragraphs.

Paragraph 31

The Prosecution seeks to add three sub-paragraphs to Paragraph 31 to add greater specificity to allegations of rape in the Indictment. While the Defence argues that new investigations will be required if this amendment is allowed, the Prosecution correctly points out that Nizeyimana specifically asked for greater detail in terms of identity of rape victims on at least one occasion. The amendments are supported by the *prima facie* evidence in the statements of MKA and ZBL. Given the stage of the proceedings, and the ability of this new information to provide the Parties and the Chamber a better understanding of the case to be proven, the Chamber finds amendment of this paragraph in the interests of justice and it will not cause undue prejudice to the Accused.

Conclusion

25. Based upon the analysis of the proposed Amended Indictment, the Chamber finds that 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

²¹ Motion, para. 69.

²² *Id.*

²³ Response, paras. 62-64.

the alleged criminal conduct of Ildephonse Nizeyimana and that the new charges that have been added are justified. Further, the Prosecution has shown diligence in notifying the Accused and the Chamber of its intention to seek leave to file an amended indictment and filing that request after the completion of further investigations and months before the proposed trial date. Lastly, Nizeyimana will not suffer undue prejudice as the Trial Bench, when appointed, will provide him with adequate time to prepare his case and the Trial Bench and the Parties will be able to discuss appropriate timelines at the status conference scheduled for 23 September 2010. The Chamber notes that the additional charges and new material facts alleged are closely related to the allegations in the current effective Indictment, and therefore the additional time required for investigation should not be significant as the current Indictment would have led to some inquiry on these issues.

26. Finally, the Chamber notes that there is a discrepancy in the rank assigned to Fulgence Niyibizi at various places in the Indictment. In view of making the Indictment as specific as possible, the Prosecution is hereby ordered to investigate and clarify the position held by Fulgence Niyibizi at the relevant times he appears in the Indictment.

Further appearance of the Accused

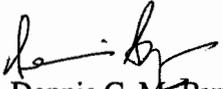
27. As new charges and material facts are pled as well as the introduction of new modes of liability, the Chamber considers that, pursuant to Rule 50 (B) as well as in the interests of a fair trial, a further appearance of Ildephonse Nizeyimana should be held as soon as practicable.

FOR THESE REASONS, THE CHAMBER

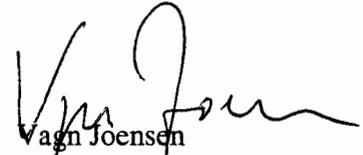
- I. **GRANTS** the Prosecution's motion to amend the Indictment;
- II. **ORDERS** the Prosecution to clarify the position held by Fulgence Niyibizi in the applicable sections of the Indictment;
- III. **ORDERS** the Prosecution to file the Indictment as amended in accordance with this decision in English and French by 28 September 2010;
- IV. **ORDERS** the Prosecution to file a revised pre-trial brief by 28 September 2010;
- V. **ORDERS** that a further appearance shall be held as soon as practicable as provided for under Rule 50 (B).

VI. **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, 22 September 2010, done in English.


Dennis C.M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

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