

ICTR-05-86-1
07-11-2006
(674-672)

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**INTERNATIONAL CRIMINAL TRIBUNAL
FOR RWANDA**

Case No. ICTR-2005-86-PT

Before: Judge Khalida Rachid Khan, Presiding
Judge Ines Monica Weinberg de Roca
Judge Dennis C.M. Byron

Registrar: Adama Dieng

Date filed: 7 November 2006

PROSECUTOR

versus

Michel BAGARAGAZA

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**DEFENCE RESPONSE TO PROSECUTOR'S APPLICATION FOR LEAVE TO AMEND THE
INDICTMENT**

Office of the Prosecutor:

**Hassan Bubacar Jallow
Stephen J. Rapp**

Counsel for the Defence:

Geert-Jan Alexander Knoops

I Introduction

1. On 1 November 2006 the Prosecution filed its "The Prosecutor's Application for Leave to Amend the Indictment" (further referred to as "**Prosecutor's Application**") in the case of the Prosecutor v. Michel Bagaragaza, wherein the Prosecution requests leave to amend the indictment with "an additional, fourth count of killing and causing violence to health and physical or mental well-being a serious violations of Article 3 common to the Geneva Convention of 1949 and Additional Protocol II of 1977 ("**war crimes**")."
2. Pursuant to Rules 50 and 73(E) of the Rules of Evidence and Procedure the Defence herewith files its Response to this Prosecutor's Application.

II Defense position as to the requested amendment

3. The Defence understand that the rationale underlying the Prosecutor's Application is to facilitate the transfer of the case of the Accused to a third State. If this is indeed the main purpose and nature of the amendment sought, the accused person does not oppose the amendment of the indictment in view of facilitating this transfer.
4. However, the Defence does not agree with the proposed new form of the Indictment, filed with the Prosecutor's Application 1 November 2006, in that a new charge is added in a cumulative way. The Defence believes that, in view of the rationale of the Prosecutor's Application and the fact that the new charge covers the same facts, the new war crimes charge can and should only be admitted in the amended Indictment as an alternative charge and therefore not be included as a cumulative charge.
5. Although the Defence is mindful of the case law of the ICTR and ICTY with respect to permissibility of cumulative charges,¹ it holds the opinion that considering the mentioned rationale of the Prosecutor's request, i.e. to facilitate a

¹ See *Prosecutor v. Kupreskic et al*, ICTY Case No. IT-95-16-T, Decision on Defence challenges to Form of the Indictment, 15 May 1998.

transfer of the case pursuant to Rule 11bis, the potential inclusion of a war crimes charge by way of alternative charge is more suitable.

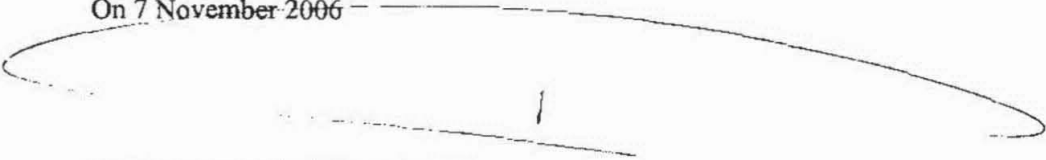
6. In this regard, reference is made to the Akayesu Trial judgment indicating that “of course, great care must be taken in sentencing that an offender convicted of different charges arising out of the same or substantially the same facts is not punished more than once for his commission of the individual acts (or omissions) which are common to two or more of those charges.”² Although this reasoning relates to the sentencing proceedings, the same argument can be applied with respect to the acceptance of a new charge in either a cumulative or alternative way within the stage of amending an existing indictment. It is the Defence position that when it concerns a request to amend an indictment for the purposes of supporting a potential Rule 11bis transfer, the same caution must be administered as reflected in the mentioned *Akayesu* judgment.

III Conclusion

7. In conclusion, the Defence respectfully prays the honourable Trial Chamber that in the event the requested amendment would be accepted, such amendment would only be permitted in an alternative form, i.e., alternative to the counts 1 – 3.

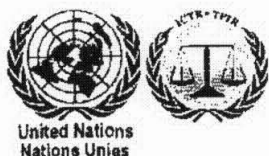
Respectfully submitted,

On 7 November 2006



Geert-Jan Alexander Knoops

² *Prosecutor v. Akayeshu*, Judgment 2 September 1998, ICTR Case. No. 96-4-T, par. 10



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Case Name:	The Prosecutor vs. Michel Bagaragaza		Case Number: ICTR-2005-86-PT	
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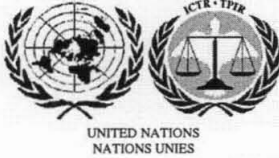
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