



**International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda**

TRIAL CHAMBER I

OR:ENG

Before: Judge Lennart Aspegren, Presiding
Judge Laïty Kama
Judge Navanethem Pillay

Registry: Ms Prisca Nyambe

Decision of: 18 November 1998

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CRIMINAL REGISTRY
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**THE PROSECUTOR
VERSUS
ALFRED MUSEMA**

Case No. ICTR-96-13-I

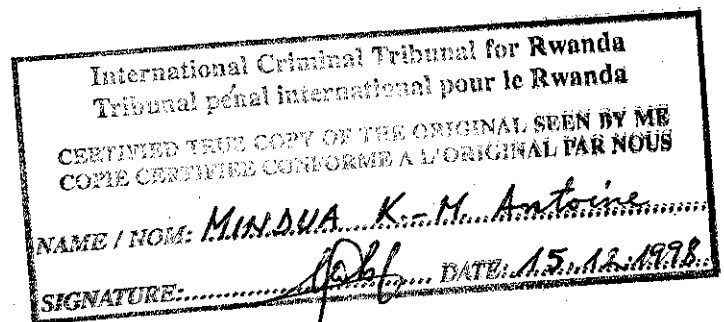
**DECISION ON THE PROSECUTOR'S REQUEST
FOR LEAVE TO AMEND THE INDICTMENT**

The Office of the Prosecutor:

Ms Jane Anywar Adong
Mr. Charles Adeogun-Phillips
Ms Holo Makwaia

Counsel for the Accused:

Mr. Steven Kay QC



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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal"),

SITTING as Trial Chamber I, composed of Judge Lennart Aspegren, presiding, Judge Laïty Kama and Judge Navanethem Pillay;

CONSIDERING the indictment filed on 22 July 1996 by the Prosecutor against Alfred Musema pursuant to Articles 17 and 18 of the Statute of the Tribunal (the "Statute") and Rule 47 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that Musema has committed genocide, conspiracy to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Yakov Ostrovsky on 15 July 1996;

CONSIDERING the initial appearance of the accused which took place on 18 November 1997;

BEING SEIZED of a motion filed by the Prosecutor on 3 November 1998 requesting leave to amend the indictment against the accused;

CONSIDERING the brief in support of the Prosecutor's request for leave to file an amended indictment and the attached draft amended indictment, both filed on 3 November 1998;

HAVING RECEIVED from the Defence Counsel on 11 November 1998, a reply to the Prosecutor's request for leave to file an amended indictment;

CONSIDERING the Defence brief, filed on 18 November 1998, in reply to the Prosecutor's request for leave to file an amended indictment;

HAVING HEARD the parties at the audience held to that end on 18 November 1998;

TAKING INTO ACCOUNT Articles 19 and 20 of the Statute and Rules 47 and 50 of the Rules;

TAKING NOTE of the Tribunal's Judgement of 2 September 1998 in the Case 'The Prosecutor v. Jean-Paul Akayesu' (Case No. ICTR-96-4-T), and the Tribunal's 'Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material' dated 30 September 1998 in the Cases 'The Prosecutor v. Pauline Nyiramasuhuko and Arsène Shalom Ntahobali' (Case No. ICTR-97-21-I), 'The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo' (Case No. ICTR-97-29A and B-I), 'The Prosecutor v. Joseph Kanyabashi' (Case No. ICTR-96-15-T) and 'The Prosecutor v. Elie Ndayambaje' (Case No. ICTR-96-8-T);

AFTER HAVING DELIBERATED,

The legal basis of the request

1. The Prosecutor has brought her request for leave to file an amended indictment on the basis of Rule 50 of the Rules (Amendment of Indictment) which reads as follows:

“Rule 50: Amendment of Indictment

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by that Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of sixty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.”

2. The Tribunal takes note of its aforementioned decision dated 30 September 1998, specifically paragraph 14 thereof, wherein it is held that “[i]n considering the Prosecutor’s motion for leave to amend the indictments under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of these motions and it is for the Defence to respond to these arguments”.

The arguments

3. The Prosecutor seeks leave to amend the indictment confirmed on 15 July 1996 so as:

- To add one alternate charge against the accused;
- To expand on the facts adduced in support of existing counts;
- To add in relevant counts, the allegation that the accused is responsible not only pursuant to Article 6(1), but also pursuant to Article 6(3) of the Statute of the Tribunal;
- To bring the current indictment in accord with the jurisprudence of the Tribunal and current charging practices.

4. The Prosecutor submitted during the audience and in the brief filed in support of her request for leave to file an amended indictment that the new charges contained in the proposed amended indictment, unlike those in the present indictment, accurately reflect the totality of the alleged criminal conduct of the accused as reflected by the evidence presently available to the Prosecutor. Further, she submits that the delay in bringing a request to amend the indictment was as a result of ongoing investigations. Moreover, the Prosecutor contends that the proposed amended indictment is justified in law and in no way prejudices the right of the accused to a fair and expeditious trial, in accordance with Articles 19(1) and 20(4)(c) of the Statute.

5. The Defence Counsel in response submits, *inter alia*, that the proposed amended indictment substantially alters the case against the accused more than 2 years and 3 months after the original indictment, and that the new allegations represent a substantial departure from the case originally put to the accused. Furthermore, he argues that in view of the new nature of the allegations, it would be necessary to have a postponement of the start of the trial on its merits. The Defence contends therefore that any further delay to the start of trial would not be in the interests of justice.

6. In reply to a question from the Tribunal, the Defence conceded that the Prosecutor was entitled in the Rules to apply for leave to amend the indictment, but objected that such amendment resulted in a totally new indictment which therefore changed the case as a whole against the accused.

On the alternative count

7. The first amendment sought by the Prosecutor is to add one alternate count against the accused, namely Complicity in genocide pursuant to Article 2(3)(e) of the Statute, as an alternative to existing Count 1, Genocide. The Tribunal notes that the possibility of having Complicity in genocide as an alternative to Genocide is in conformity with the jurisprudence established in the aforementioned Akayesu Judgement. It is held in paragraph 532 thereof that "an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which the accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since both are mutually exclusive, the same individual cannot be convicted of both crimes for the same act". Thus, is envisaged the possibility of charging Genocide and Complicity in genocide alternatively if pertaining to the same set of facts.

8. In the opinion of the Tribunal, an alternate count may be charged, if founded on the same facts. Therefore, the addition of Complicity in genocide as an alternative to Genocide, as requested by the Prosecutor, is not problematic insofar as the new count purports to be based on facts already contained in the indictment against the accused. To include new facts in support of this amendment is unnecessary as the confirming Judge has already been satisfied that the Prosecutor has established a *prima facie* case against an accused in relation to the indictment as a whole, and hence, as pertains to the specific count of Genocide.

9. The Prosecutor and the Defence concurred with the Tribunal's aforementioned definition of an alternate count. Therefore, the Tribunal shall grant leave to the Prosecutor to amend the indictment by adding the count of Complicity in genocide as an alternative to existing Count 1 of Genocide in the present indictment.

On the supporting facts

10. The Prosecutor is seeking leave to amend the indictment by expanding on the facts adduced in support of the existing counts. The Tribunal notes that the existing counts in the indictment are specific as to, namely, the temporal and geographical settings of the charges against the accused. Thus, considering the specific request of the Prosecutor, any facts expanded upon should be in direct connection with the particulars of each count as it stands, that is as the count presently exists.

11. The Defence argues that the facts so expanded upon are wholly new and represent a substantial departure from the case originally put against the accused. In the opinion of the Tribunal, facts falling outside the aforementioned settings are not a mere expansion on the facts already adduced in support of the existing counts, but rather represent additional material which can be used later by the Prosecutor during trial.

12. Indeed, the Tribunal recalls that, in accordance with Rule 73 (*bis*) of the Rules, the Prosecutor has the opportunity to file a pre-trial brief addressing factual and legal issues as well as a statement of contested matters of facts and law. Moreover, inherent to trial proceedings is the presentation of evidence in complement to materials disclosed in accordance with Rule 66 of the Rules. Thus, an expansion on the facts adduced in support of existing counts does not in the opinion of the Tribunal represent an amendment to the indictment but rather further particulars which emerge during various stages of the trial against the accused.

13. Furthermore, the Tribunal finds upon perusal of the proposed draft amended indictment filed by the Prosecutor that the Prosecutor has not confined herself to her specific request, namely, to amend the indictment by expanding on the facts adduced in support of existing counts but rather attempts to adduce new factual material which goes beyond the particulars of the existing counts and which are, in its opinion, new facts not supporting the existing counts.

On the individual responsibility under Article 6(3) of the Statute

14. The Prosecutor also requests leave to amend the indictment by adding in relevant counts that the accused is responsible not only pursuant to Article 6(1) of the Statute but also pursuant to Article 6(3). Article 6(3) deals with the responsibility of a superior, or command responsibility. As aforementioned, for leave to be granted to amend the indictment by adding criminal responsibility pursuant to Article 6(3), it is incumbent on the Prosecutor to present legal motivations and demonstrate a factual basis from the present indictment justifying such a request.

15. The Prosecutor argues that evidence brought to light after further investigations tends to demonstrate that, at the time of the events alleged in the indictment, the accused in his capacity as a superior exerted authority and control over certain subordinates, namely employees of the Gisovu tea factory.

16. Considering the above, and the facts presented in the existing indictment, the Tribunal finds that there is sufficient basis to grant leave to the Prosecutor to amend the indictment by adding the allegation that the accused is also responsible under Article 6(3) of the Statute.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

GRANTS leave to the Prosecutor to add the count of Complicity in genocide as an *alternative* Count to the Count of Genocide in the present indictment and on the same facts adduced in respect of Count 1 of that indictment;

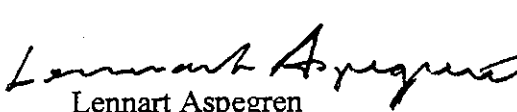
FINDS that the Prosecutor does not need to request leave of the Trial Chamber to expand on the facts adduced in support of existing counts;

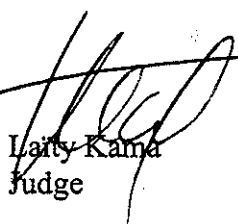
REMINDS the Prosecutor of her obligation under Rule 66 of the Rules to disclose to the Defence as soon as possible all new materials she intends to present at trial in support of the Counts;

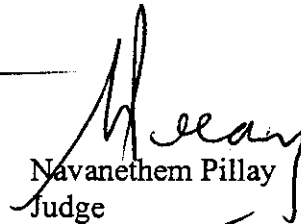
GRANTS leave to the Prosecutor to amend paragraph 5 of the present indictment to include the allegation of individual criminal responsibility under Article 6(3) of the Statute in respect of every mentioned Count;

DIRECTS the Prosecutor to withdraw the draft amended indictment filed by her, and to immediately amend the present indictment in conformity with this decision and to file it with the Registry.

Decision of 18 November 1998,
Signed on 14 December 1998.


Lennart Aspegren
Presiding Judge


Lally Kana
Judge


Navanethem Pillay
Judge

(Seal of the Tribunal)

