



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 Marianne Ben Salimo

Decision of: 6 May 1999

1999 MAY 25 A 10:42  
ICTR  
CRIMINAL REGISTRY  
RECEIVED

THE PROSECUTOR  
VERSUS  
ALFRED MUSEMA

Case No. ICTR-96-13-T

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  
Prof. Michail Wladimiroff

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME  
COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR NOUS  
NAME / NOM: *Dr. MINDUA K. M. Antoine*  
SIGNATURE: *[Signature]* DATE: *25.05.1999*

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

1. The Tribunal, sitting as Judge Lennart Aspegren, presiding, Judge Laity Kama, and Judge Navanethem Pillay has received from the Prosecutor a request for leave to file an amended indictment, dated 29 April 1999, in the case of "The Prosecutor versus Alfred Musema". The Defence filed a response thereto on 4 May 1999.
2. The submissions of the parties were heard on 5 May 1999.

### The Submissions

#### *The Prosecutor*

3. The Prosecutor is seeking, *inter alia*:
  - (a) in terms of Rule 50 of the Tribunal's Rules of Procedure and Evidence (the "Rules"), to amend the indictment to add one new charge against the accused;
  - (b) to expand upon the facts adduced in the existing indictment; and
  - (c) to amend count 7 of the indictment, as indicated in counts 8 and 9 of the proposed amended indictment.
4. The Prosecutor submitted that the proposed amended indictment reflects current jurisprudence by bringing it in line with jurisprudence of the Tribunal, *viz* the form of the indictment, and that it reflects the totality of the accused's alleged criminal conduct as presented by the evidence adduced during trial and as will be presented by anticipated witnesses. The Prosecutor cited extracts from witness testimony as well as witness statements in support of her submission that a *prima facie* case had been made in respect of the new charges. In support of her motion, the Prosecutor refers to the decision of the Tribunal granting leave to the Prosecutor to amend the indictment to admit the additional count of rape during the trial of 'The Prosecutor v. Jean-Paul Akayesu' (case no ICTR- 96-4-T).
5. It is argued by the Prosecutor that the amendment as sought is a mere technicality and therefore cannot be held to occasion prejudice or erode the rights of the Defence and will not fundamentally alter the on going trial against the accused, thus causing no additional delay to the trial. The Prosecutor contends that she had intimated at a status conference on 21 January 1999 that evidence of the alleged involvement of the accused in acts of sexual violence were uncovered in December 1998 and on that occasion she had indicated her intention to move for the amendment of the indictment against the accused, to include sexual offences. Subsequently, statements of the relevant witnesses were disclosed to the Defence on 25 January 1999. The Prosecutor submitted that the accused will therefore not suffer any prejudice, if the amendment to the indictment is granted, as he had been informed of these proposed charges, and the Defence has had ample opportunity to challenge the evidence presented by these witnesses.

6. The Prosecutor submitted that in the spirit of Rule 115 of the Rules, she should not be limited to any formalities and she added that where evidence relevant to the accused has come to light, which could contribute to justice being done, such evidence must be presented before the Trial Chamber.

7. In response to questions from the bench, pertaining to the delay in the filing of this motion for the amendment of the indictment, particularly in light of the fact that the relevant witness statements were disclosed to the Defence on 25 January 1999 and the motion for amendment was filed on 29 April 1999, the Prosecutor submitted *inter alia* that this delay was due to consultations being held among the various departments of the Office of the Prosecutor. These consultations, according to the Prosecutor, pertained to the investigation of the cases of sexual violence and further evaluation of the weight of the evidence and the credibility of these witnesses. Consultations were also held as to whether it would be prudent to file a motion to amend the indictment to include a separate charge of rape or alternatively to argue that these acts of sexual violence constitute acts of genocide, as charged in Count 1 of the indictment.

#### *The Defence*

8. In response, the Defence, on the basis of Rule 87 (B) of the Rules and Article 20 of the Statute of the Tribunal, submitted that the accused will only have to defend himself against acts as set out in a concise statement of facts culminating in charges as specified in the indictment against him. On the basis of the present indictment, the Defence argues that it has had no reason to conduct investigations or to prepare a defence for alleged but not indicted rapes.

9. On the same line, the Defence submitted that they should not be expected to act on the basis of the intention to amend the indictment as expressed by the Prosecutor during the status conference of 21 January 1999, but rather on allegations as specified in the indictment.

10. The Defence contends that the late filing of the motion is not justified, and that the Prosecutor has not shown any acceptable reason why the motion was not filed immediately after the taking of the witness statements. A further contention of the Defence is that the Trial Chamber is not empowered under the Rules to grant leave to amend the indictment, but rather that in terms of Rule 50 of the Rules this lies with the confirming judge.

11. In response to the Prosecutor's submission, the Defence submitted that Rule 115 of the Rules as cited by the Prosecutor is irrelevant to this case because this rule deals with issues arising at the level of appeal and not at the stage of trial. Referring to the Decision by the Appeal Chamber of the International Criminal Tribunal for the former Yugoslavia, dated 15 October 1998, in the case of "Prosecutor versus Džsko Tadić", the Defence submitted that there is a substantial difference between additional evidence and additional charges.

12. In conclusion, the Defence submitted that the evidence as presented at trial relevant to the allegation of rape, does not provide reasonable grounds for believing that the accused committed rapes and therefore the request to amend the indictment does not meet the required standard of proof to allow the Prosecutor to present new charges.

**AFTER HAVING DELIBERATED,**

**The Tribunal states the following**

13. The Tribunal has considered the submissions of the parties. In response to the Defence submission that it is the confirming judge and not the Trial Chamber who is empowered to order the amendment of the indictment, the Tribunal notes that Rule 50 of the Rules, clearly stipulates that 'At or after such initial appearance, an amendment of an indictment may only be made by leave granted by [a] Trial Chamber'. It is on the basis of this provision that the Trial Chamber is competent to entertain the motion and rule thereon.

14. The Tribunal notes that Rule 115 of the Rules, as cited by the Prosecutor is pertinent to matters arising at the level of appeal and not at the level of trial. Further, this rule, allows for the presentation of additional evidence at the level of appeal, but does not under any circumstances allow for additional charges to be brought against the accused. This rule is therefore irrelevant to these proceedings.

15. As a point of order, the Tribunal notes that the delay between the discovery of the pertinent statements in this instance and the filing of the motion cannot be justified on the grounds of the need for consultation between departments of the Office of the Prosecutor, and the technicalities of drafting the amended indictment. In the opinion of the Tribunal such grounds are not tenable when the issue pertains to the right of the accused to a fair and expeditious trial, and thus shall not be entertained by the Tribunal in the present matter.

16. As such, the Tribunal reiterates its criticism of the Prosecutor for failing to keep the Trial Chamber and the Defence informed of the development with regard to her motion to amend the indictment against the accused.

17. Notwithstanding the above, the Tribunal notes that Rule 50 of the Rules does not explicitly prescribe a time limit within which the Prosecutor may file a request to amend the indictment, leaving it open to the Trial Chamber to consider the motion in light of the circumstances of each individual case. A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial. In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.

18. The Tribunal is of the opinion that the filing of the motion, though coming at a late stage in the presentation of the Prosecutor's case, does not cause irreparable prejudice to the accused. Furthermore, the Tribunal is of the opinion that the amendments sought will not unduly delay the proceedings, considering firstly, that the Prosecutor has already disclosed all her witness statements supporting the additional allegations contained in the proposed amended indictment, and secondly, that all the witnesses she intended to rely on in respect of the proposed amendment, have already testified in this case.

19. The Tribunal has considered the evidence presented by the Prosecutor in support of her motion. On the basis of this, it finds that a *prima facie* case has been established by the

Prosecutor with respect to the new counts and grants leave to file the amended indictment.

**FOR ALL THE ABOVE REASONS,**

**THE TRIBUNAL**

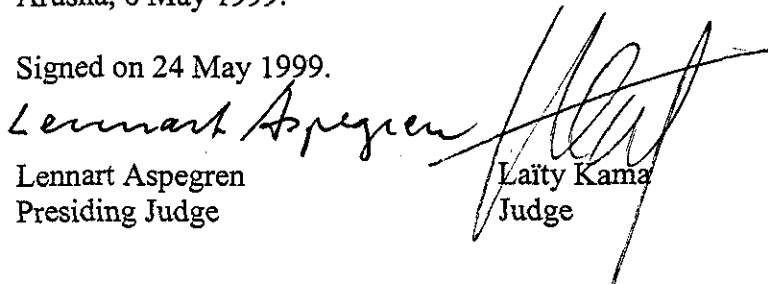
**GRANTS** leave to the Prosecutor to amend the indictment by:

- (i) adding one new charge against the accused as indicated in Count 7 of the proposed amended indictment of 29 April 1999;
- (ii) expanding on the facts adduced in the existing indictment in support of the new charges, as indicated in paragraphs 4.7 to 4.11 of the proposed amended indictment; and
- (iii) amending Count 7 of the present indictment against the accused, as indicated in Counts 8 and 9 of the proposed amended indictment.

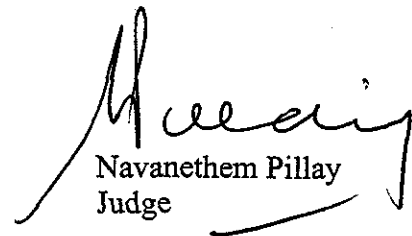
**REMINDS** the Prosecutor of her obligation to immediately serve on the accused and his Counsel the amended indictment in English and in French.

Arusha, 6 May 1999.

Signed on 24 May 1999.

  
Lennart Aspegren  
Presiding Judge

Laity Kama  
Judge

  
Navanethem Pillay  
Judge

(Seal of the Tribunal)

