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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER I

OR: ENG

Before: Judge Navanethem Pillay, Presiding
Judge William H. Sekule,
Judge Mehmet Güney.

Registrar: Mr. John Kiyeyeu

Decision of: 10 August 1999

THE PROSECUTOR
v.
PAULINE NYIRAMASUHUKO AND ARSENE SHALOM NTAHOBALI
Case No. ICTR-97-21-I

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

The Office of the Prosecutor:
Mr Fréderic Ossogo
Mr Robert Petit
Mr Mathias Marcussen

Counsel for the Accused:
Ms Nicole Bergevin
Ms Frédérique Poitte

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

SITTING AS Trial Chamber 1 composed of Judge Navanethem Pillay, presiding, Judge William H. Sekule, and Judge Mehmet Güney;

CONSIDERING a motion from the Prosecutor for leave to file an amended indictment, dated 17 August 1998, in the case of *The Prosecutor versus Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*. The Defence filed a response thereto on 14 September 1998 and 26 July 1999, respectively.

Having heard the parties at a hearing on 9 August 1999.

The Submissions

The Prosecutor

1. Pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (The Rules), the Prosecutor seeks leave to amend the Indictment by:

- adding a total of ten new charges against the accused persons pursuant to Rule 50 of the Rules,

- consolidating into one count the two present charges of Violation of Article 3 of the Geneva Convention and of Additional Protocol II pursuant to Rule 4 (e) of the Statute,

- expanding existing charges,

- adding relevant charges against the accused pursuant to Rule 6(1) and 6(3) of the Statute.

In support of her motion, the Prosecutor has attached two annexes, Annex A which is the proposed amended indictment, and Annex B, which provides supporting material to the proposed new counts.

The Prosecutor argues that such amendments are consistent with the Tribunal statutory and case law and with current charging practices. Moreover, granting the amendments will bring to light evidence gathered in recent months, which will show that the genocide was planned and that the accused participated in the plan.

2. The Prosecutor further submits that the legal basis for the motion is Rule 50(A), *in fine*, which provides that amendment of an indictment may only be made by leave granted by the Trial Chamber.

3. The Prosecutor asserts that the new charges better reflect the totality of the alleged criminal activity of the accused and enables her to present all the new evidence which, she contends establish a prima facie case against the accused for the new charges. The newly acquired evidence was obtained after confirmation of the initial indictment and after much investigation at the Butare prefecture. Such evidence will prove that the accused participated in a conspiracy and will also reveal a plan to gain political control over Rwanda by eliminating the Tutsi population.

4. The Prosecutor argues that the amendments, if granted, will not prejudice the rights of the accused to be accorded a fair and expeditious trial, as provided by Articles 19(1) and 20(4) of the Statute. In the interest of justice the Tribunal should balance any possible delay occasioned by the proposed amendments against the need to present the full scope of available evidence, the complexity of the trial and the investigations related to the alleged crimes, the capital importance of the charges, as well as the length of pre-trial detention of the accused.

5. The Prosecutor further refers to international case law as well as international legal texts and opinions in support of her argument. Pursuant to Articles 5(3) and 6(1) of The European Convention on Human Rights, a determination of undue delay depends upon the circumstances of each case. Accordingly, The European Court on Human Rights has interpreted Articles 5(3) and 6(1) to hold that a pre-trial detention of four, or even five years, may be reasonable depending upon the circumstances of the particular case at bar. Further, the Prosecutor cites the *Akayesu* case (ICTR-96-4-T), of 2 September 1998, where the Tribunal granted leave to amend the indictment more than a year after the arrest of the accused.

6. The Prosecutor notes that the two defendants have been held in custody since July 1997, that a number of motions have been heard, and that no date has yet been established for a trial. Even if a reasonable delay were the consequence of granting any additional time to prepare a defence to the amended charges, the length of the accused's pre-trial detention would violate neither international standards nor provisions of Article 20(4)(c) of the Statute.

7. The determination of what constitutes a reasonable delay must be made in light of international human rights statute and case law. Accordingly, The European Court on Human Rights has established a number of factors to consider in determining "excessive delay," as defined in Articles 5(3) and 6(1) of the European Convention, namely the complexity of the case, the conduct of the accused, and the nature of the charges.

The Defence for Pauline Nyiramasuhuko

8. The Defence argues that the right of the accused to be heard includes the right of access to relevant documents. Accordingly, Annex B, providing the basis of the Prosecutor's prima facie case in support of the amendments in question, must be made available to the accused.

9. The Defence maintains that non-disclosure cannot be justified on the basis of Rule 66(A) (i) of The Rules, which applies only to an initial appearance, following confirmation by a single judge, pursuant to Rule 47, indeed the amendment procedure in the case at bar is governed by Rule 50. Furthermore, non-disclosure cannot be justified on the basis of Rule 70(B), since the Prosecutor intends to use Annex B to establish its prima facie case without prior disclosure to the accused.

10. TheDefence also asserts that the right to be heard guarantees access to Annex B before the hearing on the motion to amend, in order to provide the accused with an equitable inter-parte defence.

11. The Defence argues that the accused's rights have been violated. The Prosecution has voluntarily delayed the hearing by proceeding ex-parte during the presentation of the indictment against Theoneste Bagosora and twenty-eight others. Furthermore, the Prosecutor failed to inform the court of her intention to amend. Even had the accused been on notice, since 17 October 1997, of the Prosecutor's intent to join the case, the Prosecutor did nothing to prepare the Defence to expect that such substantial changes, regarding new counts, would be introduced and would cause such delay. The Defence refers to the decision of The Appeals Chamber cited by the Prosecutor, in the case *Prosecutor v. Kovacevic* (IT-97-24-AR73) of 29 May 1998, where the Chamber held that a pre-trial detention of six and a half months, preceding a motion for amendment, and an anticipated extension of seven months not to be unreasonable. The Defence points out that in the present case the accused's pre-trial detention has exceeded a year.

12. The Defence argues that eighteen new facts related to the actions of the accused have been added to sustain six new counts. Therefore the Prosecution's claim that most of the facts concerning the accused's actions are identical to those alleged in the original indictment and that the new facts only cast new light on the accused's involvement in the conspiracy, is untenable.

The Defence for Arsene Shalom Ntahobali

13. The Defence counsel disputes that evidence in support of the proposed amendment was discovered during the current investigation rather than before the original indictment was confirmed on 29 May 1997. Moreover, of the evidence gathered after 29 May 1997, only four testimonies support the new count of conspiracy.

14. The Defence asserts that Mr. Ntahobali's alleged responsibility for crimes of genocide, pursuant to Rule 6(3), is unfounded since none of the testimony refers to any role of responsibility that he exercised in the Interahamwe chain of command.

15. In conclusion, the Defence argues that the identification of the accused's alleged co-conspirators in the amended indictment is too vague and is counter to The Tribunal's decisions, notably in *Prosecutor v. Serushago* (ICTR-98-39-1), of 29 September 1998, where Judge Ostrovsky dismissed the count of conspiracy to commit genocide because of vagueness. Furthermore, there is no recent evidence to support the proposed charge of conspiracy, no proof to show the accused's alleged participation in the Interahamwe, and no reference in the original indictment to Mr. Ntahobali's political activities.

AFTER HAVING DELIBERATED

The Tribunal states the following:

<u>On the Disclosure of Annex B</u>

16. The Chamber has considered the arguments of the parties. While the Defence has asserted that disclosure of Annex B is the accused's right and that non-disclosure is not justified either under Rule 66(A)(i) of the Rules or under Rule 70(B), nevertheless, in the instant case, the Chamber holds that Rule 66(A)(i) must be read in light of Rule 50(A), which provides that the Trial Chamber has competence to grant leave to amend an indictment. Contrary to the argument of the Defence, the ambit of Rule 47 does not extend to this case.

17. The Chamber notes that pursuant to Rule 66(A)(i) the Prosecution shall disclose to the Defence copies of the supporting material "within 30 days of the initial appearance of the accused." Thus, in the instant case disclosure is justified

only if the proposed amendment is granted and if, pursuant to Rule 50, the accused make another initial appearance on the new charges. Furthermore, there is no need to inquire whether or not a prima facie case has been established since the Chamber has only been seized with a motion to amend, pursuant to Rule 50. Therefore the Defence has no right to the supporting material before the motion to amend is heard. Moreover, such determination is made by the reviewing judge, who, pursuant to Rule 47 E), "shall examine each of the counts in the indictment, and supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 1) of the Statute, whether a case exists against the suspect."

18. In reaching its conclusions, the Chamber has relied upon the Prosecutor's motion to amend, the brief in support of the motion, and the parties' arguments regarding the evidence to substantiate the motion and not on Annex B. As stated above, pursuant to Rule 66 (A)(i) of the Rules, Annex B will be transmitted to the Defence within 30 days of the initial appearance of the accused on the new charges.

19. The Chamber considers the Prosecutor's objection to the release of Annex B based on the victims' and witnesses' protection to be of utmost importance, and cannot be entirely subordinated to the rights of the accused for disclosure.

20. The Chamber has determined that the accused will suffer no substantial prejudice if the amendment is granted. Nevertheless, whatever prejudice might occur can be cured by the relief provided in the Rules, in particular by Rule 72, pursuant to which the accused will have the opportunity to raise preliminary motions, such as objections based on defects in the form of the indictment, within sixty days following disclosure by the Prosecutor of the supporting material envisaged by Rule 66(A)(i).

<u>On the Delay Caused by the Amendment</u>

21. The Chamber is acutely aware of the right of all accused to be tried expeditiously. However, in the instant case the Defense has not demonstrated that undue delay will be caused if the amendment is granted.

23. The Chamber finds sufficient factual and legal basis in the Prosecutor's oral and written arguments to support the present motion to amend, and therefore grants leave to the Prosecutor to file the amended indictment.

FOR ALL THE ABOVE REASONS,

THE TRIBUNAL

GRANTS leave to the Prosecutor to amend the indictment by:

(a) adding the new charge of conspiracy to commit genocide pursuant to Article 2(3)b) of the Statute,

(b) adding the charge of Direct and Public Incitment to commit Genocide pursuant to article 2(3)c) of the Statute against Pauline Nyiramasuhuko,

(c) adding a charge of Crimes against Humanity (Extermination) pursuant to article 3 b) of the Statute,

(d) adding a charge of Crimes against Humanity(Rape) pursuant to artcle 3 g) of the Statute against Pauline Nyiramasuhuko,

(e) adding a charge of Crimes against Humanity (Persecution) pursuant to article 3 h) of the Statute,

(f) adding a charge of Crimes against Humanity (Other inhumane acts) pursuant to article 3 i) of the Statute,

(g) consolidating the two counts of Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II pursuant to article 4(e) of the Statute (Outrages upon personal dignity) in a single count,

(h) adding in relevant counts the allegation that the accused are responsible pursuant to article 6(3) of the Statute.

ORDERS the Prosecutor to immediately file the new aforementioned Indictment for service on the Accused and their Counsel in French and English.

Arusha, 10 August 1999.

Signed on, 3 september 1999.

Navanethem Pillay
Presiding Judge

William H. Sekule
Judge

Mehmet Güney
Judge

(Seal of the Tribunal)