Case No. ICTR-96-15-T

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

TRIAL CHAMBER II

OR:ENG

Before: Judge Mehmet Güney, Presiding
Judge Lloyd George Williams
Judge Erik Møse

Registry: Mr. John Kiyeyeu

Oral decision of: 12 August 1999

THE PROSECUTOR
VERSUS
JOSEPH KANYABASHI

Case No. ICTR-96-15-T

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

The Office of the Prosecutor:

Mr. Japhet Daniel Mono
Mr. Robert Petit
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Ms Sola Adeboyejo
Ms Ibukunolu Alao Babajide
Ms Nadira Bayat

Counsel for the Accused:

Mr. Michel Boyer

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

SITTING AS Trial Chamber II, composed of Judge Mehmet Güney, Presiding, Judge Lloyd George Williams and Judge Erik Møse;

HAVING RECEIVED a request on 17 August 1998 from the Prosecutor for leave to file an amended indictment, in the case "The Prosecutor v. Joseph Kanyabashi" (Case No. ICTR-96-15-T);

CONSIDERING the Response of the Defence dated 18 September 1998 and the Addendum thereto dated 23 July 1999;

CONSIDERING Rule 50 of the Rules of Procedure and Evidence (the "Rules");

NOTING the Decision rendered by Trial Chamber I on 30 September 1998 on the Status of the Hearings for the Amendment of Indictments and for Disclosure of Supporting Material in the cases of "The Prosecutor v. Pauline Nyiramasuhuko and Arséne 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).

HAVING HEARD the parties on 10 August 1999;

WHEREAS on 12 August 1999 the Trial Chamber rendered an oral decision in this case on the Prosecutor's request for leave to amend the indictment, and the parties were notified that the written reasons for the decision would be communicated to them at a later date;

WHEREAS the Trial Chamber hereby renders its reasons for the oral decision on the Prosecutor's request for leave to amend the indictment.

The constitution of the Chamber

1. The Trial Chamber notes that by virtue of the powers entrusted by the Statute of the Tribunal (the "Statute") and Rules 15(E), 27(A), 27(B) and 27(C) of the Rules, the President of the Tribunal recomposed the Trial Chamber for the hearing of this request for leave to file an amended indictment. This recomposition complies with the Appeals Chamber Decision of 3 June 1999 in this case, and is subject to the recusals in this matter of Judge Navanethem Pillay and Judge William Sekule.

The submissions of the Prosecutor

On the amendments to the Indictment

2. The Prosecutor submits her request on the basis of Rule 50 of the Rules and seeks to amend the indictment so as to:

(i) add four new charges against Joseph Kanyabashi;

(ii) expand certain existing counts;

(iii) add in relevant counts the allegation that the accused is responsible pursuant to Article 6(3) of the Statute; and

(iv) bring the current indictment in accord with the jurisprudence of the Tribunal and current charging practices.

3. The Prosecutor submits that the amendments as sought are based on new evidence uncovered by ongoing investigations. This new evidence, purports the Prosecutor, has brought to the fore the existence of a plan among several people, including the accused, to take over political power in Rwanda. The Prosecutor alleges that to achieve this plan the Tutsi population had to be exterminated.

4. The Prosecutor argues that the amendments to the indictment, if so granted, will in no way prejudice the right of the accused to be tried without undue delay. In support of this argument, the Prosecutor proffers a balancing test between, on the one hand, the rights of the accused to a fair and expeditious trial, and, on the other hand, the need for the prosecution to present all available and relevant evidence against the accused thereby reflecting the totality of the culpable conduct against the accused. The Prosecutor submits that the length of pre-trial detention served by the accused is not deemed unreasonable by international standards considering, *inter alia*, the seriousness of the charges against the accused and the difficulties for the Prosecutor to investigate complex matters involving serious crimes which were committed on a very large scale.

On Annex B

5. The Prosecutor requests that the Chamber order the Defence to return to the Prosecutor all non-redacted materials which are contained essentially in Annex B and which are subject to the non-disclosure order of 30 September 1998 rendered by Trial Chamber I. The Prosecutor contends that these materials reveal the identity of witnesses the use of which would moreover be contrary to a witness protection order previously rendered by the Tribunal. Further, the Prosecutor seeks an order from the Chamber restraining the Defence from making any reference to Annex B in any proceedings prior to its normal disclosure.

The Submissions of the Defence

On the amendment of the Indictment

6. The Defence contends that the Chamber cannot authorise amendments to indictments without first being satisfied that there is evidence not in relation to the culpability of the accused but sufficient to support a case against the accused. In the same line of reasoning, the Defence submits that the Chamber should have to apply this same standard of proof upon the Prosecutor both at the confirming stage of an indictment, and under the Rule 50 procedure pertaining to amendment of indictments. The Defence states that any other approach as regards the standards of proof required would be illogical in the purviews of Article 19 and 20 of the Statute.

7. The Defence contends that prejudice would be caused to the accused if the Prosecutor's motion to amend were granted on the grounds that by the sheer scope of the amendments the

Defence would have to examine more voluminous evidence and conduct new investigations, studies and analyses, let alone rethink its strategy. It is argued that evidence relied upon by the Prosecutor is not *per se* new, as in the opinion of the Defence, either it was already available to the Prosecutor at the time the indictment was initially confirmed, or it is evidence which has already been disclosed. Defence Counsel submits that in considering the request of the Prosecutor, the Chamber needs to ensure respect for the right of the accused to a fair and expeditious trial. It is argued by the Defence that the pertinent starting date for the evaluation of any delay which may result from the amendments being granted should be 28 June 1995, the date on which the accused was initially arrested.

8. Consequently, the Defence submits that the request of the Prosecutor should be dismissed.

On Annex B

9. The Defence contends that it lawfully came into possession of Annex B on 25 May 1999 in full conformity with the provisos of Rules 107, 108 and 109 of the Rules pertaining to the Appelate proceedings. In support of this contention, the Defence submits that the non-disclosure order of 30 September 1998 is null and void as a consequence of the Appeal Chamber declaring Trial Chamber I devoid of jurisdiction in the matter. Thus, Annex B was not subject to non-disclosure. Arguments on this basis have been developed in the 23 July 1999 addendum to the 18 September 1998 Defence Response. Furthermore, the Defence states that the Prosecutor has known since 25 May 1999 that the Defence was in possession of the Annex yet did not raise any objections until the hearing of 10 August 1999. This, says the Defence, necessarily weakens the arguments presented by the Prosecutor for the return of the Annex.

AFTER HAVING DELIBERATED,

10. The Trial Chamber has considered the submissions of the parties and in so doing sees that three issues emanate therefrom, first, whether the request of the Prosecutor is founded in law and fact, secondly, whether any prejudice would be caused to the accused if the request were granted, and thirdly, whether Annex B is subject to non-disclosure. As this third issue deals with materials which may be used in support of arguments for and against the requested amendments, the Chamber will deal with it first.

On Annex B

11. The Prosecutor requests the Trial Chamber to order the return of Annex B which, she argues, was mistakenly communicated to the Defence. The Defence, in retort, argues that it has received this document on 25 may 1999 in conformity with the Appelate procedure laid down in Rules 107, 108 and 109 of the Rules. Although the Trial Chamber does not doubt the good faith of the Defence, of importance in this matter is not the means by which the Defence obtained the Annex, but whether the Defence was entitled to receive the Annex on 25 May 1999 when it was subject to a non-disclosure order.

12. The pertinent text in Trial Chamber I's decision of 30 September 1998 reads as follows:

> "10. The Tribunal notes that in terms of Rule 66(A)(i), material submitted in support of the indictment at confirmation shall only be disclosed after the accused has made an initial appearance.

> Therefore, disclosure of any material in support of the proposed amended indictment, at this stage of the proceedings may be construed as premature."

13. One could argue that this reasoning does not *per se* apply in this instant case as the initial appearance of the accused already took place on 29 November 1996. Hence, a textual interpretation of Rule 66(A)(i) might support the contention that, as the initial appearance of the accused has already occurred, Annex B in this instance falls outside the purview of Rule 66(A)(i). This approach, however, does not take due account of the procedure concerning the amendment of indictments. Rule 50(B) of the Rules clearly stipulates that in situations where new charges form part of the amended indictment, and where the accused has already made an initial appearance before a Trial Chamber, then a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges. In the instant case, if the amendments are authorized by the Trial Chamber, disclosure of supporting material in support of the new charges shall be made within thirty days of the further appearance of the accused to plead on the new charges. Consequently, the Chamber finds that disclosure of supporting material, which in this instance is Annex B, at this stage would be premature.

14. Moreover, the said decision of 30 September 1998, clearly ordered that the supporting material marked Annex B shall not be subject to disclosure to the Defence by the Prosecutor. The fact remains that at the time the material was communicated to the Defence, being 25 May 1999, the non-disclosure order was valid and binding. Although the disclosure of Annex B came from the Registry and not the Prosecutor, it is clear that the intent of the order was that the documents be not disclosed to the Defence. Therefore the Trial Chamber finds that the documents contained in Annex B were erroneously communicated to the Defence, in spite of the standing order of Trial Chamber I.

15. In view of the above, the Chamber therefore finds that it would be inappropriate for the Defence to make submissions on or use of the material and contents of Annex B in any proceedings prior to its disclosure pursuant to Rule 66(A)(i) of the Rules. Documents obtained contrary to a court order cannot form the basis of submissions to the Chamber.

16. The Trial Chamber finds that the Defence, its investigators, the accused, persons under the control of the Defence, or any other persons to whom the Defence may have transmitted all or part of Annex B, shall retrieve and return forthwith to the Registry all materials derived from Annex B communicated to it by the Registry, including all copies, extracts or documents mentioning any information derived from Annex B.

On the request to amend the indictment

17. The Prosecutor submits her request to amend the indictment on the basis of on-going investigations having unearthed evidence of a plan involving the accused to take over political power in Rwanda, and that to achieve this plan the Tutsi population had to be exterminated. The Defence argues that this request is not grounded in fact as the burden of proof for the Prosecutor in bringing amendments is the same as that required for the confirmation of the indictment, which, under Article 18 of the Statute and Rule 47 of the Rules, is whether there exists a *prima facie* case against the accused. The Trial Chamber does not agree with the argument of the Defence.

18. Indeed, as was stated in the decision of 30 September 1998:

> "13. The Tribunal distinguishes between the procedural requirements of Rules 47 and 50. In terms of Rule 47, a single judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with an application for leave to amend an indictment under Rule 50 against an accused who has already been indicted has no cause to enquire into the *prima facie* basis for the charge. Since such a finding has been made in respect of each of the accused, it is not necessary for the Tribunal to consider the supporting material marked Annexure 'B', which according to the Prosecutor is made up of witness statements and these witnesses have to be protected."

19. Even though the Trial Chamber need not be satisfied that a *prima facie* case exists against the accused for the new charges, the Prosecutor does need to demonstrate that there are sufficient grounds both in fact and law to allow the amendments. Consequently, the Trial Chamber has considered the Prosecutor's request, the brief thereto and the submissions developed by the Prosecutor during the hearing. The Tribunal notes that it follows from the Prosecutor's oral clarification that Count 2 (Genocide) of the Amended Indictment and Count 3 of the Amended Indictment (Complicity in Genocide) are meant to be charged alternatively.

20. With respect to the argument of the Defence that the evidence presented by the Prosecutor for the amendment needs to be put to the test of proof to establish a case against the accused, the Tribunal is of the opinion that this standard is outside the ambit of the procedure envisaged in Rule 50 of the Rules. Rather the relevant forum for such an extensive evaluation of the probative value of evidence presented by the Prosecutor is the trial stage, where the onus is on the Prosecutor to prove her case in fact and in law beyond reasonable doubt. Further, it goes without saying, that the Defence will have full opportunity, as guaranteed by Article 20 of the Statute and in the interests of justice, to put the Prosecutor's evidence to test during the trial. If the Prosecutor fails to adduce sufficient evidence to support a charge then the charge will fall.

21. The Trial Chamber, having considered the Prosecutor's submissions, request and supporting brief, the response and submissions of the Defence, is satisfied that the Prosecutor has shown sufficient grounds, both in fact and in law, to justify the amendments to the indictment against the accused.

On the right to be tried without undue delay

22. The Prosecutor submits that the amendments as sought are based on new evidence uncovered by ongoing investigations and that the length of pre-trial detention served by the accused is not deemed unreasonable by international standards considering, *inter alia*, the seriousness of the charges against the accused and the difficulties for the Prosecutor to investigate complex matters involving serious crimes which were committed on a very large scale. The Defence contends however that there has been undue delay in this case. Further, Counsel for the Defence stated that in considering whether the right of the accused to be tried without undue delay has been violated, the Trial Chamber should have as starting point the date of arrest, namely 28 June 1995 in Cameroon.

23. The Trial Chamber is of course at all times mindful to ensure full respect of the right of the accused to be tried without undue delay as stipulated in Article 20(4)(c) of the Statute. In considering the question of undue delay, the Tribunal cannot be held responsible for delays

occurring before the accused is brought under its jurisdiction. The issue which presently concerns the Chamber is twofold, whether the Prosecutor acted with undue delay in submitting the request and whether the amendments if so granted will cause any resulting undue delay in the trial of the accused. Decisions rendered both by this Tribunal and the International Criminal Tribunal for the former Yugoslavia (the "ICTY") have already dealt with this matter.

24. Trial Chamber I of this Tribunal in its 'Decision on the Prosecutor's Request for Leave to Amend the Indictment' of 6 May 1999 in the case "The Prosecutor v. Alfred Musema"(Case No. ICTR-96-13-T), held that:

> "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."

25. Furthermore, the Trial Chamber has noted that in the case of "The Prosecutor v. Milan Kovacevic"(Case No. IT-97-24-AR73) before the ICTY, Judge Mohamed Shahabuddeen in his separate opinion of 2 July 1998 to the Appeals Chamber 'Decision Stating the Reasons for Appeals Chamber's Order of 29 May 1998', stated:

> " As to the second point, concerning the timing of the motion to amend, the Trial Chamber correctly understood the prosecution to be saying that it was, from the beginning of the case, in possession of enough material to support the making of the amendments. But I am not persuaded that this meant, as the Trial Chamber thought, that there was no justification for waiting. A prosecutor, though in possession of enough material to file charges, may be justified in holding his hand until the results of further investigations are in.
>
> There is no need to furnish details in support of the proposition, often affirmed, that the investigative problems of the [International] Tribunal are more complex and difficult than those connected with the work of a national crim[redacted]l court.[...]"

26. The Trial Chamber has considered the submissions of the parties in this regard, and is satisfied that the Prosecutor was acting within the ambit of her discretion, on the basis of the ongoing investigations and the uncovering of evidence, in filing the request to amend the indictment when she did. The Chamber, however, is not satisfied that the Defence has demonstrated that the amendment of the indictment will cause undue delay in the instant case.

27. The Trial Chamber therefore finds that the amendments so granted will not prejudice the rights of the accused to a fair trial without undue delay.

IE ABOVE REASONS,

CHAMBER

: Defence, its investigators, the accused, persons under the control of the Defence, ersons to whom the Defence may have transmitted all or part of Annex B, to retrieve orthwith to the Registry all materials derived from Annex B communicated to it by ncluding all copies, extracts or documents mentioning any information derived from

Defence not to make use of or reference to the material and contents of Annex B in igs prior to its disclosure pursuant to the Rules of Procedure and Evidence.

ive to the Prosecutor to amend the indictment against Joseph Kanyabashi;

it the indictment shall be amended by:

ldition of a count of Conspiracy to Commit Genocide pursuant to Article 2(3)(b) of atute;

ldition of a count of Crime Against Humanity (Murder) pursuant to Article 3(a) of atute;

ddition of a count of Crime Against Humanity (Extermination) pursuant to Article f the Statute;

ddition of a count of Crime Against Humanity (Other Inhumane Acts) pursuant to e 3(i) of the Statute;

ldition of the allegation that the accused is responsible pursuant to Article 6(3) of the e to Count 1 (Conspiracy to commit Genocide), Count 2 (Genocide), Count 3 olicity to Commit Genocide), Count 5 (Crime Against Humanity), Count 6 (Crime st Humanity), Count 7 (Crime Against Humanity), Count 8 (Crime Against nity) and Count 9 (Serious Violations of Article 3 Common to the Geneva ntions and Additional Protocol II);

it the new indictment, reflecting the amendments so ordered, shall be filed with the served on the accused forthwith;

INSTRUCTS the Registrar to immediately schedule a hearing date for the initial appearance of the accused and to notify the parties thereof;

REMINDS the Prosecutor of her obligations under Rule 66(A)(i) of the Rules of Procedure and Evidence;

Oral Decision of 12 August 1999,
Reasons given on 10 September 1999

Mehmet Güney
Presiding Judge

Lloyd George Williams
Judge

Erik Møse
Judge

(Seal of the Tribunal)