

Case No. : ICTR-96-11-T



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

*Office of the President
Bureau du Président*

Arusha International Conference Centre

P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie

Tel: 255 57 4207-11/4367-72 or 1 212 963 2850 Fax: 255 57 4000/4373 or 1 212 963 7365

Trial Chamber I

Before: Judge Navanethem Pillay, Presiding
Judge Asoka de Zoysa Gunawardana
Judge Erik Møse

Original: English

Registry: Ms. Marianne Ben Salimo

Decision of: 5 November 1999

**THE PROSECUTOR
versus
FERDINAND NAHIMANA**

Case N°: ICTR-96-11-T

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**DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO
FILE AN AMENDED INDICTMENT**

Office of the Prosecutor:

Mr. N. Sankara Menon
Mr. William T. Egbe

Counsel for the Defence:

Mr. Jean-Marie Biju-Duval

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: AMINATTA L.R. N'GUM
SIGNATURE: [Signature] DATE: 10/11/99

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

SITTING AS Trial Chamber I, composed of Judge Navanethem Pillay, presiding, Judge Asoka de Zoysa Gunawardana and Judge Erik Møse;

CONSIDERING a motion filed by the Prosecutor, for leave to file an amended indictment, against Ferdinand Nahimana (the "accused"), pursuant to Rule 50 of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the Prosecutor's brief, filed on 19 July 1999, and her supplementary brief filed on 30 October 1999, in support of her motion;

CONSIDERING the Prosecutor's request for leave to withdraw her motion entitled "The Prosecutor's Request for Leave to File an Amended Indictment", filed on 18 December 1998;

CONSIDERING the Defence brief, filed on 15 October 1999 and supplementary briefs, filed on 18 and 26 October 1999, respectively;

CONSIDERING the oral submissions made by the Parties at a hearing on 19 October 1999.

Background

The original indictment against the accused was confirmed on 12 July 1996. The accused made his initial appearance on 19 February 1997, pursuant to Rule 62 of the Rules, and pleaded not guilty to all four counts contained in the original indictment.

The Defence filed a motion on 17 April 1997, objecting to defects in the form of the original indictment. On 24 November 1997, Trial Chamber I ordered amendments to the original indictment. Pursuant to the said order, the Prosecutor filed a 1st amended indictment, dated 19 December 1997.

The Defence filed a motion on 22 April 1998, objecting to the said 1st amended indictment on the basis that it did not comply with the said order of 24 November 1997. On 17 November 1998, having considered the Defence motion, Trial Chamber I ordered the Prosecutor to make alterations to the 1st amended indictment. Pursuant to the said order, the Prosecutor filed a 2nd amended indictment, dated 26 November 1998.

The Defence filed a motion on 8 February 1999, objecting to the form of the 2nd amended indictment. However, while the order in respect of the said defence motion was pending, the Prosecutor filed the present motion requesting leave to file an amended indictment on 19 July 1999, along with a draft 3rd amended indictment dated 12 July 1999. After the said draft 3rd amended indictment was filed, Trial Chamber I made an order on 30 August 1999 on the motion filed by the Defence on 8 February 1999 requiring the Prosecutor to make alterations to the 2nd amended indictment. Pursuant to the said order, the Prosecutor filed a 4th

amended indictment, dated 3 September 1999 (the "indictment"). However, the Prosecutor has now moved for leave to file an amended indictment as set out in the draft 3rd amended indictment containing additional charges, which is the subject matter of this order.

The Prosecutor's Motion

1. The Prosecutor filed her undated motion for leave to file an amended indictment on 19 July 1999, along with the draft 3rd amended indictment dated 12 July 1999, a supplementary brief and a brief in reply to the Defence response. The Prosecutor's draft 3rd amended indictment was submitted marked Annex B and the supporting material marked Annex C.
2. In the said motion, the Prosecutor moved to amend the indictment against the accused by:
 - 2.1 Expanding the statement of facts and allegations to cover the four existing counts, and the new counts sought to be added, in the proposed draft amended indictment;
 - 2.2 Adding the counts of genocide, crimes against humanity for extermination and for murder, and;
 - 2.3 Reformulating the count of conspiracy to commit genocide.

AFTER HAVING DELIBERATED,

The Service of the Motion and Other Documents on the Defence

3. The Defence submitted that the motion and the proposed draft indictment was served on the accused in English, and contended that this is a violation of the minimum guarantees stipulated in Article 20 of the Statute of the Tribunal.
4. The Trial Chamber notes that the working languages of the Tribunal are English and French. The accused has a right to choose a language he understands and to conduct his defence in that language. Where court documents are served on the accused in a language he does not understand and where he receives late service of these documents, the consequences are prejudicial. To avoid prejudice to the accused, the Registry was ordered to serve on the accused the necessary documentation no later than the 21 October 1999 and the Defence was allowed time until 26 October 1999, to file an additional brief in this matter.
5. The Trial Chamber noted with concern the improper service of the relevant documents on the Defence, and requested the Registrar and his Court Management Section, to investigate this matter thoroughly and furnish a report to the Trial Chamber, upon the completion of this investigation. In view of the remedial steps taken by the Trial Chamber,

the Tribunal is of the view that the prejudicial effect to the Defence has been minimised.

On the Non-Disclosure of Annex C

6. The Defence submitted that the supporting material annexed to the Prosecutor's motion as Annex C was submitted to the Trial Chamber, but not disclosed to the Defence. This supporting material contains new evidence obtained by the Prosecutor, which relates to the new charges that the Prosecutor moves to add to the existing indictment, and to the original counts contained in the existing indictment. The failure to submit supporting material has resulted in the Defence being unable to make submissions on the merits and impact of this evidence, in the event that the new evidence is taken into consideration by the Trial Chamber. Therefore, the Defence argued that the Trial Chamber should order the Prosecutor to withdraw Annex C from the proceedings. The Defence further contended that if Annex C is withdrawn, the Prosecutor would not be able to establish a *prima facie* case in respect of the proposed new charges.

7. The Prosecutor submitted in response that she is not relying on the supporting material in Annex C, following the principle established by the Tribunal in earlier decisions on motions for leave to file an amended indictment, wherein the supporting material was not considered by the Trial Chamber.

8. The Trial Chamber notes that in terms of Rules 50(B) and 62, where an amendment to an indictment is granted by adding new charges, the accused is required to make an "initial appearance" and to enter a plea on the new counts. Thereafter the Prosecutor is obliged to disclose to the Defence all supporting material in respect of those new counts within thirty days of the "initial appearance", as envisaged by Rule 66 (A)(i) of the Rules. Therefore, the disclosure of any material in support of the proposed new counts at this stage of the proceedings is pre-mature.

9. The Trial Chamber notes that Rule 66 must be applied subject to the provisions of Rules 53 and 69. Rule 69 provides measures for the protection of victims and witnesses. Where such measures are granted, it has a direct bearing on the timing, nature and extent of disclosure made to the Defence. The Trial Chamber is of the view that it is essential for the proper administration of justice to balance the interests of the victims and witnesses against the right of the accused to disclosure.

10. The Trial Chamber notes that pursuant to Rule 72, the Defence has the opportunity to raise objections based on defects in the form of the indictment. This Rule further provides that such objections may be raised within sixty days following disclosure of the supporting material. The Trial Chamber is of the view that the accused therefore suffers no prejudice if disclosure of the supporting material is not made at this stage of the proceedings.

The Applicable Rules

11. The Prosecutor submitted that Rule 50 of the Rules allows her to amend the indictment at this stage of the proceedings, with leave of the Trial Chamber.

12. The Defence submitted that, pursuant to Article 18 of the Statute and Rules 47 and 50 of the Rules, it is incumbent on the Trial Chamber to consider whether the Prosecutor has provided a reliable and consistent body of evidence to warrant the amendment to the indictment. Rule 47 sets forth the standard and degree of proof required to confirm an indictment. In support of its submissions, the Defence referred to the Separate Opinion of Judge Dolenc in Prosecutor vs. Kabiligi and Ntabakuze, Decision of 8 October 1999.

13. The Defence argued that the Prosecutor is not seeking to amend the indictment, but rather to substitute the indictment with a proposed new indictment. This being the case, every suspect has a right to have the indictment against him confirmed by a Judge, pursuant to Rule 47 of the Rules. The confirming Judge is required to review the indictment and the supporting material to ascertain whether a *prima facie* case exists against the suspect, for having committed a crime that falls within the jurisdiction of the Tribunal. Only then will the Judge confirm the indictment. The Defence further submitted that even if the Trial Chamber finds that the proposed amended indictment is not a substitution, but an amendment to the existing indictment, then the same principles as required for the confirmation of the indictment, should apply.

14. The Trial Chamber wishes to draw a distinction between the procedural requirements of Rules 47 and 50. In the case 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 a motion requesting leave to amend an indictment, pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for the proposed amendments to the indictment. Since such a finding has already been made in respect of the accused, it is not necessary for the Trial Chamber to consider the supporting material contained in Annex C. The Trial Chamber has therefore not considered the supporting material marked Annex C, in its deliberation.

15. The Trial Chamber finds that in considering the Prosecutor's request for leave to file an amended indictment pursuant to Rule 50, it is sufficient if the Prosecutor establishes the factual basis and the legal motivation in support of her motion.

The Factual Basis for this Motion

16. The Prosecutor submitted that the proposed new counts, the reformulated count of conspiracy to commit genocide, and the expanded statement of facts accurately reflect the totality of the alleged criminal conduct of the accused. In addition, the proposed amendments are based on new evidence, following the on-going investigations by the Office of

the Prosecutor.

17. The Prosecutor further submitted that she has the unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence at the trial of the accused, and that she will only be in a position to fulfil this responsibility if the indictment is amended, as requested.

18. The Trial Chamber is of the view that the Prosecutor is entitled to continue the ongoing investigations against the accused. As stated in the Musema case, the Prosecutor has an unfettered responsibility to prosecute the accused to the full extent of the law and to present all relevant evidence before the Trial Chamber.

19. In relation to the count of conspiracy to commit genocide, the Prosecutor requested leave to reformulate the count. The Trial Chamber notes that in the proposed amended indictment the names of the alleged known co-conspirators are stated in the concise statement of facts but do not appear in the body of the conspiracy count itself. The Trial Chamber is of the view that when the names of co-conspirators are known and referred to in the concise statement of facts, these names should be stated in the body of the conspiracy count and, therefore, that the proposed amended indictment should be altered accordingly to include the names of the known co-conspirators.

On the Submission that the Proposed Amended Indictment is a Substitution of the Existing Indictment.

20. The Defence submitted that the Prosecutor is not seeking to amend the indictment, but rather to substitute it with a proposed new indictment. The Prosecutor, however, argued that the proposed amended indictment adds three new counts to the four existing counts and expands the factual basis of certain existing counts, which accounts for the increase in its volume, from five to twenty nine pages. Therefore, she submitted that the addition of new charges or the increased size of the proposed amended indictment does not warrant the conclusion that the proposed amended indictment is a substitution for the existing indictment.

21. The Trial Chamber is not persuaded by the Defence submission that, because of the substantial difference in volume between the existing indictment and the proposed amended indictment, the proposed amended indictment is a substitution for the existing indictment. The Trial Chamber is satisfied that the Prosecutor's request is to amend the existing indictment and not for substitution.

On the Relevance of the Historical Context in the Proposed amended Indictment.

22. The Defence submitted that the section headed "Historical Context" in the proposed amended indictment, is not relevant to the existing or the proposed new charges against the accused.

23. In reply, the Prosecutor submitted that this text serves as background information to the events alleged in the proposed amended indictment. The relevance of this information can only be determined after the presentation and consideration of the evidence at trial, and the examination of the applicable Rules.

24. The Trial Chamber accepts that the historical context is, in principle, relevant to the alleged events. A final decision of its relevance will be made at the trial stage.

On the Submission that some of the Allegations Fall Outside the Temporal Jurisdiction of the Tribunal

25. The Defence submitted that some of the allegations in the proposed amended indictment do not fall within the temporal jurisdiction of the Tribunal. These allegations are found in paragraphs 5.1 to 5.14, 5.21, 5.24 to 5.26, 6.1 to 6.4, 6.6, 6.15, 6.21 and 6.22. These allegations support the counts of conspiracy to commit genocide, genocide, direct and public incitement to commit genocide and crimes against humanity for persecution, for extermination and for murder.

26. In reply to the Defence submission, the Prosecutor submitted that it is a trite principle of law that the task of assessing and weighing the evidence presented by the Parties is left to the Judges sitting at trial. The Prosecutor will show, at the trial of the accused, that the alleged facts that the Defence seeks to expunge from the proposed amended indictment, on the grounds that these facts fall outside the temporal jurisdiction of the Tribunal, are relevant in proving the ingredients of the offences which were committed within the temporal jurisdiction of the Tribunal.

27. The Trial Chamber notes that some of the allegations in the proposed amended indictment do fall outside the period 1 January 1994 to 31 December 1994. However, the Trial Chamber accepts the Prosecutor's submission that she intends to rely on these allegations in proving the ingredients of the offences which were allegedly committed within the temporal jurisdiction of the Tribunal.

28. The Trial Chamber recognises the possibility that these allegations may be subsidiary or interrelated allegations to the principal allegation in issue and thus may have probative or evidentiary value. The Trial Chamber is therefore of the view that it is premature to address the relevance and admissibility of these allegations at this stage of proceedings. The appropriate stage will be at the trial of the accused.

The Trial Chamber, after having considered the written briefs submitted by the Parties and their oral submissions, at the hearing on 19 October 1999, is satisfied that the Prosecutor has set out the factual basis and legal motivation for the amendment of the Indictment, against the accused and accordingly:

GRANTS the Prosecutor's motion to amend the Indictment of 3 September 1999, against Ferdinand Nahimana;

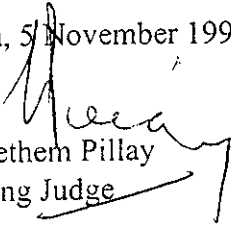
ORDERS the amendment of the Indictment by adding:


- (i) The count of GENOCIDE, pursuant to Articles 2(3)(a) and 6(1) of the Statute;
- (ii) The count of CRIMES AGAINST HUMANITY (MURDER), pursuant to Articles 3(a) and 6(1) of the Statute;
- (iii) The count of CRIMES AGAINST HUMANITY (EXTERMINATION), pursuant to Articles 3(b) and 6(1) of the Statute;
- (iv) The names of the alleged co-conspirators in the Count of Conspiracy to commit Genocide, pursuant to Article 2(3)(b) and 6(1) of the Statute;


FURTHER ORDERS that the Indictment reflecting the amendments as ordered above, is filed with the Registry and served on the accused immediately;

GRANTS the Prosecutor leave to withdraw her motion entitled "The Prosecutor's request for Leave to file an amended Indictment", filed on 18 December 1998.

Arusha, 5 November 1999


Nayanthem Pillay
Presiding Judge


Asoka de Zoysa Gunawardana
Judge


Erik Møse
Judge

(Seal of the Tribunal)

