

ICTR-2001-70-I
12-9-2001
(185-181)

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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER

OR: ENG

Before: Judge Pavel Dolenc

Registrar: Adama Dieng

Date: 12 September 2001

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THE PROSECUTOR

v.

Emmanuel RUKUNDO

Case No. ICTR-2001-70-I

**ADDITIONAL ACT OF CONFIRMATION
OF THE INDICTMENT**

The Office of the Prosecutor:

Silvana Arbia

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the Tribunal),

Sitting as Judge Pavel Dolenc, designated by the President of the Tribunal pursuant to Rule 28 of the Tribunal's Rules of Procedure and Evidence (the Rules);

HAVING RECEIVED an indictment (the Indictment) against Emmanuel Rukundo (the Accused) dated 22 June 2001 and filed with the Registry in English on 25 June 2001 for review and confirmation pursuant to Articles 17(4) and 18(1) of the Statute of the Tribunal (the Statute) and Rules 47(a)(b) and (e);

HAVING CONFIRMED Counts 1, 3 and 4 and having ordered certain modifications of the Indictment in the "Confirmation of the Indictment" dated 5 July 2001;

HAVING RECEIVED a letter from the Prosecutor dated 19 July 2001 detailing proposed Amendments to the Indictment and an attached Indictment that incorporated the proposed amendments (the Prosecutor's Letter);

FINDINGS

1. On 5 July 2001 the Tribunal confirmed counts 1, 3 and 4 of the Indictment, which charged the accused, as a principal perpetrator, with genocide and with murder and extermination as crimes against humanity. Further, the Tribunal granted the Prosecutor 15 days to comply with the order to amend paragraphs 5, 13, 14 and 18 with particulars on the time frames of the events and paragraph 13 with details as to whom the accused denounced his colleagues. For all the counts that charged the accused alternatively with superior responsibility pursuant Article 6(3) of the Statute, the Tribunal ordered the Prosecutor to amend the concise statement of facts to clearly state the identities of the actual perpetrators, the grounds for the superior-subordinate relationship and the omissions of the accused. Lastly, with respect to the alternative charge of complicity in genocide under count 2, the Tribunal ordered the Prosecutor to specify which form of complicity the Prosecutor is charging and to outline the acts of the accused that form the factual basis for complicity.
2. The Prosecutor submitted proposed amendments by letter, accompanied by a proposed amended indictment, dated 19 July 2001. The amendments to paragraphs 5, 13 and 18 comply with Order to specify the time frame of the events. The Prosecutor also amended paragraph 13 in conformity with the Order, alleging that the Accused denounced his colleagues to the Rwandan authorities. However, the Prosecutor failed to comply with the Order to indicate a time frame for the factual allegations in paragraph 14. Instead, the Prosecutor explained that the allegations in paragraph 14 are linked to the previous paragraph, which defines the time frame as "from 1990 and during 1994". It is therefore unclear whether the allegation that the Accused denounced Alphonse Mbuguje occurred prior to the temporal jurisdiction of this Tribunal. The Prosecutor shall accordingly amend paragraph 14 to clarify the timing of this alleged event.

3. Paragraph 14 of the attached modified indictment omits, without any explanation or request for leave, the allegation that the name of Alphonse Mbuguje “was included in a list of persons to kill, in the Kangura newspaper and radio RTLM broadcasts where he was pointed out as person to kill”. The Prosecutor shall inform the Tribunal whether this omission is intentional and if so, the reason for the requested modification.
4. In addition to the amendments ordered in the Confirmation of the Indictment, the Prosecutor seeks leave to make the same modifications to paragraphs 22, 26 and 32 that describe identical events as paragraphs 5, 18 and 13 respectively in order to harmonize the factual allegations. The Tribunal finds that these proposed modifications are justified.
5. The Prosecutor also requests leave to withdraw all alternative charges for superior responsibility pursuant Article 6(3). These alternative charges were not confirmed in the Confirmation of the Indictment. The Tribunal is therefore of the view, relying by analogy on Rule 51 relating to the withdrawal of the entire indictment prior to confirmation, that these charges may be withdrawn at the discretion of the Prosecutor without leave of the Tribunal
6. The Prosecutor did not amend count 2 and related concise statement of facts for alternative charge of complicity in genocide as ordered by the Confirmation of the Indictment. Rather, the Prosecutor reiterated in her letter that the combined statement of facts for count 1 and count 2 could support both participation as a principal perpetrator and participation by aiding or abetting or some other form of complicity.
7. The Tribunal, however, does not share this view. The acts or omissions of a principal perpetrator that constitute a crime are fundamentally different from accomplice acts of assistance, incitement or instigation relating to the same crime. Most often, acts of complicity are carried out in different time, place and other circumstances than the primary crime. Logical inference dictates that the same acts of the same person cannot be both a crime and complicity in a crime. This position is expressed in *Prosecutor v. Jean-Paul Akayesu*, Judgement of 2 September 1998, Case No. ICTR-96-4-T, para. 532: “an act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide....”.
8. According to Rule 47(E) and Articles 17(4) and 18(1) of the Statute an indictment shall demonstrate a “*prima facie* case”. Pursuant Rule 47(B) and (C), a *prima facie* case exists where the Prosecutor obtains “sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal”, and sets forth in the indictment a concise statement of facts that constitute all the elements of the crime. This standard applies for each crime alleged in an indictment.
9. As was previously explained in paragraphs 3 and 7 of the Confirmation of the Indictment, the charge of complicity must therefore set forth the factual allegations

that the Prosecutor alleges constitute aiding or abetting or any other form of complicity. This factual statement must include all required elements of the charged form of complicity. It is insufficient to merely recite the provisions of Article 6(1) of the Statute.

10. Leaving aside the general allegations about Rwanda and the accused, the “concise statement of facts for counts 1 and 2” provides that the accused:

- from 1990 and during 1994 several times denounced to the Rwandan authorities Tutsis as Inkotanyi, including priests and in particular the priest Alphonse Mbuguje, who was killed in May 1994 in diocese of Cyangugu (paragraphs 5, 13, 14, 17 and 18);
- during April and May 1994, escorted by Interhamwe and soldiers hunted Tutsis, visited different places in Kabgayi where Tutsis gathered seeking refuge, called on certain Tutsis from the list, controlled their whereabouts and afterwards his escort took these Tutsis to kill (paragraphs 9, 10, 11, 12, 15, 16 and 17);
- at undefined times searched for Tutsis from house to house to be killed (paragraph 12).

11. These allegations do not raise a *prima facie* case that there was another principal perpetrator with whom the Accused could have been complicit. The allegations fail to explain how the Accused is purported to have acted as an accomplice. In addition, the supporting materials fail to present any reason to conclude that the involvement of the accused in the charged events was different than the account set out in the concise statement of facts. Therefore, a *prima facie* case of complicity in genocide against the Accused does not exist in accordance with Rule 47(E).

12. For these reasons the Tribunal:

- (a) **APPROVES** of the modifications to paragraphs 5, 13 and 18 as set forth paragraphs I. to IV. of the Prosecutor’s letter;
- (b) **TAKES NOTE** of the withdrawal of the alternative charges for superior responsibility pursuant Article 6(3) of the Statute in each count of the indictment;
- (c) **ORDERS** the Prosecutor to modify, within 7 days from this decision, paragraph 14 to clarify the timing of the events described therein;
- (d) **ORDERS** the Prosecutor to inform the Tribunal, within 7 days from this decision, whether the omission from paragraph 14 is intentional and, if so, to seek leave to amend;
- (e) **GRANTS** leave to amend paragraphs 22, 26, and 32 to the extent that is proposed in paragraph “V.” of the Prosecutor’s letter;

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- (f) **DISMISSES** count 2 for the alternative charge of complicity in genocide;
- (g) **DECIDES** that this additional act of confirmation together with Confirmation of the Indictment of 5 July 2001 constitute a common act of confirmation of the Indictment against the Accused.

Arusha, 12 September 2001.



Judge Pavel Dolenc

Seal of the Tribunal