



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-2001-73-I
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OR: ENG

TRIAL CHAMBER III

Before: Judge Lloyd G. Williams, Q.C., Presiding
Judge Andréia Vaz
Judge Khalida Rachid Khan

Registrar: Adama Dieng

Date: 15 October 2003

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-I

2003 OCT 16 A 11:04
ICTR
JUDICIAL RECORDS/REGISTRE
PROSECUTOR

**DECISION ON PROSECUTOR'S REQUEST FOR LEAVE TO AMEND THE
INDICTMENT AND ON DEFENCE URGENT MOTION FOR AN ORDER TO
DISCLOSE SUPPORTING MATERIAL IN RESPECT OF THE PROSECUTOR'S
MOTION FOR LEAVE TO AMEND THE INDICTMENT**

Office of the Prosecutor:
Stephen Rapp
Fatou Bensouda
Amanda Reichman

Defence Counsel
John Philpot

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

SITTING as Trial Chamber III composed of Judges Lloyd G. Williams, Q.C., Presiding, Andréia Vaz, and Khalida Rachid Khan ("Chamber");

BEING SEISED of the "Prosecutor's Motion for Leave to Amend Indictment" filed 20 March 2003 ("Prosecutor's Motion") and the "Prosecutor's Brief in Support of Motion for Leave to Amend Indictment" filed the same day ("Prosecutor's Brief in Support");

AND BEING SEISED of the Defence "Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend Indictment" filed 31 March 2003 ("Defence Motion") and the accompanying "Brief in Support of Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend Indictment" filed on the same day ("Defence Brief in Support");

CONSIDERING "The Prosecutor's Reply to Urgent Request for Supporting Material Regarding the Motion for Leave to Amend Indictment" filed 9 April 2003 ("Prosecutor's Reply") and the accompanying "Prosecutor's Brief in Reply to Urgent Request for Supporting Material Regarding the Motion for Leave to Amend Indictment" filed on the same day ("Prosecutor's Brief in Reply");

CONSIDERING the "Brief in Reply to Prosecutor's Response to Urgent Motion for an Order to Disclose Supporting Material Relating to Motion for Leave to Amend Indictment" dated 18 April 2003 and filed 5 May 2003 ("Defence Brief in Reply");

CONSIDERING the "Defence Response to Prosecutor's Motion for Leave to Amend Indictment" filed 24 August 2003 ("Defence Response") and the accompanying "Defence Brief in Support of Response to Prosecutor's Motion for Leave to Amend Indictment" filed on the same day ("Defence Brief in Response");

CONSIDERING the "Prosecutor's Reply to Defence Response to Prosecutor's Motion for Leave to Amend Indictment" filed 28 August 2003 ("Prosecutor's Further Reply");

RECALLING the "Decision Confirming the Indictment" of 20 July 2001, in which the Confirming Judge (Judge Møse) confirmed two counts of the Prosecutor's modified indictment dated 20 July 2001, namely, a crime against humanity (murder) or, alternatively, a crime against humanity (extermination);

RECALLING Articles 19 and 20 of the Statute of the Tribunal ("Statute"), Rules 49 and 50 of the Rules of Procedure and Evidence ("Rules"), Articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 6 the European Convention on Human Rights ("ECHR"), and Article 7 of the African Charter on Human and Peoples' Rights ("ACHPR");

RECALLING that the Accused was arrested in Belgium on 8 June 2001 and transferred to the United Nations Detention Facility in Arusha on 3 October 2001;

RECALLING that the Accused made his initial appearance and entered pleas of "Not Guilty" to the counts in the indictment on 10 October 2001;



NOTING that the two motions of the parties raise interlocking issues that may be expeditiously dealt with together and that no prejudice will result to either party from dealing with them in the course of one decision;

NOW DECIDES both matters solely on the basis of the briefs of the parties pursuant to Rule 73(A) of the Rules of Procedure and Evidence ("Rules").

Submissions of the Parties

As to the Prosecution Motion for Leave to Amend the Indictment

Prosecution

1. The Prosecutor brings the Motion under Rule 50(A) of the Rules.¹ The Prosecutor states that the amendment is sought to add three counts of conspiracy to commit genocide, genocide or, alternatively, complicity in genocide to the existing counts which will be re-cast. Additionally, the Prosecutor states that he wishes, *inter alia*, to add new factual material in support of the new counts and expand and elaborate on the factual material in the Concise Statement of Facts.

2. The Prosecution argues that the proposed amendment is justified in law and on the evidence and serves the interests of justice. The Prosecution cites the Tribunal jurisprudence in support of its submission that the amendment is justified in law. In support of its submission that the amendment is justified on the evidence, the Prosecution cites the availability of additional evidence and the complexity of the crimes alleged and the manner of their alleged commission, and alleges a right of the Prosecution to charge an accused with any offence without limit of time. The Prosecution further states that a second trial will be avoided if the Accused stands trial on all charges based on the evidence available. Finally, the Prosecution avers that while there will be some delay attributable to the amendment, in the light of international jurisprudence, the difficulties encountered by the Prosecutor in investigating the case, the fact that the rights of the Accused will not be prejudiced, and the fact that there is time for the Defence to investigate and meet the new counts in the indictment, the amendment is in the overall interests of justice.

3. The Prosecution also argues that the amendment will save the Accused the inconvenience of going through a second trial on a further indictment based on new evidence available to the Prosecutor and will also prevent the possibility of multiple sentences in the event of separate proofs of guilt. The Prosecution's Further Reply denies the Defence contention that there is any contradiction in part of the indictment.

¹ **Rule 50: Amendment of Indictment:**

(A) The Prosecutor may amend an indictment, without prior leave, at any time before its confirmation, but thereafter, until the initial appearance of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it but, in exceptional circumstances, by leave of a Judge assigned by the President. At or after such initial appearance, an amendment of an indictment may only be made by leave granted by a Trial Chamber pursuant to Rule 73. If leave to amend is granted, Rule 47 (G) and Rule 53 bis apply *mutatis mutandis* to the amended indictment.

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges.

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges.

Defence

4. The Defence argues that no evidence has been produced to justify the new counts or the timing of the amendment. The Defence observes that mere assertion of the existence of evidence by the Prosecutor is not enough and that proof by affidavit or similar sworn statement is required. The Defence observes that the jurisprudence of the *ad hoc* Tribunals does not impose an obligation on the Prosecutor to prefer charges. As to the expansion of the factual basis of the indictment, the Defence observes that the Prosecution should provide factual material by disclosure.

5. Noting the content of a letter from the Prosecution dated 27 August 2001 stating that the Prosecution intended to bring new charges for genocide and other crimes, the Defence further avers that the Prosecution has not been diligent and that granting leave to amend the indictment will cause undue delay in the trial process and will therefore violate Articles 19(1) and 20(4)(c) of the Statute. It is noted that, if the amendment is allowed, the Accused will have to appear again before a Trial Chamber to enter a plea. That would be followed by disclosure of supporting material, and then the Defence would have thirty days in which they may file preliminary motions which would likely be followed by further pleadings. The Defence considers that this will impose an unreasonable delay, in particular because the Accused has been in custody since May 2001 and that four five years have elapsed since the Accused presented himself to the Prosecution to assist it with its enquiries.

6. As to the possibility of a fresh indictment being preferred against the Accused if the amendment is not allowed, the Defence states that it is prepared to face that prospect subject to available procedural remedies for the delays arising.

7. The Defence also avers that the proposed amended indictment is self-contradictory in part, and vague as to the application of Article 6(1) and 6(3) of the Statute, in that it fails to particularise the acts giving rise to the different modes of responsibility. The Defence also asks the Chamber to order that the supporting material be disclosed to it within seven days if the amendment is allowed.

As to the Defence Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend Indictment**Defence**

8. The Defence requests the Chamber to order the Prosecutor to file and disclose to the Defence the supporting material in respect of its Motion for Leave to Amend Indictment.

9. The Defence avers that the amendments sought are extensive and involve allegations of graver crimes than in the original indictment. The Defence claims that, contrary to the submission of the Prosecution, it is necessary to test the sufficiency of the evidence in support of the new counts. The Defence prays in aid the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and two cases from this Tribunal. The Defence avers that it would be inappropriate for an Accused to be given less rights before this Tribunal than an Accused before the ICTY. The Defence claims that its arguments in support of this proposition have not been made before the Tribunal hitherto.



10. The Defence additionally avers that on a proper construction of Rule 50(B) and (C), the supporting material must accompany a substantive amendment. The Defence argues that the confirmation of the indictment by a judge is not subject to review by the Trial Chamber. In the event of a substantive amendment, the Defence submits, if the sufficiency of the supporting evidence is not addressed by the Chamber, after an amendment is allowed and supporting material is then provided under the Rules, any resulting insufficiency will be the subject of appeals.

11. The Defence further asserts that if the Prosecution was forced to prefer a new indictment rather than amend, it would have to persuade the confirming judge that there was a *prima facie* case. It argues that it is therefore unfair to allow the Prosecutor to avoid that hurdle by allowing amendment without further consideration of sufficiency. The Defence finally observes that the Prosecutor has not laid sufficient evidential foundation for its Motion and that the supporting material itself would fill some of the lacuna.

12. In response to the Prosecution's arguments, the Defence Brief in Reply avers that defending charges when there may be no *prima facie* case would be wasteful in resources and cause delay.

The Prosecution

13. The Prosecutor requests the Trial Chamber to deny the Urgent Request for Supporting Material. The Prosecutor argues that confirmation of a new indictment and amendment of a confirmed indictment involve different considerations. The former process, it avers, takes place when the liberty interest of a suspect is in question. Contrary to the Defence argument, the Prosecution asserts that the disclosure of the supporting material after an amendment is allowed takes place after the initial appearance and then is, in turn, followed by the thirty day period for preliminary motions which must, in any event, address not questions of evidential sufficiency but defects of form.

Deliberations

As to the Prosecution Motion for Leave to Amend the Indictment

14. In seeking the amendment of the indictment, the Prosecution invokes Rule 50. By virtue of permissive words of the Rule, the Trial Chamber is vested with discretion in the matter. The jurisprudence of the Tribunal is to the effect that an application to amend an indictment under Rule 50 does not involve the Trial Chamber in an examination of the supporting material but that the Trial Chamber examines the factual basis and the legal motivation for the proposed amendment in the context of the overall duty of the Chamber to ensure that the Accused receives a fair trial.

15. The two cases of this Tribunal cited by the Defence² in support of its arguments against allowing the amendment are both cases in which amendments were sought during the trial itself when evidence was already being heard, when evidence relating to the specific amendments sought had already been given, and the Trial Chambers had to consider the relationship between the proposed amendment and the evidence in the ongoing trials. That is quite different from the pre-trial situation.

² *Prosecutor v. Akayesu*, ICTR-96-4-I Leave to Amend the Indictment (TC), 17 June 1997; *Prosecutor v. Musema* ICTR-96-13-I, Decision on the Prosecutor's Request (TC), 6 May 1999.



16. The wording of Rule 50 dealing with amendments to indictments has differed between this Tribunal and the ICTY for much of their history. The related jurisprudence of the two Tribunals has differed as well. Thus, precedents from one Tribunal should be applied with caution in relation to the other, particularly on this issue.

17. Nevertheless, the Appeals Chamber in *Prosecutor v. Akayesu*³ specifically drew attention to the general principles governing amendments to indictments enunciated in *Prosecutor v. Kovacevic*⁴. In *Kovacevic*, the Appeals Chamber set out the provisions of Articles 9 and 14 of the International Covenant on Civil and Political Rights ("ICCPR"), Article 6 of the European Convention on Human Rights ("ECHR") and the rights guaranteed to the Accused by the ICTY Statute⁵. The Trial Chamber would add that, in the context of this Tribunal, the provisions of the African Charter on Human and People's Rights, Article 7, would be apposite.

18. From the jurisprudence of the Appeals Chamber referred to, the Trial Chamber is satisfied that there is an overriding consideration of fairness when Trial Chambers are seised with applications for leave to amend an indictment. The Accused has a fundamental right to be informed promptly of the charges against him, to be tried without undue delay, to be provided with sufficient information to enable him to prepare an effective defence and to have a fair trial, each case being judged on its particular circumstances.

19. A useful summary of the applicable principles is to be found in a Decision of the Trial Chamber II of the ICTY:

"The fundamental issue in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly. The word 'unfairly' is used in order to emphasise that an amendment will not be refused merely because it assists the prosecution quite fairly to obtain a conviction. To be relevant, the prejudice caused to an accused would ordinarily need to relate to the fairness of the trial. Where an amendment is sought in order to ensure that the real issues in the case will be determined, the Trial Chamber will normally exercise its discretion to permit the amendment, provided that the amendment does not cause any injustice to the accused, or does not otherwise prejudice the accused unfairly in the conduct of his defence. There should be no injustice caused to the accused if he is given an adequate opportunity to prepare an effective defence to the amended case. Whether any delay resulting from the amendment denies the accused his right to be tried without undue delay will depend upon (i) the circumstances of the particular case, including any improper tactical advantage sought by the prosecution, and (ii) the exceptional character of criminal proceedings involving war crimes, including the general complexity and difficulties necessarily inherent in the investigation of such crimes. There is a need for reasonable judicial flexibility in relation to such amendments."⁶

20. The Trial Chamber observes that the additional counts sought in this case are fresh charges and that new facts are alleged, but also notes that they appear to be of a similar character to the facts as previously pleaded. The Trial Chamber has considered the particular

³ *Prosecutor v. Akayesu* ICTR-96-4-A, Judgement, 1 June 2001, The Appeals Chamber recalls that the said Rule[50] must be applied pursuant to Article 9(2) of the ICCPR and Articles 19 and 20 of the Statute of the Tribunal. It recalls in this connection the decision rendered by ICTY Appeals Chamber in *Kovacevic*, para 117.

⁴ Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998, *Prosecutor v. Kovacevic*, Case No. IT-97-24-AR73, ICTY Appeals Chamber, 2 July 1998.

⁵ Equivalent to Articles 19 and 20 of the ICTR Statute.

⁶ *Prosecutor v. Brdanin & Talic*, IT-99-36, Decision On Filing Of Replies (TC), 7 June 2001, para. 3, [footnotes omitted].

facts of this case and notes that the Prosecution notified the Defence on 27 August 2001 that there would follow charges "pursuant to Article 2 of the Statute, including Genocide..."⁷ That notification was made some 5 weeks after the confirmation of the indictment in the case and some 4 weeks after the arrest of the Accused.

21. The Prosecution delay thereafter in bringing the application to amend the indictment amounts to some 19 months. In so far as the Prosecution explains the delay at all, the explanation is found in paragraphs 27, 28 and 33 to 58 of the Prosecution Brief in Support stating in summary that the crimes committed in Rwanda are legally and factually complex in nature, the "inter-linkages" wide, the investigatory process difficult and that new evidence was uncovered which led to further investigations and discovery of new witnesses.

22. The Prosecutor's review of precedents on delay is of little help in considering the issue of fairness in this particular case. While not necessarily expecting sworn affidavits (which would not accord with the actual practice of the Tribunal), the Trial Chamber would ordinarily expect a more detailed and comprehensive review of the reasons for such a delay. However, the Trial Chamber is satisfied, bearing in mind the contents of the Prosecution letter of 27 August 2001, that the reasons for the delay were the exigencies of the Prosecution investigation. The Chamber can discern no unfair attempt to gain any advantage by the Prosecution. Additionally, the Defence should have adequate time to prepare an effective defence to the new counts.

As to the Defence Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend Indictment

23. As noted in paragraph 14 above, it is settled law in this Tribunal that, in considering applications to amend indictments before the trial commences, a Trial Chamber does not consider the supporting material. The factual basis (as distinct from the legal basis) of the amendment is to be found in the Concise Statement of Facts as previously pleaded or as subject to proposed amendment. The Concise Statement of Facts must, as a matter of form, support the Counts alleged in the indictment. That is why no requirement exists in Rule 50 for the provision of supporting material before amendment is sought. If the amendment is granted, such material is provided at a later date.

24. However, while Rule 50 sets out the requirement that there be an appearance on the new charges for pleas, there is no express requirement set out for the disclosure of supporting material. The Prosecution suggests that, following the appearance of the Accused there will be a further 30 days for the service of such material by analogy with Rule 66(A)(i). The Trial Chamber notes the practice followed in *Prosecutor v. Barayagwiza*⁸ which ordered service of the supporting material forthwith, with the copy of the amended indictment. The Trial Chamber finds that the time for service of material that allegedly supports the amendments to an indictment is a matter that is within the discretion of the Chamber and orders the material to be disclosed to the Defence within 21 (twenty one) days of the receipt of this Decision.

25. The Chamber additionally notes that while it will order amendments to the indictment, they do not require any further investigations by the Prosecutor but merely some

⁷ "Schedule A: Letter from Mr. Don Webster to Defense counsel dated August 27 2001" annexed to the Defence Brief in Response.

⁸ *Prosecutor v. Barayagwiza*, ICTR-97-19-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 11 April 2000



work in clarifying the drafting of the indictment. The Chamber will order that the final form of the indictment should be filed within 21 (twenty one) days. Additionally, the Chamber will order the Prosecution to file an annexure to the amended indictment showing the changes that have been made in the previous indictment.

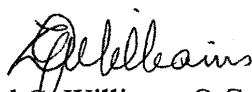
The Amended Indictment


26. The Defence points out that the proposed indictment as amended does not contain a clear statement of the acts stated to give rise to individual and superior responsibility respectively. The specific facts and relationships giving rise to the superior responsibility alleged need to be clearly set out. The Trial Chamber is in agreement with this Defence submission and will order the Prosecution to file its amended indictment distinguishing therein for each Count the alleged acts of the Accused that give rise to individual responsibility under Article 6(1) of the Statute and the alleged acts and relationships that give rise to criminal responsibility under Article 6(3) of the Statute.

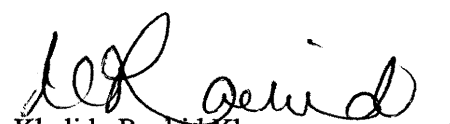
THE CHAMBER therefore:

- (a) **GRANTS** the Prosecution leave to file an amended indictment in the form of the text of the Indictment annexed to the Prosecutor's Brief in Support with the further amendments specified in paragraph 26 above.
- (b) **ORDERS** the Prosecution to file an annexure to the amended indictment showing all the changes that have been made in the previous indictment;
- (c) **ORDERS** the Prosecutor to file the amended indictment within 21 (twenty one) days of the receipt of this Decision; and
- (d) **DENIES** the Defence "Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend Indictment".

Arusha, 15 October 2003


Lloyd G. Williams, Q.C.
Presiding Judge


Andréia Vaz
Judge


Khalida Rachid Khan
Judge

[Seal of the Tribunal]

