



UNITED NATIONS
NATIONS UNIES

ICTR-01-76-1
26-01-2004
(878-874)
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER I

Before: Judge Erik Møse
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 26 January 2004

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THE PROSECUTOR

v.

Aloys SIMBA

Case No. ICTR-2001-76-I

DECISION ON MOTION TO AMEND INDICTMENT

The Prosecutor

William T. Egbe
Sulaiman Khan
Amina Ibrahim

The Defence

Sadikou Ayo Alou
Francis Dako

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

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEISED of the Prosecution "Request for Leave to File an Amended Indictment", with annexes, filed on 28 November 2003;

CONSIDERING the Defence Response thereto, filed on 15 January 2004;

HEREBY DECIDES the Motion.

INTRODUCTION

1. The Accused was arrested in Senegal on 27 November 2001 in response to an Order of this Tribunal for his provisional detention and transfer, issued under Rule 40*bis*. On 9 March 2002, having exhausted legal proceedings before the courts of Senegal, the Accused was remanded into the custody of officials of the Tribunal and arrived at the detention unit in Arusha on 11 March 2002, where he has remained in custody to this day. He made his initial appearance on 18 March 2002, pleading not guilty to all four counts in an Indictment confirmed on 8 January 2002.

2. On 31 October 2002, the Defence filed two separate motions, one for the provisional release of the Accused based on an alleged violation of Rule 40*bis*, and another alleging defects in the form of the Indictment. The Prosecution filed responses to these motions on 5 December 2002 and, after being granted an extension of time, on 18 February 2003, respectively. The Defence filed replies in respect of the two motions on 2 January 2003 and 6 June 2003.

3. On 28 November 2003, the Prosecution filed a motion requesting leave to amend its Indictment and the Defence responded on 15 January 2004, opposing the amendments.

4. On 15 January 2004, a Status Conference was held before the Chamber to discuss the readiness of the parties for trial and the possible timing of its commencement.

SUBMISSIONS

5. The Prosecution characterizes the amendments to the Indictment as serving two purposes. First, to provide additional and more precise information of the alleged criminal conduct of the Accused; and second, to allege that criminal liability under Article 6(1) is based on acts committed "in concert with others as part of a common scheme, strategy or plan". The additional information is said to be derived from Prosecution investigations undertaken since the confirmation of the Indictment and, in particular, reflect the content of six additional witness statements. These additions more accurately reflect the totality of the evidence to be adduced against the Accused at trial. In its submissions, the Prosecution also stated that "the proposed amendment is an effort by the Prosecution, partly in response to the Defense request for specificity in pre-trial motions".¹ The addition of the language charging responsibility under Article 6(1) is said to be a response to legal developments at the

¹ Prosecutor's Request for Leave to File an Amended Indictment, 28 November 2003, para. 6(ii).

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International Criminal Tribunal for the Former Yugoslavia ("the ICTY") on the manner of alleging individual criminal responsibility. The Prosecution argues that the right of the Accused to be tried without undue delay under Article 19(1) and 20(4)(c) of the Statute will not be impaired by these amendments. No new charge is laid which would permit the Defence to raise preliminary objections. Any delay that might be occasioned is speculative, in light of the absence of date set for trial. Further, the need to set out critical details of the case against the Accused is, itself, a fundamental interest which must be taken into account in deciding whether to permit amendments.

6. The Defence opposes the amendments on three grounds. First, the defects in the Indictment, which are the object of a pending motion, should be addressed not by the Prosecution but the Chamber. The motion is said to be, in effect, an effort to divest the Chamber of jurisdiction. Second, no new disclosure has been made to the Defence since the confirmation of the Indictment to justify the Prosecution claim that the amendments reflect new evidence. The amendments do not reflect new evidence but merely remedy a defective Indictment. Third, the amendments impair the right of the Accused to trial without delay. The Prosecution's lengthy delay since its last submissions on the Defence motion for defects in the Indictment was negligent, warrants sanctions, and will abridge the right of the Accused to be tried within a reasonable period.

DELIBERATIONS

7. Rule 50 provides that after the initial appearance of the Accused, "an amendment of an Indictment may only be made by leave granted by a Trial Chamber", pursuant to a motion filed. A Chamber of the ICTY, applying virtually identical language in its Rules, has comprehensively described the applicable principles as follows:

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 emphasize 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.²

² *Prosecutor v. Brdanin & Talic*, Case No. IT-99-36, Decision on Filing of Replies (TC), 7 June 2001, para. 3 [footnotes omitted]; adopted in ICTR caselaw by *Prosecutor v. Zigiranyirazo*, Case No. ICTR-2001-73-I, 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 (TC), 15 October 2003, para. 19.

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8. The right to be tried without undue delay, guaranteed by Article 20(4)(c) of the Statute, must be considered in conjunction with other rights of the Accused, including the right to be informed in detail of the nature and cause of the charges brought.³ In discussing an amendment that, as here, added allegations of fact to existing charges, the ICTR Appeals Chamber explained the relationship between an Indictment that more accurately reflects the Prosecution evidence and the right to trial without undue delay:

Compared to the more general allegations in the Current Indictment, the added particulars in the Amended Indictment better reflect the case that the Prosecution will seek to present at trial and provide further notice to the Accused of the nature of the charges against them. Likewise, the specific allegation of a joint and criminal enterprise gives the Accused clear notice that the Prosecution intends to argue this theory of commission of crimes. Particularized notice in advance of trial of the Prosecution's theory of the case does not render proceedings unfair; on the contrary, it enhances the ability of the Accused to prepare to meet that case. Granting leave to file the Amended Indictment would therefore enhance the fairness of the actual trial by clarifying the Prosecution's case and eliminating general allegations that the Prosecution does not intend to prove at trial. These amendments will very likely streamline both trial and appeal by eliminating objections that particular events are beyond the scope of the Indictment.⁴

9. In summary, the factors to be weighed in determining whether to grant leave to amend an Indictment include: the ameliorating effect of the changes on the clarity and precision of the case to be met; the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage; and the likely delay or other possible prejudice to the Defence, if any, caused by the amendment.

10. The amendments proposed by the Prosecution clarify the case to be met by the Defence. Indeed, the amendments to the Indictment correspond significantly to the objections raised by the Defence in its motion alleging defects in the form of the Indictment, in particular its objection that the allegations are vague and that certain names were redacted.⁵ The amended Indictment describes in meaningful detail additional incidents, and gives additional details of events only very generally described in the current Indictment, including names of victims and accomplices that are redacted in the current Indictment. Regardless of whether the Defence has notice of these incidents through disclosure of witness statements, their inclusion in the Indictment makes clear that they are part of the Prosecution case to which the Defence must respond, and enhances the fairness of the trial. Further, the additional allegation that the Accused is engaged in a joint and criminal enterprise clarifies the Prosecution's theory of liability.

11. The Defence complains that the Prosecution has made no disclosures justifying its claim that the amendments are based on newly discovered evidence. On 15 January 2004, however, on the date of a status conference in the case, the Prosecution disclosed statements

³ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (AC), 19 December 2003, para. 13.

⁴ *Ibid.* para. 27.

⁵ Defence Preliminary Motion for Defects in the Form With Respect to Four Counts and for Lack of Jurisdiction (Rule 72(A), (B)(i) and (ii) and (H)(iv) of the Rules, 31 October 2002; Defence Reply to the Prosecutor's Response to the Defence Preliminary Motion for Defects in the Form With Respect to Four Counts and for Lack of Jurisdiction.

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from fourteen witnesses, some dated as late as November 2003, containing allegations which are reflected in the amendments to the Indictment.

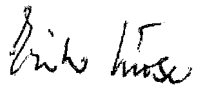
12. It is important to emphasize that the amendments do not introduce new charges, but rather bring specificity to allegations that were hitherto, in some respects, generally described. Those general descriptions would have led to disputes at trial as to adequacy of notice and the relevance of evidence led by the Prosecution. No trial date has yet been set, although the Presiding Judge of the Status Conference held on 15 January 2004 indicated that the trial would start between 15 March 2004 and the end of July 2004. The Chamber is of the view, given the scope and nature of the amendments, that the remaining period before the earliest possible start of the trial is sufficient to permit adequate preparation by the Defence, and that the amendment of the Indictment clarifies issues that would otherwise remain vague and subject to considerable dispute at trial.

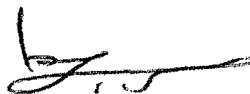
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution motion to amend its Indictment in accordance with Annex B of its motion;

ORDERS that the amended Indictment be filed by the Prosecution with the Registry immediately.

Arusha, 26 January 2004


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

