



ICTR-01-65-1
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

04-03-2005

(816 - 810)

816
1444

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 4 March 2005

THE PROSECUTOR

v.

Jean MPAMBARA

Case No. : ICTR-2001-65-1

JUDICIAL RECORDS/ARCHIVES
RECEIVED
ICTR

2005 MAR -4 P 12:37

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

Office of the Prosecutor:

Richard Karegyesa
Khaled Ramadan
Roberta Baldini
Kentaro Kanyomozi

Counsel for the Defence:

Arthur Vercken
Vincent Courcelle-Labrousse

6/4

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 SEIZED OF "The Prosecutor's Request for Leave to File an Amended Indictment", filed on 29 November 2004;

CONSIDERING the Defence response, filed on 10 December 2004; the Prosecutor's rejoinder, filed on 21 December 2004; and the Defence's reply, filed on 27 December 2003;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 23 July 2001, the Indictment was confirmed against the Accused charging a sole count of genocide. The Accused pleaded not guilty to this count at his initial appearance on 8 August 2001. The Prosecution now seeks leave to file an amended indictment charging the Accused with three counts of genocide, complicity in genocide, and extermination as a crime against humanity ("the Amended Indictment").

SUBMISSIONS

Prosecution

2. The Prosecution seeks leave to amend the Indictment for three principal reasons: to add the alternate count of complicity in genocide and a count of extermination as a crime against humanity; to advance joint criminal enterprise, with respect to the entirety of the Indictment; and to specify the factual basis of the current charges by withdrawing some of the factual allegations in the Indictment and providing additional names, dates and places with respect to the remaining allegations.

3. As a result of ongoing investigations, evidence became available after the confirmation of the Indictment which indicates a much greater level of participation by the Accused in the crimes charged. As such, the proposed amendments to the Indictment more accurately reflect the Accused's level and modes of participation in the crimes alleged and provide a clearer picture of the evidence to be adduced at trial. The Amended Indictment also better conforms to the charging directives elaborated in recent case law.

4. A substantial volume of the evidence relied on in the Amended Indictment has already been disclosed to the Accused, and any new charges or alternate legal characterizations of facts are supported by the same factual allegations pleaded in the original Indictment, thus mitigating any prejudice or surprise to the Accused. As the date for trial has not yet been set, no delay can be attributed to the filing of a more precise indictment, and the right of the Accused to an expeditious trial will not be compromised. On the contrary, the Amended Indictment better respects the rights of the Accused by giving him the information necessary to enable him to adequately prepare his defence.

Defence

5. The Defence opposes the motion on two principal grounds. First, the Defence argues that the Prosecution acted in bad faith and failed to exercise due diligence in bringing the present motion. According to the Defence, of the statements received on 6 December 2004, and upon

which the present motion is based, fifteen had never before been seen by the Defence. Of those fifteen statements, eight were taken over two years ago, and of those eight, four were taken prior to confirmation of the Indictment in 2001. Moreover, with respect to the five most recent statements one is the statement of a witness for the Defence and two others are redacted to such an extent that the Defence is unable to discern what is being alleged. The withdrawal of factual allegations on which the Defence has been working for several months coupled with the addition of new factual allegations, based on statements long in the possession of the Prosecution but only recently disclosed, demonstrates an attempt to derail the Defence and gain a tactical advantage by deliberately leading the Defence in the wrong direction.

6. The Defence's second ground of opposition is the undue delay that would result if leave to amend the Indictment is granted. The addition of new names of individuals with whom the Accused is alleged to have acted will necessitate lengthy further investigations, thus considerably delaying the commencement of the trial and jeopardizing the right of the Accused to a fair and expeditious trial. Although no date has yet been set for trial, on 24 August 2004, the Prosecution and the Defence held an informal meeting with a view to setting a possible trial date in April 2005, and at which no mention was made of any proposals to amend the Indictment.

7. Finally, the Defence submits that if the Chamber grants leave to amend the Indictment, the addition of the alternate count of complicity in genocide and of the new count of extermination as a crime against humanity entitles the Accused to a new initial appearance.

DELIBERATIONS

8. Rule 50 provides that after the initial appearance of the Accused, an indictment may only be amended by leave of the Trial Chamber. As established in the jurisprudence, there are three factors to be weighed in determining whether to grant leave: 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.¹ The Chamber must also consider whether a *prima facie* case exists with respect to any new charges in the proposed amendment.²

The Ameliorating Effect of the Changes

9. The proposed changes to the Indictment fall into three categories: removal of factual allegations; addition of specific factual allegations; and alternate or additional legal characterizations of existing factual allegations.

10. The removal of factual allegations is not opposed by the Defence and has an ameliorating effect on the proceedings by sparing the expenditure of any further time or resources on allegations the Prosecution does not intend to prove at trial.

¹ *Karamera et al.*, 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; *Simba*, Decision on Motion to Amend Indictment (TC), 26 January 2004, para. 9; *Muhimana*, Decision on Motion to Amend Indictment (TC), 21 January 2004, para. 6.

² Rule 50 (A) (ii) ("In deciding whether to grant leave to amend the indictment, the Trial Chamber or, where applicable, a Judge shall, *mutatis mutandis*, follow the procedures and apply the standards set out in Sub-Rules 47 (E) and (F) in addition to considering any other relevant factors").

813

11. In addition, the proposed Amended Indictment particularizes the allegations in the current Indictment by, *inter alia*, specifying dates,³ locations,⁴ names and numbers of victims,⁵ and names of other individuals with whom the Accused is allegedly involved in a joint criminal enterprise.⁶ Such additions provide a more accurate picture of the case the Prosecution intends to present at trial, and as such, have an ameliorating effect on the clarity and precision of the case to be met. The Chamber cannot exclude that the addition of Brigadier Ruhiguri and Samuel Gasana as members of the alleged joint criminal enterprise may possibly necessitate some further investigations and preparation. However, when compared to the general allegation in the original Indictment that the accused acted in concert "with others",⁷ the Chamber is satisfied that the specification of names will enhance the ability of the Accused to prepare his defence by providing further details of the case to be met.

12. The Amended Indictment also advances with greater particularity the mode of criminal liability joint criminal enterprise. Though not using the words "joint criminal enterprise", paragraph 19 of the original Indictment alluded to this form of criminal responsibility when it alleged that "Jean Mpambara, acting in concert with others, participated in the planning, preparation or execution of a common scheme, strategy or plan or campaign". The Amended Indictment has not therefore added a new form of responsibility, but rather eliminated the ambiguity arising from the formulation used in the original Indictment concerning the Prosecution's intent to argue this form of participation. Recent jurisprudence of this Tribunal identifies three forms of joint criminal enterprise, basic, systemic, and extended, each characterized by a distinct mental element.⁸ Although the Prosecution has not specifically mentioned the three forms by name, the Chamber is of the opinion that the formulation of the allegation of joint criminal enterprise in the Amended Indictment indicates the Prosecution's intent to argue all three forms.⁹

13. The proposed amendments also consist of the addition of an alternate count of complicity in genocide and a count of extermination as a crime against humanity. The Chamber notes that these two additional counts are based on the same factual allegations underlying the already existing count of genocide. Therefore, the addition of the two new counts does not alter the fundamental factual case against the Accused, thereby, necessitating additional preparation.

³ For example, para. 18 of Indictment alleges that "During April 1994, Tutsi women were often victims of sexual violence" and 18(i) alleges that "on a date or dates unknown, a pregnant Tutsi woman ... was raped ..." Para. 20 of the Amended Indictment specifies a date range of between 6 and 16 April 2004 for the general acts of sexual violence and the date of on or about 8 April 1994 for the specific incident. The Chamber is mindful that in certain instances, the specification of dates actually amounts to new factual allegations, as is the case with meetings in which the accused allegedly participated or organized on or about 8 April 1994 and on or about 12 April 1994 at Samson Gacumbitsi's place. See para. 7 of the Indictment and para. 9 of the Amended Indictment.

⁴ For example, paras. 11 and 12 of the Amended Indictment specifically allege attacks on Tutsis in Umwiga *cellule* and Ibiza *cellule*, respectively.

⁵ For example, names of victims are specified in paras. 11, 12 and 14 of the Amended Indictment, and an approximate number of victims is provided in para 17.

⁶ For example, the Amended Indictment alleges that the Accused met and participated in a joint criminal enterprise with Samuel Gasana and Brigadier Ruhiguri, individuals not previously named in the Indictment. See paras. 6, 9(i), and 21.

⁷ Indictment, para. 19.

⁸ *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 463-467; *Simba*, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment (TC), 14 July 2004, paras. 8-10.

⁹ See para. 6 of the Amended Indictment, which alleges that the Accused "wilfully and knowingly participated in a joint criminal enterprise whose object, purpose, and foreseeable outcome was the destruction of the Tutsi racial or ethnic group throughout Rwanda".

6h

812

14. In sum, the added particulars in the Amended Indictment better reflect the case the Prosecution will present at trial and provide further notice to the Accused of the nature of the charges against him. Allowing such amendments would therefore clarify the Prosecution's case and allowing the Defence to better prepare for trial.

The Diligence of the Prosecution

15. No date has yet been set for trial. Although this is an important factor in assessing the timeliness of the Prosecution's motion, this factor in itself does not suffice to explain the timing of the proposed amendments. The Prosecution has provided very little information regarding its diligence in investigating the facts that underlie the Amended Indictment and its timeliness in bringing this motion. Rule 50 does not require the Prosecution to amend an indictment as soon as it discovers new evidence supporting the amendment; however, it may not delay giving notice of the changes to the Defence to earn strategic advantage.¹⁰

16. Although the Prosecution makes reference to information acquired as a result of "on-going investigations, after the confirmation of the original indictment", the Chamber notes, as the Defence submitted, that of the fifteen new witness statements disclosed to the Defence in support of this motion, four such statements were taken prior to the confirmation of the original indictment, and three others had been in the possession of the Prosecution for at least two years. In addition, the two new proposed counts of complicity in genocide and extermination are based on facts already pleaded in the original Indictment. The Prosecution has not adequately explained why it has delayed advancing these counts. The Chamber cannot therefore conclude that the Prosecution has shown that the factors of diligence and timeliness support granting its motion in the present case. Nonetheless, the Prosecution's failure to bring the amendments forward in a timely manner is not necessarily dispositive and must be measured within the framework of the overall requirement of the fairness of the proceedings obtained by having greater particulars in the Indictment.

Undue Delay or Possible Prejudice to the Accused

17. The Defence asserts that a tentative date for the start of trial in the coming months has been discussed with the Prosecution, and that the proposed amendments would require a long delay from this date for further Defence investigations, infringing on the right of the Accused to be tried without undue delay.

18. Although the proposed addition of material facts to the Indictment may necessitate additional investigations, they do not substantially alter or enlarge the Prosecution case. Some of the amendments merely provide additional details (by providing specific dates or places) of events already identified in the present Indictment. Other amendments describe new incidents, but with enough specificity to permit focused investigations by the Defence. Furthermore, the new incidents are similar in character, and proximate in time and place, to incidents already enumerated in the existing Indictment. Under these circumstances, only limited additional investigations will be required to fully prepare for these additional material facts. The Chamber is confident that such investigations could be completed before trial, even if it were to start in a couple of months.

¹⁰ *Karamera et al.*, 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, paras. 8, 20; *Muhimana*, Decision on Motion to Amend Indictment (TC), 21 January 2004, para. 8 ("The existence of such new evidence, the date of its discovery, and the date of its disclosure to the Defence are important factors in weighing both whether Prosecution has acted diligently, and also whether there is surprise to the Defence that would justify a postponement of the schedule for trial, and which might raise the prospect of undue delay in the trial of the Accused").

812

811

19. Nor is any extensive delay justified by the addition of the counts of complicity in genocide and extermination. The legal elements of these new counts substantially overlap with the genocide charge as framed by the present Indictment. Complicity in genocide under Article 2 (3)(e) is similar to a charge of genocide for which aiding and abetting liability is sought under Article 6 (1), as in the existing Indictment.¹¹ Extermination does introduce new material elements: that there be a widespread or systematic attack on a civilian population on prohibited discriminatory grounds; that the perpetrator at least have knowledge of, if not actually share, the discriminatory grounds of the attack; and that the perpetrator participate in some manner in a widespread or systematic killing of a group, collectively.¹² Unlike the charge of genocide, there is no requirement that the perpetrator intend the destruction of at least a substantial part of the group. Although these legal elements are distinct from those for the charge of genocide, the material facts enumerated in the existing Indictment are highly probative of the mental elements for extermination. Indeed, the Prosecution relies on no additional facts to support of the extermination count, simply incorporating by reference the paragraphs relevant to the genocide charge.

20. In the Chamber's view, any possible short term delay caused by allowing the amendment of the Indictment is outweighed by the overall efficiency of the proceedings resulting from a more specific Indictment.¹³

Existence of a Prima Facie Case

21. Having reviewed the material tendered by the Prosecution in support of this motion, the Chamber is satisfied that a *prima facie* case exists with respect to the new factual allegations in the Amended Indictment. The Chamber also finds that the existing and new allegations, if proven, establish a *prima facie* case for the count of genocide, the two new additional counts of complicity in genocide and extermination as a crime against humanity, as well as the more fully articulated form of criminal participation joint criminal enterprise.

22. Considering the relevant factors, the Chamber is of the opinion that it is appropriate to grant the Prosecution's motion to amend the Indictment. In light of the new counts of complicity in genocide and extermination as a crime against humanity, the Accused is

¹¹ *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 21; *Semanza*, Judgement (TC), 15 May 2003, para. 394 ("In the view of the Chamber, there is no material distinction between complicity in Article 2 (3)(e) of the Statute and the broad definition accorded to aiding and abetting in Article 6 (1)"); *Krstic*, Judgement (AC), 19 April 2004, paras. 138-39 ("As the Trial Chamber observed, there is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all offences punishable under the Statute, including the offence of genocide ... In this case, the two provisions can be reconciled, because the terms "complicity" and "accomplice" may encompass conduct broader than that of aiding and abetting genocide").

¹² *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 522; *Bagosora et al.*, Decision on Motions for Judgement of Acquittal (TC), 2 February 2005, para. 28; *Ndindabahizi*, Judgement (TC), 15 July 2004, paras. 479, 483, 485.

¹³ *Karemera et al.*, 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. 15 ("Although amending an indictment frequently causes delay in the short term, the Appeals Chamber takes the view that this procedure can also have the overall effect of simplifying proceedings by narrowing the scope of allegations, by improving the Accused's and the Tribunal's understanding of the Prosecution's case, or by averting possible challenges to the indictment or the evidence presented at trial. The Appeals Chamber finds that a clearer and more specific indictment benefits the accused, not only because a streamlined indictment may result in shorter proceedings, but also because the accused can tailor their preparations to an indictment that more accurately reflects the case they will meet, thus resulting in a more effective defence.").

6h

810

entitled, pursuant to Rule 50 (B), to a new appearance so that he may enter a plea on these additional counts.

FOR THE ABOVE REASONS, THE CHAMBER

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

ORDERS that the Amended Indictment be filed with the Registry immediately;

DECIDES that pursuant to Rule 50 (B), a further appearance shall be held as soon as practicable to enable the Accused to enter a plea on the new counts.

Arusha, 4 March 2005

Erik Møse

Erik Møse
Presiding Judge

PP & Møse

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]

