



UNITED NATIONS
NATIONS UNIES

ICTR-00-60-I
27-10-2005
(1241-1233)

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge Arlette Ramaroson, Presiding
Judge William H. Sekule
Judge Solomy Balungi Bossa

Registrar: Mr Adama Dieng

Date: 27 October 2005

The PROSECUTOR

v.

Paul BIENGIMANA
Case No. ICTR-00-60-I

**DECISION ON THE PROSECUTOR'S REQUEST
FOR LEAVE TO AMEND THE INDICTMENT**

Office of the Prosecutor

Mr Charles Adeogun-Phillips
Mr Peter Tafah
Ms Memory Maposa
Ms Maymuchka Lauriston
Ms Florida Kabasinga

Defence Counsel

Ms Catherine Mabilie
Ms Nathalie Passeron

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”),

SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, Presiding, Judge William H. Sekule, and Judge Solomy Balungi Bossa (the “Chamber”);

BEING SEIZED of the “Prosecutor’s Request for Leave to Amend an Indictment Pursuant to Rules 73, 50, and 51 of the Rules of Procedure and Evidence”, annexed to which is the proposed Amended Indictment (“Proposed Amended Indictment”), filed on 21 September 2005 (the “Motion”);

CONSIDERING the Accused’s “*Réponse à la requête du Procureur aux fins d’amendement de l’acte d’accusation*”, filed on 5 October 2005 (the Response);

NOTING the Supporting Materials for the amended indictment filed on 21 October 2005;

CONSIDERING the Statute of the Tribunal (the “Statute”), specifically Articles 19 and 20, and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 47 (E), (F), and (G), 50, and 73;

NOW DECIDES the matter pursuant to Rule 73(A), on the basis of the written submissions of the Parties.

INTRODUCTION

1. Judge Pavel Dolenc confirmed the Indictment dated 10 July 2000 against the Accused Paul Bisengimana (the “Accused”) on 17 July 2000 (the “Current Indictment”). In its Motion, the Prosecution seeks leave to amend the Current Indictment as indicated below.

SUBMISSIONS OF THE PARTIES

The Prosecution

2. The Prosecution requests the Chamber to grant leave for it to amend the Current Indictment by withdrawing the following seven charges:

- i) Count 3, conspiracy to commit genocide;
- ii) Count 4, direct and public incitement to commit genocide;
- iii) Count 7, crimes against humanity (torture);
- iv) Count 9, crimes against humanity (other inhumane acts);
- v) Count 10, violations of the Geneva Convention (Article 4(a) of the Statute);
- vi) Count 11, violations of the Geneva Convention (Article 4(e) of the Statute);

vii) Count 12, violations of the Geneva Convention (Article 4(f) of the Statute).

3. The Prosecution also seeks to delete the factual allegations supporting the seven counts it proposes to withdraw.

4. In addition, the Prosecution seeks to allege “new and additional material facts” in support of the remaining counts and some “further counts or charges”, in order to bring the Proposed Amended Indictment in accord with the evidence. It submits that the additional factual allegations are the result of ongoing investigations.

5. Finally, the Prosecution seeks to re-number the paragraphs in the Proposed Amended Indictment to reflect the additions and deletions.

6. According to the Prosecution, these amendments will bring the organizational layout of the Current Indictment in accordance with the current charging practices of the Office of the Prosecutor (the “OTP”), which is reflective of the evolving jurisprudence of the Tribunal.¹

7. The Prosecution submits that Rule 50 of the Rules and the jurisprudence of the Tribunal allow for the amendment of the indictment after the initial appearance of the Accused.

8. According to the Prosecution, it is obligated by Article 15 of the Statute and Rule 37 of the Rules to investigate violations of law under the Statute. In “fulfilment of these obligations”, the Prosecution submits that it continued to investigate the case against the Accused after confirmation of the Current Indictment, which yielded new evidence, implicating the Accused in new crimes related to the remaining counts in the Current Indictment.² These include crimes committed in Ruhita *cellule*, Rwamashyongoshyo *secteur*, Gikoro *Commune*, at the Gikoro *Commune* Office, in Ruhanga *cellule*, Gicaca *secteur*, Gikoro *Commune*, as well as new evidence expanding on the factual allegations regarding the events at Musha Church described in the Current Indictment.

9. The Prosecution submits that “the new factual allegations and charges allow the Prosecutor to present the full scope of available evidence which was not previously available and establishes a *prima facie* case against the accused”.³

10. The Prosecution alleges that the evidence in support of the new charges in the Proposed Amended Indictment was disclosed to the Defence pursuant to Rules 66, 67(d) and 68 of the Rules on the following dates: 18 February 2005, 2 March 2005, 9 May 2005, and 1 June 2005.

¹ Motion, para. 1.5

² Genocide, complicity in genocide, extermination, murder as a crime against humanity, and rape as a crime against humanity

³ Motion, para. 3.8.

11. The Prosecution further submits that the amendment of the Current Indictment is in the interest of justice and will not result in any delay that might impinge upon the Accused's right to be tried without undue delay pursuant to Articles 19(1) and 20 (4)(c) of the Statute, as the Proposed Amended Indictment withdraws seven counts from and streamlines the Current Indictment, thereby "making it more focused" and "allowing for a more expeditious trial" and a smaller number of trial days.⁴

12. In any event, the Prosecution submits that the issue of undue delay must be seen in context, and, in that regard, no trial date has been set in this case and, given the Tribunal's calendar schedule, the trial against the Accused is unlikely to commence in the first quarter of 2006.

The Defence

13. The Defence submits that it has taken note of the proposed amendments and that it does not oppose the Motion.

DELIBERATIONS

The Applicable Standard Under Rule 50

In considering the Motion, the Chamber notes the relevant provisions of Rule 50:

Rule 50: Amendment of the Indictment

- (A)
- (i) 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 that 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.
 - (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.
- (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.

⁴ Motion, para. 3.13

(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 and, where necessary, the date for trial may be postponed to ensure adequate time for preparation of the defence.

14. The Chamber notes the relevant provisions of Rule 47, which provide:

Rule 47: Submission of Indictment by the Prosecutor

- (A) [...]
- (B) [...]
- (C) [...]
- (D) [...]
- (E) The reviewing judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 18 of the Statute, whether a case exists against the suspect.
- (F) The reviewing Judge may:
 - i. Request the Prosecutor to present additional material in support of any or all counts, or to take any further measures which appear appropriate;
 - ii. Confirm each count;
 - iii. Dismiss each count; or
 - iv. Adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.
- (G) The Indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known by the Registrar, a translation of the indictment in that language shall also be prepared, and a copy of the translation attached to each certified copy of the indictment.
- (H) [...]
- (I) [...]

15. The Chamber notes that after the initial appearance of the accused, a Trial Chamber is given discretion to grant leave for the amendment of an indictment, placing the burden on the Prosecution to set out the factual and legal justifications for such amendments.⁵ In general, “amendments pursuant to Rule 50 are granted in order to (a) add new charges; (b) develop the factual allegations found in the confirmed indictment; and (c) make minor changes to the indictment.”⁶

16. The Chamber recalls that in its evaluation of the requests to amend, it should analyse the following non-exclusive circumstances:

⁵*Prosecutor v. Muhimana*, Case No. ICTR-1995-1B-I, Decision on Motion to Amend Indictment, 21 January 2004, para. 4 (the “*Muhimana* Decision”); *Prosecutor v. Bizimungu, et al.*, Case No. ICTR-99-50-I, Decision on the Prosecutor’s Request for Leave to File an Amended Indictment (TC), 06 October 2003, para. 27 (the “*Bizimungu* Trial Chamber Decision”).

⁶*Bizimungu* Trial Chamber Decision, para. 26.

- (i) The effect of the proposed amended Indictment on the accused persons' right to an expeditious trial, to prompt notices of the charges against them, and to adequate time and facilities in order to prepare their defence;
- (ii) Whether any additional time can be granted to the Accused for the preparation of their defence;
- (iii) Reasonableness of resulting delays in the scheduled start day of trial, and the length of the trial itself;
- (iv) Effect on the time spent by the Accused in pre-trial detention;
- (v) Nature and scope of the proposed amendment;
- (vi) Whether the [A]ccused and Trial Chamber had prior notice of the Prosecutor's intention to seek leave to amend the indictment, the nature of the notice, and any improper tactical advantage gained by the Prosecution as a result of the proposed amended Indictment;
- (vii) The evidentiary basis of the new charges, if any, and the timing of their discovery;
- (viii) Judicial economy; and
- (ix) Whether the proposed amended Indictment, through more specificity and accuracy, allows the Accused to better respond and prepare for trial, or shortens the length of the trial proceedings, thus protecting rather than prejudicing the accused persons' rights to a fair trial.⁷

17. As suggested by the ninth and final consideration listed above, the Chamber balances potentially competing rights of the Accused, such as the Accused's right to be informed promptly and in detail of the nature and cause of the charges against him, the right to have adequate time and facilities for the preparation of his defence, and the right to be tried without undue delay.⁸

18. As stated by the Chamber in the *Renzaho* "Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié," of 18 March 2005,⁹ where reference was made to the ICTY jurisprudence in *Hadzhihasanović* and *Kubura*,¹⁰ the fundamental question in relation to granting leave to amend an indictment is whether the amendment will prejudice the accused unfairly.

19. The Chamber notes that these considerations are not exhaustive, and that not all of those listed will necessarily be relevant in particular cases. Deciding whether to grant leave to amend is therefore left to the discretion of the Trial Chamber to be determined on a case-by-case basis.¹¹

⁷ *Prosecutor v. Nindiliyimana, et al (Military II)*, Case No. ICTR-2000-56-I, Decision on Prosecutor's Motion under Rule 50 for Leave to Amend the Indictment (TC), 26 March 2004, para. 42 (citing *Prosecutor v. Bizimungu, et al.*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File an Amended Indictment (AC), 12 February 2004, para. 16 (the "Bizimungu Appeals Chamber Decision")).

⁸ *Bizimungu Trial Chamber Decision*, para. 27; *Muhimana Decision*, para. 5.

⁹ *Prosecutor v. Renzaho*, case no. ICTR-97-31-I, *Décision sur la Requête du Procureur demandant l'autorisation de déposer un acte d'accusation modifié*, 18 March 2005, para. 47

¹⁰ *Prosecutor v. Hadzhihasanović and Kubura*, Case no. IT-01-47-PT, *Décision relative à la forme de l'acte d'accusation*, 17 September 2003 at para. 35

¹¹ *Nindiliyimana*, para 41 (quoting *Bizimungu Appeals Chamber Decision*, para. 27).

On the Request to Withdraw Seven Counts and Delete All Factual Allegations Alleged in Support of the Withdrawn Counts

20. The Chamber notes that the Prosecution seeks leave to withdraw seven counts and delete all factual allegations alleged in support of the withdrawn counts. Generally, amendments seeking to narrow the indictment may “increase the fairness and efficiency of proceedings, and should be encouraged and usually accepted.”¹² Such amendments may result in a more expeditious trial, particularly if there is a reduction in the number of witnesses and, thus, a reduction in the number of trial days, thereby promoting judicial economy and the Accused’s right to a fair trial.¹³

21. Considering that the Defence does not oppose the Motion and that the withdrawal of seven counts and the removal of factual allegations supporting those counts will likely result in a more expeditious trial that promotes judicial economy and the rights of the Accused, the Chamber grants this Prosecution request.

On the Request to Expand upon the Facts and Add Further Charges in Support of the Remaining Counts and the Potential Prejudice to the Accused

22. The Chamber notes that, “[n]ew charges do not prohibit a Chamber from granting the Prosecution leave to amend an indictment.”¹⁴ Rather the most important consideration for the Chamber is the potential prejudice to the Accused.

23. The Chamber notes that the Prosecution submits that it has disclosed to the Defence the evidence in support of the new charges and factual allegations. The Chamber also notes that there has been no trial date set and that the Accused does not oppose the Prosecution’s motion and in any case, any prejudice that might result from delay can be cured because the Chamber may grant the Accused additional time to challenge the Proposed Amended Indictment and prepare his defence regarding new charges and allegations contained therein.¹⁵

24. However, pursuant to Rule 50 (A)(ii), in deciding on a request to add new charges to the indictment, the Chamber notes that it is required to follow the procedures and standards under Rule 47(E) and (F). In the present case, even though the Defence does not object to the request for addition of new charges, the Chamber is required to examine each of the counts. The Chamber shall consider any supporting material the Prosecutor may provide to determine whether a case exists against the Accused.¹⁶ The Chamber

¹² *Ndindiliyimana*, para. 43 (citing *Bizimungu Appeals Chamber Decision*, Para. 19).

¹³ *Prosecutor v. Karemera, et al.*, Case No. ICTR-98-44-T, Decision On The Prosecutor's Motion For Leave To Amend The Indictment - Rule 50 Of The Rules Of Procedure And Evidence, 13 February 2004, paras. 41-45 (the “*Karemera Trial Chamber Decision*”).

¹⁴ *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC), 12 May 2005, para. 38.

¹⁵ *Ndindiliyimana*, para. 53.

¹⁶ *Prosecutor v. Seselj* Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Leave to Amend the Indictment of 27 May 2005, paras. 13 - 16

recalls that in the *Renzaho* Decision, it was opined that the Prosecution may plead its case as it wishes, as long as it sets out the material facts that will allow the Defence to meet the case.¹⁷

25. The Chamber, noting that the Prosecution had not provided it with any supporting material in support of the requested expanded factual allegations and new charges, requested the Prosecution to file any supporting material in its possession in support of its Motion. The Chamber notes that the Prosecution filed said supporting material with the Registry on 21 October 2005 whereupon the Registry distributed the same to the Chamber on 24 October 2005.

26. Having examined the supporting material, the Chamber notes that the Prosecution has not given any demonstration as to which piece of evidence supports which expanded allegation or new charge of the Proposed Amended Indictment. The Chamber notes that this exercise should have been done by the Prosecution in the interest of judicial economy. Nonetheless, the Chamber finds that the expanded factual allegations and/or new charges in paragraphs 23-33, and paragraph 42 of the Proposed Amended Indictment are supported by the *prima facie* evidence provided in the supporting material.

27. Regarding Count V of the Proposed Amended Indictment, Rape as a Crime Against Humanity (Count 8 of the Current Indictment), paragraphs 55 and 56 therein add particulars to the allegations in paragraph 3.22 of the Current Indictment. It would appear that the amendments under paragraph 56 could have been made earlier given that the statements in support of the allegations therein date from 16 June 1998.

28. Nonetheless, the Chamber notes that no trial date has been set in this matter, that the Defence does not oppose the proposed amendments, that the allegations contained in paragraphs 55 and 56 of the Proposed Amended Indictment merely add specificity to the allegations contained in paragraph 3.22 of the Current Indictment, and that, given the Chamber's decision regarding the other new material facts and charges contained in the Proposed Amended Indictment, the Accused will be making a further appearance pursuant to Rule 50 (B).¹⁸ Accordingly, the Chamber finds that granting the Prosecution's request to add particulars to the count of Rape as a Crime Against Humanity is unlikely to prejudice the Accused and is in the interest of justice.

29. The Trial Chamber notes that the Proposed Amended Indictment contains new charges within the meaning of Rule 50(B) and (C) of the Rules. Therefore, the Chamber will make appropriate orders to safeguard the rights of the Accused.

¹⁷ *Prosecutor v. Renzaho*, para 47 (citing *Prosecutor v. Hadzihasanović and Kubura*, para. 35).

¹⁸ *Prosecutor v. Mpambara*, Case No.: ICTR-2001-65-1, Decision on the Prosecution's Request for Leave to File an Amended Indictment, 4 March 2005, para. 16 (noting that "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 [...]").

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Motion;

ORDERS the Prosecution to file the Amended Indictment in both languages on or before close of business Wednesday, 2 November 2005;

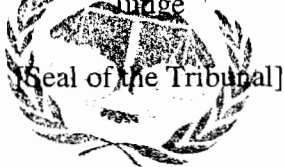
ORDERS that a further appearance shall be held as soon as practicable to enable the Accused to enter a plea on the new charges;

REMINDS the Accused that within thirty days, he is entitled to file preliminary motions pursuant to Rule 72 of the Rules with respect to the new charges.

Arusha, 27 October 2005

Arlette Ramaroson
Presiding Judge

William H. Sekule
Judge



Solomy Balungi Bossa
Judge