

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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ICTR-01-68-PT
03-02-2010
(657-650)

OR: ENG

TRIAL CHAMBER III

Before Judge: Dennis C. M. Byron, Presiding
Vagn Joensen
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 3 February 2010

THE PROSECUTOR

v.

Grégoire NDAHIMANA

CASE NO. ICTR-2001-68-PT

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

Rule 50 of the Rules of Procedure and Evidence

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INTRODUCTION

1. On 3 July 2001, the Indictment was confirmed against the Accused, containing four counts (genocide; or in the alternative complicity in genocide; conspiracy to commit genocide; and extermination as a crime against humanity). After he was arrested, the Accused was transferred to the Tribunal on 20 September 2009 and pled not guilty to all counts during his initial appearance on 28 September 2009.¹ A date for the commencement of trial has not yet been set.

2. The Prosecution filed a motion for leave to amend the Indictment on 16 November 2009 which seeks to: (i) add a number of new factual allegations in support of the proposed and existing charges, (ii) add joint criminal enterprise ("JCE") as a mode of liability to all counts, (iii) remove the count of conspiracy to commit genocide, and (iv) remove paragraphs unrelated to the Accused.² The Defence opposes the amendments under (i) and (ii).³ The Prosecution replied to the Defence response on 11 December 2009.⁴

DELIBERATIONS

3. As a preliminary matter, the Chamber notes that the Defence's motion filed on 10 November 2009 alleging defects in the original Indictment is moot given that the proposed Amended Indictment is the Indictment now before the Chamber and the proposed Amended Indictment addresses the concerns raised in that motion.

The Law with Respect to Amending Indictments

4. Rule 50 of the Rules of Procedure and Evidence (the "Rules") allows for an indictment to be amended after the initial appearance of the Accused with leave of the Chamber. As is well established, three factors are weighed in determining whether to grant leave: (i) the ameliorating effect of the changes on the clarity and precision of the case to be met, (ii) the diligence of the Prosecution in making the amendment in a timely manner that avoids creating an unfair tactical advantage, and (iii) the likely delay or other possible prejudice to the Defence, if any, caused by the amendment.⁵ Further, any new charges in the

¹ T. 28 Sept. 2010, pp. 13, 14.

² Prosecutor's Request for Leave to File an Amended Indictment, 16 November 2009 (the "Motion") with the proposed amended indictment as an annex to the Motion (the "Amended Indictment").

³ Defence Response to the Prosecutor's Request for Leave to File an Amended Indictment, 7 December 2009 (the "Response").

⁴ Prosecutor's Reply to the Defence's Response to the Prosecutor's Request for Leave to File an Amended Indictment, 11 December 2009 (the "Reply").

⁵ See generally *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-00-50-AR5, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2003 Denying Leave to File Amended

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proposed amendment must be supported by a *prima facie* case.⁶ After having reviewed the material submitted by the Prosecution in support of the new charges, the Chamber is satisfied that a *prima facie* case exists.

5. The Defence put forward three challenges to the proposed Amended Indictment: (i) that the proposed Amended Indictment is a substitution of the original Indictment because of new factual allegations as well as the addition of new charges including JCE, (ii) the Prosecution did not submit the proposed Amended Indictment diligently, and (iii) the proposed Amended Indictment, if confirmed, will cause undue delay in the commencement of the trial.⁷ The Defence does not object to the removal of the count of conspiracy to commit genocide.⁸

Are New Charges Alleged?

6. The Defence alleges that the proposed Amended Indictment has the effect of replacing the entire original Indictment.⁹ The Defence further submits that a new charge is added when additional factual allegations are added without changing the crime alleged under the Statute. It alleges that the proposed Amended Indictment includes twelve new charges as described in paragraphs 16, 17, 20, 24, 25, 26, 27, 28, 29, 30, 31 and 32 of the proposed Amended Indictment.¹⁰

7. The Prosecution is not prohibited from submitting an amended indictment with additional material factual allegations supporting the original Indictment and new charges that are substantial.¹¹ However, if new charges are added, Rule 50 (B) applies and the Accused must be brought before the Tribunal for a further appearance and the Defence should be provided with adequate time to prepare their case so as not to prejudice the Accused.

Indictment (AC), 12 February 2004 ("*Bizimungu et al.* Appeal Decision") para. 16; *Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-I, Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007 ("*Setako* Decision") para. 6.

⁶ Rule 50(A)(ii) and Rule 47 (E) and (F) of the Rules; *See also Setako* Decision, para. 6.

⁷ Response, para. 8.

⁸ Response, para. 43.

⁹ Response, paras. 12-15.

¹⁰ Response, paras. 17-24.

¹¹ *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 ("*Karemera* Decision") para. 11 ("the difference between an 'amended' indictment and a 'new' indictment is not useful[...]Nothing in Rule 50 prevents the prosecution, as a general matter, from offering amendments that are substantial").

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8. With respect to what constitutes a new charge, the Chamber recalls that the Appeals Chamber has articulated that

[t]he count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts).¹²

9. Based upon the criteria above, the Chamber has identified a new charge in the proposed Amended Indictment. Paragraph 29 of the proposed Amended Indictment states that the Accused is alleged to have "started shooting at the refugees thereby signalling the assailants to launch a large scale attack on the Tutsi refugees."¹³ There was no mention in the original Indictment of the Accused shooting at refugees. Shooting at refugees is an act that gives rise to a new legal prohibition infringed upon under Articles 2 (b) and (c) of the Statute and constitutes a new charge.

10. The Chamber considers that the remaining paragraphs described by the Defence as new charges merely contain material facts that support charges in the original Indictment. The Chamber finds that this has an ameliorating effect on the clarity and precision of the case.¹⁴

11. The Defence further contends that the addition of JCE as a mode of liability constitutes a new charge, which is prejudicial to the Accused's right to a fair trial because the Accused was arrested and arraigned on the basis of an indictment which did not charge JCE.¹⁵ The Chamber considers that JCE, as a mode of liability, does not constitute a new charge.¹⁶ However, as was decided in *Simba* with respect to the addition of JCE, "it would be

¹² *Prosecutor v. Tharisse 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. 19. *See also Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgement (TC), 22 June 2009, para. 189.

¹³ Amended Indictment, para. 29.

¹⁴ Paragraphs 16, 17 and 20 of the Amended Indictment support the charge in paragraph 5 of the original Indictment, which alleges that the Accused "prepared and executed a plan of extermination of the Tutsi population." Paragraph 24 of the Amended Indictment provides further material facts in support of allegations in the original Indictment. Paragraphs 25 and 26 of the Amended Indictment relate to the charge described in paragraph 45 of the original Indictment. Paragraphs 27 and 28 of the Amended Indictment support the existing charges found in paragraphs 25 and 30 of the original Indictment. Paragraph 30 of the Amended Indictment supports the existing charges in paragraphs 27 and 45 of the original Indictment. Paragraph 32 elaborates upon the material facts described in paragraph 46 of the original Indictment.

¹⁵ Response, paras. 25-31.

¹⁶ *Prosecutor v. Simba*, Case No. ICTR-01-76-I, Decision on Defence Motion for New Initial Appearance (TC), 5 March 2004, para. 7

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in the interests of a fair trial for the Accused that he be allowed to plead to the new allegations in a further appearance.”¹⁷

12. Therefore, because there is a new charge pled as well as the introduction of JCE as a new mode of liability, the Chamber considers that, pursuant to Rule 50 (B) as well as in the interests of a fair trial, a further appearance of the Accused should be held.

Has the Prosecution Been Diligent in Bringing the Proposed Amended Indictment?

13. The Defence contends that by submitting the proposed Amended Indictment almost eight and a half years after it was first confirmed demonstrates a lack of due diligence on the part of the Prosecution.¹⁸ Further, it submits that the Motion was submitted close to the “eve of trial” and provides the Prosecution with a strategic advantage over the Accused by requesting the amendments at this late stage.¹⁹ Therefore, the Defence contends that it is not in the interests of justice to certify the proposed Amended Indictment.²⁰

14. The Chamber recalls that the Accused was transferred to the Tribunal on 20 September 2009 and the Prosecution filed its Motion for leave to amend the Indictment only two months later. The Chamber considers that the Defence has not demonstrated a basis for concluding that a strategic advantage was sought by the Prosecution in seeking to amend the Indictment. Therefore, the Chamber rejects the Defence’s assertion of the Prosecution’s lack of due diligence.

Will the Proposed Amended Indictment Cause Undue Delay to the Trial?

15. Lastly, the Defence states that the trial date has been set for 22 March 2010 and if the changes in the proposed Amended Indictment were allowed this would lead to an undue delay in favour of the Prosecution.²¹ Moreover, it states that the addition of new charges and the introduction of new individuals will require the Defence to conduct further investigations which will delay the proceedings.²²

16. The Chamber recalls that no formal scheduling order with respect to trial date has been set.²³ Moreover, the Chamber considers that there is no prejudice as the Accused will be

¹⁷ *Ibid.*, para. 7

¹⁸ Response, paras. 32-33.

¹⁹ Response, paras. 34-35

²⁰ Response, paras. 36-37.

²¹ Response, para. 40.

²² Response, paras. 40-42.

²³ The Scheduling Order of 4 November 2009 only suggested that the trial begin in the “first quarter of 2010”.

provided with adequate time to investigate his case. Therefore, the proposed Amended Indictment will not cause undue delay or prejudice to the Accused.

Changes to be Made to the Proposed Amended Indictment

17. The Chamber has found a number of instances where the proposed Amended Indictment should be clarified. With respect to pleading superior responsibility pursuant to Article 6(3) of the Statute, apart from paragraphs 12 and 37 where they are identified, alleged subordinates Védaste Mupende, Laurent Sindabyemera, Jean Marie Vianney Habarugira and Ferdinand Munyarukato are not mentioned in the material allegations section of the proposed Amended Indictment. The Chamber considers that the Prosecution should specify what criminal activities those subordinates, who are not mentioned in the material allegations section of the proposed Amended Indictment, engaged in, or remove their names.²⁴

18. The Chamber also notes that with respect to the pleading of JCE under Count 3, Extermination as a Crime Against Humanity, paragraph 36 states that the “common purpose was the commission of genocide[.]” However, the commission should be described as a crime against humanity, not genocide.²⁵

19. The Chamber also notes the following should be corrected:

- a. Throughout the proposed Amended Indictment, the word “Bourgmaster” should be changed to *bourgmestre* in italics to denote a word in the French language.
- b. At paragraph 23, the Kinyarwanda word “inyenzi” should be in italics.
- c. At paragraphs 14-20, the label “Communal Office” should specify which communal office.

20. Further, in order to ensure the accuracy of the French version of the Indictment, the Chamber requests the following changes be made:

- a. Paragraph 2, “il” should be replaced by “Grégoire Ndahimana”;
- b. Paragraph 10, at the beginning of the last sentence the first instance of “il” should be replaced by “Grégoire Ndahimana”;

²⁴ Even if they are part of the “others” mentioned in paragraphs 15-26, 29-32 of the Amended Indictment their names should be specified so that the Accused can properly prepare his case.

²⁵ See Amended Indictment, para. 36.

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- c. Paragraph 11, “des *conseillers de secteur* tels” should be inserted before “Jean-Marie Vianney HABARUGIRA”;
- d. Paragraph 12, in the first line, “les intéressés” should be replaced with “ses subordonnés”;
- e. Paragraph 12, “des *conseillers de secteur* tels” should be inserted before “Laurent SINDABYEMERA”;
- f. Paragraph 20, “du plan visant à attaquer les réfugiés tutsis pour les tuer” should be replaced with “du plan visant à attaquer et tuer les réfugiés tutsis”;
- g. Paragraph 23, at the beginning of the third sentence, “Celui-ci” should be replaced with “Grégoire Ndahimana”. Further, at the start of the fourth sentence, “ses subordonnés” should be replaced with “les subordonnés de Grégoire Ndahimana”;
- h. Paragraph 24, at the start of the second sentence, “À” should be replaced with “Lors de”;
- i. Paragraph 34, “intéressé” before the word “animé” should be replaced with “Grégoire Ndahimana”;
- j. Paragraph 26, “des *conseillers de secteur* tels” should be inserted before “Jean-Marie Vianney HABARUGIRA”.

FOR THESE REASONS, THE CHAMBER


- I. **GRANTS** the Prosecution's motion to amend the Indictment;
- II. **ORDERS** the Prosecution to provide greater clarity as to the involvement of alleged subordinates not mentioned in the material section of the Indictment or remove their names from paragraphs 12 and 37 of the proposed Amended Indictment;
- III. **ORDERS** the Prosecution to make the amendments described in paragraphs 18, 19 and 20 above;
- IV. **ORDERS** the Prosecution to file the Indictment as amended in accordance with this decision in French and English by 4 February 2010;


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- V. **ORDERS** that a further appearance shall be held 8 February 2010 at 3.45 p.m. as provided for under Rule 50 (B);
- VI. **REQUESTS** that the Registrar make arrangements for a further appearance to be held 8 February 2010;
- VII. **REMINDS** the Accused that, according to Rule 50 (C), he is entitled to file preliminary motions pursuant to Rule 72 within 30 days of the filing of the Amended Indictment;
- VIII. **DISMISSES** as moot the Defence's motion filed on 10 November 2009 alleging defects in the form of the original Indictment.

Arusha, 3 February 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Vagn Joensen
Judge


Aydin Sefa Akay
Judge

