



UNITED NATIONS
NATIONS UNIES

ICTR-01-75-I
23-11-10
(1603-1596)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1603
PM

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Gberdao Gustave Kam
Vagn Joensen

Registrar: Adama Dieng

Date: 23 November 2010

THE PROSECUTOR

v.

Jean UWINKINDI

CASE NO. ICTR-2001-75-PT

JUDICIAL RECORDS ARCHIVES
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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

Office of the Prosecution:
Richard Karegyesa
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Defence Counsel for Jean Uwinkindi:
Claver Sindayigaya
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RM

INTRODUCTION

1. On 21 September 2001, the Indictment was confirmed against Jean Uwinkindi, containing three counts (genocide, conspiracy to commit genocide and extermination as a crime against humanity). Uwinkindi pled not guilty to all counts during his initial appearance on 9 July 2010.¹
2. The Prosecution filed a motion for leave to amend the Indictment on 21 September 2010, which seeks to: (i) add more detail to the charges based upon new evidence available to the Prosecution; (ii) withdraw the count of conspiracy to commit genocide; (iii) correct Jean Uwinkindi's name; (iii) add joint criminal enterprise ("JCE") and aiding and abetting as forms of participation; and (iv) render the Indictment consistent with the Tribunal's recent jurisprudence.²
3. Jean Uwinkindi opposes most of the amendments.³
4. The Prosecution has filed a request that the case be referred to Rwanda pursuant to Rule 11 *bis* of the Rules of Procedure and Evidence. The setting of a date for the commencement of the trial before the Tribunal, if any, awaits the outcome of the referral request.

DELIBERATIONS

5. Rule 50 allows an indictment to be amended after the initial appearance of the Accused with leave of a Trial Chamber. In deciding whether to grant leave to amend the Indictment, the Trial Chamber shall examine each of the counts in the Indictment and any supporting materials provided by the Prosecution to determine whether a case exists against

¹ T. 9 July 2010, p. 8.

² Prosecutor's Request for Leave to File an Amended Indictment, filed on 21 September 2010 ("Motion"); Prosecutor's Reply to the Defence's Response to the Prosecutor's Request for Leave to File an Amended Indictment, filed on 8 October 2010 ("Reply"); Corrigendum to the Prosecutor's Request for Leave to File an Amended Indictment, filed on 23 September 2010; Corrigendum to the Prosecutor's Request for Leave to File an Amended Indictment, filed on 5 October 2010.

³ Defence Response to the Prosecutor's Request for Leave to File an Amended Indictment, filed on 5 October 2010 ("Response").

the Accused.⁴ Other factors to be considered include: (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 prejudice to the Defence, if any, caused by the amendment.⁵

Uncontested Changes to the Indictment

6. The Defence does not oppose the addition of greater specificity in the proposed Amended Indictment, the withdrawal of the count of conspiracy to commit genocide and the correction of Jean Uwinkindi's name.⁶ The Chamber finds that greater specificity and the deletion of a count as well as the correction of Jean Uwinkindi's name will provide an ameliorating effect that does not prejudice Uwinkindi. Therefore, the Chamber grants these changes.

The Addition of JCE

7. The Defence contends that the addition of JCE as a form of participation would not be ameliorating,⁷ arises from a lack of the Prosecution's diligence,⁸ and will cause prejudice and delay.⁹

8. Jean Uwinkindi argues that the addition of JCE will cause a reduction in clarity and precision with respect to the case he must meet as it a "nebulous and imprecise concept".¹⁰ Moreover, Uwinkindi argues that the Chamber should consider adopting an approach which interprets the term "committing" without reference to JCE because it is unlikely to be endorsed by the International Criminal Court ("ICC") due to "abundant criticism". Additionally, Uwinkindi contends that the usefulness of JCE as a tool in fair prosecutions is ending.¹¹

⁴ Rule 50(A)(ii) and Rule 47 (E) and (F) of the Rules; Article 18 of the Statute; See also *Prosecutor v. Ephrem Setako*, Case No. ICTR-04-81-1, ("*Setako*") Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007 ("*Setako* Decision"), para. 6.

⁵ See generally *Prosecutor v. Casimir Bizimungu, Justin Mugenzi, Jérôme-Clément Bicamumpaka and Prosper Mugiraneza*, 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 Indictment (AC), 12 February 2004 ("*Bizimungu et al.* Appeal Decision") para. 16; *Setako* Decision, para. 6.

⁶ Response, para. 3.

⁷ *Ibid.*, para. 7.

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*, para. 16.

¹⁰ *Ibid.*, paras. 7-8.

¹¹ *Ibid.*, para. 9.

9. The Chamber recalls that there are clear established requirements that the Prosecution must follow when attempting to prove the existence of a JCE, which are set out by the jurisprudence of the Appeals Chamber.¹² Accordingly, the Chamber does not consider that the addition of JCE in the Indictment will cause a reduction in clarity.

10. Jean Uwinkindi contends that the Prosecution was not diligent in adding JCE to the proposed Amended Indictment now instead of years ago and has thus sought an unfair tactical advantage.¹³ Uwinkindi notes decisions in the cases of *Muvunyi* and *Setako* purportedly supporting his argument where leave was not granted because the Chamber found that the Prosecution was not diligent in filing a request to amend the indictment when it had the information in its possession earlier. However, in both the *Muvunyi* and *Setako* cases the circumstances were different.¹⁴ The accused in those cases had been arrested and transferred to the Tribunal approximately three to five years prior to the Prosecution bringing the proposed amended indictment. In this case, the Prosecution has brought the proposed Amended Indictment only two months after Uwinkindi's initial appearance and less than two months after Lead Counsel was appointed. Further, the date for the start of trial has not yet been set. The Chamber finds that the delay of two months is reasonable and that the Prosecution did not lack diligence.

11. Jean Uwinkindi further contends that there is prejudice to him arising from the very nature of JCE and its interpretation in the jurisprudence.¹⁵ Uwinkindi also notes that he must now investigate 15 additional named persons in the proposed Amended Indictment.¹⁶ Lastly, he contends that the addition of JCE will add significant supplementary investigations and if the Chamber does not provide adequate time to conduct this investigation he will be prejudiced. As stated above, the Chamber recalls that JCE is a defined and accepted form of participation in the jurisprudence of the Tribunal. Moreover, the Chamber will provide

¹² The doctrine was first described by the Appeals Chamber in *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Judgment (AC), 15 July 1999, paras. 188, 195-226. See also *The Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1, Judgment (AC), 28 February 2005, paras. 79-80, 99; *The Prosecutor v. Mitar Vasiljevic*, Case No. 98-32-1, Judgment (AC), 25 February 2004, paras. 94-95; *The Prosecutor v. Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgment (AC), 13 December 2004, para. 461-462, 466, 468; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgment (AC), 27 November 2007.

¹³ Response, paras. 10-15.

¹⁴ *Setako*, Decision on the Prosecutor's Request to Amend the Indictment, 18 September 2007; *The Prosecutor v. Tharcisse Muvunyi*, Case No. 2000-55A-PT, Decision on the Prosecutor's Motion for Leave to File an Amended Indictment, 23 February 2005.

¹⁵ Response, para. 17.

¹⁶ *Ibid.*, para. 18.

Uwinkindi with adequate time and resources to conduct his investigations. Therefore, the Chamber does not find prejudice that would arise from the addition of JCE.

The Addition of Aiding and Abetting

12. The Defence contends that the addition of aiding and abetting as a form of participation would not be ameliorating¹⁷, arises from a lack of the Prosecution's diligence¹⁸, and will cause prejudice and delay¹⁹.

13. Jean Uwinkindi argues that the addition of aiding and abetting does not provide clarity or precision with respect to the case to be met by the Defence.²⁰ He further argues that the Prosecution has not sufficiently pled the form of participation in the proposed Amended Indictment as it has not set forth the acts by which Uwinkindi planned, instigated, ordered or aided and abetted the crime.²¹ The Chamber recalls that where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.²² The Chamber further recalls that the *actus reus* for aiding and abetting requires it be proven that the alleged aider and abettor committed acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime.²³ The Chamber finds that numerous paragraphs of the proposed Amended Indictment in Count I allege particular acts or a particular course of conduct that, if proven, may amount to aiding and abetting.²⁴

14. With respect to the diligence of the Prosecution and the likely delay or prejudice to the Accused, the Chamber recalls, as mentioned above, that the Prosecution filed this proposed Amended Indictment only two months after Jean Uwinkindi's initial appearance and is therefore diligent in bringing this change promptly. Further, the Chamber will provide

¹⁷ *Ibid.*, paras. 20-21.

¹⁸ Response, paras. 22-23.

¹⁹ *Ibid.*, para. 24.

²⁰ *Ibid.*, para. 20.

²¹ *Ibid.*, para. 21.

²² *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 25.

²³ *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), 12 March 2008, para. 44.

²⁴ For example, para. 8 alleges a meeting was convened, in part, by Jean Uwinkindi to order or instigate Hutu civilians to kill Tutsi; para. 12 alleges that Uwinkindi mobilized and transported armed attackers; para. 13 alleges a meeting Uwinkindi attended and para. 15 alleges that Uwinkindi was often present and/or was aware of forcible removals and killings of Tutsi civilians.

Uwinkindi with sufficient time and resources to conduct his investigation and therefore the addition of aiding and abetting will not prejudice him.

The Addition of the Charge of Killing Gashomba

15. Jean Uwinkindi argues that the addition of the allegation is not ameliorating²⁵ and arises from a lack of the Prosecution's diligence.²⁶

16. The Chamber finds that this addition in paragraph 14 of the proposed Amended Indictment does have an ameliorating effect as it provides precision as to alleging when, where and who Jean Uwinkindi allegedly killed. With respect to the diligence of the Prosecution, the Chamber notes that as the proposed Amended Indictment is brought only a short while after Uwinkindi was transferred to the Tribunal. Therefore, the Chamber finds that the Prosecution was diligent in bringing this allegation at this early stage of the pre-trial process.

17. However, the Chamber finds that this new allegation of Jean Uwinkindi personally killing Gashomba constitutes a new charge. 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).²⁷

18. The Chamber recalls that paragraphs 19, 29 and 38 of the original Indictment dealt solely with Jean Uwinkindi allegedly being present during an attack in early April. However, the amended sentence in paragraph 14 of the proposed Amended Indictment alleges that Uwinkindi personally shot and killed a named person. Shooting and killing is an act that gives rise to a new legal prohibition infringed upon under Articles 2 (a) of the Statute and constitutes a new charge. The Chamber further finds that there is sufficient *prima facie* supporting materials for this new charge.

²⁵ Response, para. 25.

²⁶ *Ibid.*, para. 26.

²⁷ *The Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision on 23 February 2005 (AC), 12 May 2005, para. 19. See also *The Prosecutor v. Callixte Kalimanzira*, Case No. ICTR-05-88-T, Judgement (TC), 22 June 2009, para. 189.

Further Initial Appearance

19. Both Parties agree that a further appearance should be held pursuant to Rule 50 (B) so that Jean Uwinkindi can plead to the Amended Indictment with his corrected name. The Chamber orders a further appearance pursuant to Rule 50 (B) since there is a new charge in the Amended Indictment.

Clarifications to Amended Indictment

20. The Chamber, *proprio motu*, has reviewed the proposed Amended Indictment and has found the following issue which needs to be addressed by the Prosecution. In paragraph 9 of the proposed Amended Indictment, Jean Uwinkindi is alleged to have attacked Tutsi in their homes from 7 April 1994. The Chamber recalls that a broad date range, in and of itself, does not invalidate a paragraph of an Indictment.²⁸ Furthermore, in light of the events that occurred in Rwanda in 1994 it is not always possible to be precise as to the specific date on which the crimes charged were committed.²⁹ However, the date range should be balanced with the Accused's right to be informed in detail about the nature and cause of the charge against him in order to allow a comprehensive defence to be raised.³⁰ Paragraph 9 provides a start date but no end date for the alleged crime. The Chamber finds that the Prosecution must narrow the range of possible dates in order to provide Uwinkindi with sufficient notice as to the dates the crimes were allegedly committed.

FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** the Prosecution's Motion, subject to the clarification below;
- II. **ORDERS** the Prosecution to narrow the date range in paragraph 9 of the proposed Amended Indictment;
- III. **ORDERS** the Prosecution to file the Indictment as amended in accordance with this decision in English by 25 November 2010;
- IV. **ORDERS** that a further appearance shall be held 1 December 2010 at 2 p.m. as provided for under Rule 50 (B); and

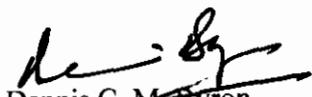
²⁸ *Muvunyi*, Judgement (AC), 29 August 2008, para. 58.

²⁹ *The Prosecutor v. Emmanuel Ndinabahizi*, Case No. ICTR-01-71-A, Judgement (AC), 16 January 2007, para. 20.

³⁰ *Id.*

V. **REQUESTS** that the Registrar make arrangements for a further appearance to be held
1 December 2010.

Arusha, 23 November 2010, done in English.


Dennis C. M. Byron
Presiding Judge


Gberdao Gustave Kam
Judge


Vagn Joensen
Judge

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