

ICTR-95-1B-I

**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

**21-01-2004
(1012-1008)**

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TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 21 January 2004

THE PROSECUTOR

v.

Mikaeli MUHIMANA

Case No. : ICTR-1995-1B-I

JUDICIAL
2004 JAN 21 A 9:45
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DECISION ON MOTION TO AMEND INDICTMENT

The Prosecutor

Charles Adeogun-Phillips
Wallace Kapaya
Renifa Madenga

The Defence

Professor Nyabirungu Mwene Songa

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Prosecution "Request for Leave to Amend an Indictment", etc., filed on 17 April 2003;

CONSIDERING the "Mémoire de la Défense en réponse", etc., filed on 14 July 2003; and a Prosecution letter dated 14 January 2004, entitled "Issues Raised in the Muhimana Status Conference";

HEREBY DECIDES the motion.

INTRODUCTION

1. The original Indictment against the Accused Mikaeli Muhimana, charging him jointly with seven other co-defendants, was confirmed on 28 November 1995. An amendment to the Indictment, dated 29 April 1996, was confirmed on 6 May 1996. On 14 April 2003, noting that three of the co-defendants had already been tried separately and that three others remained at large, Trial Chamber I granted the Prosecution motion to try the Accused separately and to file an amended Indictment against him individually. That Indictment was filed on 7 May 2003, and is the object of the Prosecution's present motion for amendment.

SUBMISSIONS

2. The proposed amendments remove five charges from the current Indictment; add two new charges; provide more detailed particulars of events already mentioned; and describe new events not previously mentioned. The Prosecution submits that these amendments accurately reflect the totality of the evidence of the Accused's criminal conduct, as developed from its ongoing investigations. In determining whether to grant leave for the amendments, the Prosecution's need to present all relevant evidence must be balanced by the right of the Accused to an expeditious trial. No undue delay will be occasioned by granting these amendments: five of the existing charges are being withdrawn; the fresh evidence supporting the new charges has already been disclosed to the Defence, thus negating any surprise; and, even assuming that some delay in the start of the trial arises from these amendments, the total period of the Accused's detention would still comply with international standards. The Prosecution states that it would be ready to commence trial immediately on the basis of the amended Indictment.

3. The Defence objects to the additional charges on a number of grounds. The amendment would cause further delay in the trial of the Accused, who has been in custody for almost four years. If the new charges are approved, the Accused would exercise his right under Rule 50 to raise preliminary motions and, in any event, there is no guarantee that the Prosecution would not attempt to amend the Indictment again at some later time. Specific paragraphs of the amended Indictment are said to be unduly vague as to the date of events, identification of victims, and means by which they were committed. Further, the amended Indictment does not satisfy the standard of a *prima facie* case against the Accused and should be justified by disclosure of any new supporting material for review by the Defence and the Chamber. If the Prosecution is granted leave to amend the Indictment, the Defence requests that it be granted at least six months to conduct further investigations. The Defence does not object to the Prosecution request to withdraw five charges against the Accused.

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DELIBERATIONS

4. Rule 50 of the Rules of Procedure and Evidence ("the Rules") permits a Trial Chamber to grant leave for the amendment of an Indictment. Case law has placed the onus on the Prosecution to set out the factual or legal justifications for amendments which may include, for example, a fuller and more accurate description of the "the totality of the criminal conduct of the accused".¹ 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

5. 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 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

¹ *Prosecutor v. Anatole Nsengiyumva*, Case No. ICR-96-12-T, Decision on the Prosecutor's Request for Leave to Amend the Indictment (TC), 2 September 1999, para. 10; *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-T, Decision on the Prosecutor's Request for Leave to File an Amended Indictment (TC), 5 November 1999, para. 15;

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-2001-73-1, 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.

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.

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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

6. In summary, the factors to be weighed in determining whether to grant leave to amend 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.

7. The proposed Indictment substantially modifies the current Indictment. The current Indictment contains only six paragraphs of very general factual allegations to support seven counts. The proposed Indictment offers forty-one paragraphs of factual allegations, in many cases describing the place and date of events, the presence of other persons, and the names of victims, in respect of four counts. The new counts charge the Accused with rape as a crime against humanity and add complicity in genocide in the alternative to the charge of genocide. The proposed Indictment also provides a much more detailed and comprehensive account of the criminal acts alleged and the Prosecution theory of criminal liability. The modifications of the Indictment will aid the Defence in knowing the nature of the case which it must meet and, accordingly, enhance the fairness of the trial. A comparison of the general allegations and facts described in the current Indictment with the detailed account in the proposed Indictment shows that the fairness of the trial will be very substantially enhanced.

8. The Prosecution argues that these additional details have emerged as a result of ongoing investigations and have, in substance, already been disclosed to the Defence through disclosure of witness statements. 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. In the absence of submissions from the Prosecution, the Chamber has carefully reviewed the disclosure of witness statements and their relation to the charges in the proposed Indictment, and also sought additional submissions from the Prosecution at the status conference held on 14 January 2004, which were made by letter of that same date, copied to the Defence.

9. As claimed by the Prosecution, the additional facts in the amended Indictment are based on allegations in witness statements that have been disclosed to the Defence. The majority of those allegations, including those of rape, are to be found in statements taken in 1999 and disclosed to the Defence on or before 14 March 2000. A few of the additional facts are based on allegation in statements taken on different dates in 2002, and were disclosed to the Defence in three bundles, on 5 and 24 December 2002 and 6 February 2003. In light of the broad allegations in the current Indictment, the Defence must have been on notice upon disclosure of the witness statements that the criminal conduct described therein might form part of the Prosecution case. For instance, the current Indictment alleges the criminal responsibility of the Accused for killings "throughout Kibuye prefecture" and in the "area of Bisesero". The new Indictment provides more precise particulars as to the location of killings and other criminal acts, specifying that they occurred in Gishyita Sector, Gishyita Commune; Mubuga Sector, Gishyita Commune; Mugonero Complex, Gishyita Commune; and in the Bisesero area, Gishyita and Gisovu Communes. Rather than changing or extending geographical scope, the effect of the proposed Indictment is to specify more precise locations

⁴ *Ibid.* para. 27.

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within the broad area defined in the current Indictment. In that sense, the Defence cannot reasonably argue that it has had no notice that events at these locations are part of the Prosecution's case. Nor can the Defence claim that the existence of the allegations of rape as part of the Prosecution case is a surprise. Most of those allegations were disclosed as early as 14 March 2000. The law of this Tribunal, as set forth in *Akayesu* is that a charge of genocide may be proven by rape in some circumstances.⁵ Accordingly, the Defence would not have been justified in treating the allegations of rape in the witness statements as irrelevant to the Prosecution case. The introduction of the separate count of rape in the amended Indictment cannot, therefore, be considered as a complete surprise to the Defence.

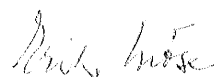
10. The introduction of the new charge of rape is a serious charge for which the Defence will require some time to prepare. In light of the extensive prior disclosure by the Prosecution, the Defence request for a delay of six months is excessive. The Chamber is willing to entertain requests for a shorter preparation period, but recognizes also that strong interests favour starting the trial as soon as possible, particularly the right of the Accused to be tried without undue delay. It is finally noted that in the present case, the removal of charges simplifies the preparations of the Defence.

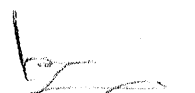
FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Prosecution leave to amend the Indictment;

INSTRUCTS the Prosecution to file its amended Indictment immediately.

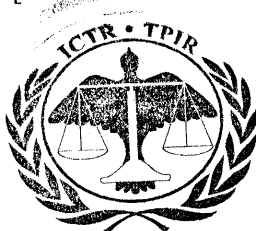
Arusha, 21 January 2004


Erik Møse
Presiding Judge


Jai Ram Reddy
Judge


Sergey Alekseevich Egorov
Judge

[Seal of the Tribunal]



⁵ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement (TC), paras. 507, 732-34.

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Date:	Transmitted: <i>21/1/4</i>		Document's date: <i>21/1/4</i>	
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