

ICTR-97-27-I
8.11.1999
(508 - 501)

Case No. ICTR-97-27-I



International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

TRIAL CHAMBER I

Original : English

Before: Judge Navanethem Pillay, Presiding
Judge Erik Møse
Judge Asoka de Zoysa Gunawardana

Registrar: Ms Marianne Ben Salimo

Decision date: 5 November 1999

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THE PROSECUTOR

vs.

HASSAN NGEZE
Case No. ICTR- 97-27-I

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

Office of the Prosecutor:

Mr. N. Sankara Menon
Mr. William Egbe
Ms Valentina Tsoneva
Mr. Alphonse Van
Mr. Mathias Marcussen

Counsel for the accused:

Ms Patricia Mongo

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: AMINATTA L.R. N'GUM
SIGNATURE: [Signature] DATE: 08/11/99.

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

SITTING AS Trial Chamber I composed of Judge Navanethem Pillay, presiding, Judge Erik Møse and Judge Asoka de Zoysa Gunawardana;

CONSIDERING a motion from the Prosecutor for leave to file an amended indictment, dated 1st July 1999, in the case of *The Prosecutor versus Hassan Ngeze*. The Defence Counsel filed a response thereto on 26 October 1999;

Having heard the parties on 20 October 1999.

Arguments by the Parties

The Prosecution argued *inter alia* that:

1. Pursuant to Rule 50 of the Rules of Procedure and Evidence of the Tribunal (“the Rules”), amended in June 1999, the Prosecutor seeks leave to amend the indictment:
 - to re-introduce the former charge of genocide;
 - to add a total of three new charges against the accused persons pursuant to Rule 50 of the Rules;
 - to expand the factual basis for certain existing counts;
 - to accord the indictment with current jurisprudence and charging practices of the Tribunal.
- 1.1 In support of the Motion to Amend the indictment, the Prosecution has submitted three Annexes marked “A”, “B” and “C” respectively. Annex “A” is the original indictment, dated 3 October 1997. Annex “B” is the proposed amended indictment, and Annex “C” provides documentary evidence in support of the new counts proposed in the amendment to the indictment against the accused.
- 1.2 The amendment of the indictment is justified in law, as Rule 50 of the Rules and the jurisprudence established by the Tribunal allow for the amendment of the indictment after the initial appearance of the accused.

- 1.3 The amendment of the indictment is justified on the available evidence against the accused. The additional counts proposed as an amendment to the existing indictment accurately reflect the alleged criminal conduct of the accused. The amendment sought is based on evidence presently available to the Prosecution, which was not available on 23 October 1997, when the original indictment against the accused was confirmed. The Prosecution's on-going investigation has uncovered evidence of the accused's use of the media, in his position as editor in chief of the *Kangura* newspaper, to plan and prepare the genocide in Rwanda in 1994. The Prosecution has also uncovered evidence of the accused's involvement in a conspiracy that included the creation of the extremist Hutu party *Coalition Democratic du Rwanda* ("CDR") and the massacres in the Prefecture of Gisenyi.
- 1.4. The evidence in support of the additional charges will facilitate a composite description of the interrelated acts of two other individuals, Ferdinand Nahimana and Jean-Bosco Barayagwiza, who used the media to plan, prepare and execute the alleged crime of conspiracy to commit genocide. The proposed amendment will expedite the administration of justice and will facilitate the joinder of the trials of the accused and of the above-named individuals who have been charged with involvement in the same conspiracy.
- 1.5 In a previous decision on the Prosecution's motion to amend the indictment, see *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Case No. ICTR-97-21-1, the Tribunal has ruled that "there is no need for it to enquire whether or not a *prima facie* case has been established, since the Chamber has only been seized with a motion to amend". However, the Chamber must be satisfied that there exist sufficient grounds to support the additional charges.
- 1.6 The delay in bringing the instant case to Court is due to the particular complexities of the case (the accused being a prominent person, the complicated nature of his activities, the need to translate newspaper articles and radio broadcasts from the Kinyarwanda language into French and English, and the discovery of new evidence).
- 1.7 Although the accused has a right to an expeditious trial, this right must be weighed against the Prosecution's duty to present the full scope of the available evidence at the trial. The amendment of the indictment will enable the Prosecution to present all relevant evidence at the trial.

2. The Defence argued *inter alia* that:

- 2.1 The Chamber lacks competence to hear the present motion. Most of the facts which are alleged in the proposed amended indictment and which support both old and new counts occurred between 1990 and 1993. Such alleged facts extend beyond the mandate of the Tribunal, which is limited to events which occurred in Rwanda in 1994.
- 2.2 The Prosecution has proposed an amendment to an unconfirmed indictment, which lacks legal standing. On 3 October 1997, the confirming judge rejected the count of genocide for lack of sufficient supporting documentation. To date, the Prosecution has not complied with the 3 October 1997 order, and the accused has not received an indictment, pursuant to such order. Although a properly drafted indictment was ordered by the confirming judge on 3 October 1997, after two years no such indictment has been furnished in either of the two official languages of the Tribunal, French or English, to the Registry, the Trial Chamber, the accused or the accused's counsel. Accordingly, the Prosecution has violated Rule 47 (G) of the Rules, which reads:

“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 to 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.”
- 2.3 The Prosecution has produced no new evidence to support the additional charges in the proposed indictment. The Prosecution's argument that it is relying on evidence gathered in the course of recent ongoing investigations must be rejected, since the Prosecution has failed to adduce new evidence to establish a *prima facie* case in support of the present motion.
- 2.4 The Prosecution has not disclosed Annex “C” to the accused. The alleged new evidence contained in this annex, which has been provided to the Trial Chamber, should be disclosed immediately to the accused to afford him the opportunity to know the nature of the alleged facts and to utilise such information in response to this motion. Failure to divulge such information is a violation of the accused's right to a fair trial. Further, in the interest of justice, it is unfair for the Chamber to allow the proposed amendment to the indictment, on the basis of allegations contained in Annex “C”.
- 2.5 The new facts alleged in the proposed amendment lack precision regarding, among other things, the names, the dates, the issues presented in the *Kangura* newspapers, and the identities of the subordinates of the accused.

- 2.6 If the amendment of the indictment is granted, it could result in undue delay in the commencement of the trial against the accused, thus causing severe prejudice to the accused.

AFTER HAVING DELIBERATED

The Tribunal states the following

With Regard to the Facts Relating to the Time Period Prior to 1994

3. The Chamber has considered the arguments of the parties. The Defence has argued that the majority of the facts cited in Paragraphs 5.3, 5.4, 5.6, 5.7, 5.9, 5.11, 5.21, 5.22, 5.23, 5.28, 5.29, 6.7, 6.8, 6.11, and 6.12 refer to events that occurred before 1994, although the Tribunal's mandate is limited to the events of the genocide of 1994. After careful review of the said paragraphs, the Chamber holds that many of the events, while related to a time period preceding 1994, provide a relevant background and a basis for understanding the accused's alleged conduct in relation to the Rwandan genocide of 1994. Paragraph 5.3, for example, relates to the creation of the newspaper *Kangura*. This newspaper allegedly was one of the primary instruments used by the media to disseminate messages of hatred against the Tutsi population. Thus, such information is directly relevant to events that occurred in 1994. The Chamber has considered the totality of the facts alleged and has noted that the Prosecution does not rely solely on the information in the paragraphs cited by the Defence, but also on facts related to the accused's alleged criminal conduct during 1994. Moreover, the Trial Chamber holds that an assessment of the acts alleged in the indictment is an evidentiary matter, the truth of which must be proved at trial.

With Regard to the Confirmation of the Indictment

4. At the hearing on 19 October 1999, the Trial Chamber raised the issue of the Prosecution's non-compliance with the confirming order of 3 October 1997. On 20 November 1997, the accused made his initial appearance before the Trial Chamber. At this time he was not asked to plead to the count of genocide. Further, on 31 October 1999, the Trial Chamber finally received the amended indictment related to the above-mentioned order. The extreme lateness of the Prosecution's compliance with the 3 October 1997 order is unjustifiable. The Chamber will no longer tolerate such negligence, which impacts the whole trial process and may well constitute grounds for penalties to be

imposed. However, the Chamber is of the view that the accused has not been prejudiced, as his rights were protected at the initial appearance.

5. The Chamber has reviewed the Defence's argument that no additional facts have been produced to support the new count of genocide. However, the Chamber is of the view that new facts now have been added to support the count of genocide, although the confirming judge rejected a proposed count of genocide on 3 October 1997 due to lack of supporting evidence. It is to be noted that the dismissal of a count, at the time of the confirmation, does not preclude the Prosecution from introducing "an amended indictment based on the acts underlying that count, if supported by additional evidence", pursuant to Rule 47 (I) of the Rules. When the Prosecution is able to adduce sufficient supporting material, the Prosecution may move to reintroduce the count of genocide against the accused. It is to be further noted that whether such alleged additional facts lay sufficient grounds for conviction of the accused of genocide is a matter for the Chamber to decide at the trial on the merits.

With Regard to the Disclosure of Annex C

6. The Defence has argued that non-disclosure of Annex "C" is a violation of the accused's right. The Trial Chamber observes that Annex "C" constitutes the supporting material described in Rule 66 A (i) of the Rules. Pursuant to this Rule, the Prosecution shall disclose said documents "within 30 days of the initial appearance of the accused". Indeed disclosure is required only if the proposed amendment is granted and if, pursuant to Rule 50, the accused makes another initial appearance on the new charges.
7. During its deliberations the Chamber has not relied on Annex "C". Rather the Chamber has based its decision, to allow the proposed amendment to the indictment, solely on the basis of oral arguments and written documents submitted by both the Defence and the Prosecution. Annex "C" will be disclosed in accordance with the provisions of Rule 66 A (i). It is to be observed that the Judges of the Trial Chamber have not relied on unfounded allegations and have not acted as confirming Judges, contrary to the contention of the Defence. Pursuant to Rule 47 (E), the determination of whether a *prima facie* case exists against the accused was made by the confirming Judge on 3 October 1997, and not by the Trial Chamber, seized with a Motion to Amend the Indictment, pursuant to Rule 50. On 10 August 1999, The Tribunal in *The Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, Case No. ICTR-97-21-I, decided that "there is no need to inquire whether or not a *prima facie* case has been established since the Chamber has only been seized with a motion to amend, pursuant to Rule 50".
8. The Trial Chamber notes that pursuant to Rule 72 (B) (ii) of the Rules, the Defence has the opportunity to raise any objections on defects in the form of the indictment. This Rule further provides that such objections may be raised within sixty days following disclosure of the supporting material. The accused, therefore, suffers no prejudice if disclosure of the supporting material is not made at this stage of the proceedings.

With Regard to Whether the Amendment of the Indictment Will Cause Undue Delay

9. Pursuant to Article 20 of the Statute, the Trial Chamber must ensure that the trial of the accused proceeds without undue delay. In ascertaining whether a delay in the criminal proceedings against the accused is "undue", the Trial Chamber has considered the nature, gravity, and complexity of the case against the accused and any prejudice that the accused may suffer. Accordingly, the Trial Chamber is of the opinion that an amendment to the indictment will not result in any additional delay in the commencement of the trial against the accused and that he will not suffer any prejudice.

10. The Trial Chamber is satisfied that sufficient grounds exist, both in fact and in law, to justify the grant of leave to amend the indictment, as requested by the Prosecution.

FOR THESE REASONS:

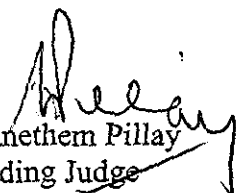
THE TRIBUNAL


GRANTS leave to the Prosecutor to amend the indictment by:

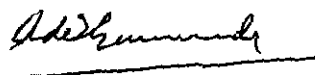
- (a) Re-introducing the former charge of GENOCIDE, pursuant to article 2 (3)(a) and 6(1) of the Statute;
- (b) adding the new charge of CONSPIRACY TO COMMIT GENOCIDE, pursuant to article 2(3)(b) and 6(1) of the Statute;
- (c) adding the charge of COMPLICITY IN GENOCIDE, pursuant to article 2(3)(e), 6(1) and 6(3) of the Statute;
- (d) adding the charge of CRIMES AGAINST HUMANITY (EXTERMINATION) pursuant to Article 3(b), 6(1) and 6(3) of the Statute.

ORDERS the Registrar to immediately file and serve the amended indictment on the accused and their Counsel in French and in English.

Arusha, 5 November 1999


Navanethem Pillay
Presiding Judge


Erik Møse
Judge


Asoka de Zoysa Gunawardana
Judge

Séal of the Tribunal

