



109R-09-81-1  
 18-09-2007  
 (1253-1248)

Tribunal Pénal International pour le Rwanda  
 International Criminal Tribunal for Rwanda

1253  
 S. M. M.

Trial Chamber I

**Before:** Judge Erik Mose, presiding  
 Judge Jai Ram Reddy  
 Judge Sergei Alekseevich Egorov

**Registrar:** Mr. Adama Dieng

**Decision of:** 18 September 2007

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 JUDICIAL SERVICES DIVISION  
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**THE PROSECUTOR**

v.

**Ephrem SETAKO**

*Case No. ICTR-04-81-I*

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**Decision on the Prosecution's Request to Amend the Indictment**

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Office of the Prosecutor:

Ms. Ifeoma Ojemeni-Okali  
 Mr. Simba Mawere

Counsel for the Defence:

Mr. Stefan Kirsch

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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's motion for leave to amend the indictment, filed on 15 June 2007;<sup>1</sup>

CONSIDERING the Defence Response, filed on 20 August 2007,<sup>2</sup> and the Prosecution's Reply filed on 27 August 2007;<sup>3</sup>

HEREBY DECIDES the motion.

## INTRODUCTION

1. On 22 March 2004, the Indictment was confirmed against the Accused, containing six counts (genocide; or in the alternative complicity in genocide; murder as a crime against humanity; extermination as a crime against humanity; as well as two counts of serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II of 1977).<sup>4</sup> The Accused pleaded not guilty to all counts during his initial appearance on 22 November 2004.<sup>5</sup> A date for the commencement of trial has yet to be fixed. It nonetheless follows from the status conference of 12 July 2007 that the case could be heard in the coming months.<sup>6</sup>

2. The Prosecution seeks leave to file an amended indictment charging two additional counts of conspiracy to commit genocide and direct and public incitement to commit genocide.<sup>7</sup> According to the Prosecution, these new charges are supported by existing material facts pleaded in the Indictment and more accurately capture the totality of the Accused's criminal conduct.<sup>8</sup> In addition, the Amended Indictment seeks to add a number of new factual allegations in support of the proposed and existing charges and modes of liability.<sup>9</sup> The Prosecution submits that these new allegations provide details and clarifications, reflecting recent appellate jurisprudence, in relation to the modes of liability that give rise to the Accused's criminal responsibility.<sup>10</sup> It further contends that the new allegations add details and make certain corrections so as to render the proposed and existing charges clearer and more precise.<sup>11</sup> Finally, the Prosecution proposes removing the factual allegations found at paragraphs 16, 19 through 19.5, and 20.3 of the Indictment because, based on currently available evidence, it is no longer in a position to prove these allegations at trial.<sup>12</sup>

3. In the Prosecution's view, the Accused will not be prejudiced because the proposed Amended Indictment provides greater clarity and more information connecting his individual acts

<sup>1</sup> Prosecutor's Motion for Leave to Amend Indictment, 15 June 2007 (the "Motion") with the proposed amended indictment as an annex to the Motion (the "Amended Indictment").

<sup>2</sup> Defence Response to the Prosecutor's Motion for Leave to Amend the Indictment, 20 August 2007 (the "Response").

<sup>3</sup> Prosecutor's Reply to Defence Response to the Prosecutor's Motion for Leave to Amend Indictment Dated 15 June 2007, 27 August 2007 (the "Reply").

<sup>4</sup> Decision on Confirmation of an Indictment against Ephrem Setako, 22 March 2004, p. 2 (confirming the Indictment against the Accused filed on 22 March 2004 (the "Indictment")).

<sup>5</sup> T. 22 November 2004 p. 5.

<sup>6</sup> T. 12 July 2007 pp. 12-13.

<sup>7</sup> Motion, paras. 2, 10.

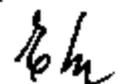
<sup>8</sup> Motion, paras. 10-12.

<sup>9</sup> Motion, paras. 2, 15-18.

<sup>10</sup> Motion, para. 2, 15-18; Reply, para. 12.

<sup>11</sup> Motion, paras. 2, 7, 20; Reply, paras. 14-22.

<sup>12</sup> Motion, para. 19.



and the crimes.<sup>13</sup> In addition, the Prosecution notes that a date had not yet been set for trial, and thus there is additional time for challenges to the Indictment and further investigations.<sup>14</sup> Furthermore, the Prosecution emphasizes that many of the amendments are based on material that has been previously disclosed to the Accused or resulted from ongoing investigations.<sup>15</sup>

4. The Defence alleges that deciding the motion at this stage would be premature because neither the motion nor the six additional witness statements supporting the proposed Amended Indictment have been translated into French, the working language of the Accused.<sup>16</sup> The Defence objects to the proposed Amended Indictment, on grounds that it significantly expands the case against the Accused, resulting in grave prejudice and necessitating further investigations.<sup>17</sup> Moreover, the Defence submits that the Prosecution has not justified the late filing of this amendment.<sup>18</sup> It further contends that the proposed amendments are not adequately grounded in the supported material.<sup>19</sup>

## DELIBERATIONS

5. The Chamber observes that the Prosecution's Motion was translated into French on 3 September 2007. The Chamber sees no reason to delay consideration of this decision pending the translation into French of the six additional witness statements used as supporting materials. Defence counsel's working language is English, and he has submitted extensive and detailed submissions on the merits of the Prosecution's request, after being granted additional time to respond. The supporting material will be translated into French in order to allow the Defence to prepare if the Chamber permits the Prosecution to amend the Indictment.

6. Rule 50 of the Tribunal's Rules of Procedure and Evidence (the "Rules") provides that, after the initial appearance of the Accused, an indictment may only be amended with leave of the Chamber. As established in the jurisprudence, there are three factors to be weighed in determining whether to grant leave: 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.<sup>20</sup> The Chamber must also consider whether a *prima facie* case exists with respect to any new charges in the proposed amendment.<sup>21</sup>

7. The Chamber notes that in some cases the proposed amendments better particularize the Prosecution's theory of criminal responsibility,<sup>22</sup> remove certain allegations,<sup>23</sup> and correct certain

<sup>13</sup> Motion, paras. 16, 20; Reply, paras. 25-28.

<sup>14</sup> Motion, paras. 21, 22; Reply, para. 29, 30.

<sup>15</sup> Motion, paras. 11-13; Reply para. 31.

<sup>16</sup> Response, paras. 8, 9.

<sup>17</sup> Response, paras. 20, 21, 25-134.

<sup>18</sup> Response, paras. 20, 135, 136-164.

<sup>19</sup> Response, paras. 20, 165-175.

<sup>20</sup> See generally *The 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 Indictment (AC), 12 February 2004, para. 16 ("*Bizimungu et al.* Appeal Decision"); *The Prosecutor v. Édouard Karamera 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, paras. 15, 20, 28 ("*Karamera et al.* Appeal Decision"); *The Prosecutor v. Jean Baptiste Gatete*, Case No. ICTR-00-61-I, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 21 April 2005, para. 3.

<sup>21</sup> Rule 50 (A)(ii) of the Rules.

<sup>22</sup> Amended Indictment, paras. 16-27.

<sup>23</sup> See Motion, paras. 2, 19 (referring to the removal of paragraphs 16, 19-19.5, 20.3 of the Indictment)

material facts, such as the locations of key meetings.<sup>24</sup> The Chamber considers that such amendments would have an ameliorating effect on the case.

8. Nevertheless, the majority of the proposed amendments seek to greatly expand the case against the Accused, as opposed to simply providing greater precision and clarity to vague allegations.<sup>25</sup> For example, the proposed Amended Indictment adds two new counts<sup>26</sup> and advances numerous new factual allegations in support of the proposed and existing charges.<sup>27</sup> In particular, the Amended Indictment refers to at least six additional events between 1990 and January 1994 wherein the Accused, *inter alia*, allegedly agreed to create and to participate in the formation and arming of the *Interahamwe* and other civilian militias for the purposes of killing the Tutsi population.<sup>28</sup> The proposed Amended Indictment also replaces several concrete allegations of the Accused's alleged criminal conduct in Kigali with more general allegations, which expand his criminal responsibility to include general supervisory authority over the Kigali *Interahamwe* and the killings at roadblocks established in that area.<sup>29</sup> In sum, the proposed Amended Indictment connects the Accused to at least seventeen additional events involving the preparation or execution of crimes against Tutsi civilians.<sup>30</sup> While this expansion of the charges is not itself a sufficient reason to deny the Prosecution's motion, the Appeals Chamber has held that "the risk of prejudice to the Accused from such expansions is high and must be carefully weighed."<sup>31</sup>

9. In view of the Prosecution's submission that the proposed counts are supported by allegations in the existing indictment and that many of the new factual allegations are based largely on material previously disclosed, the Prosecution does not appear to have exercised diligence in bringing forth these amendments more than three years after confirmation was originally sought. Although the Prosecution contends that some allegations arise from its ongoing investigations, it does not convincingly demonstrate that this material could not have been discovered and submitted to the Chamber at an earlier point in the exercise of due diligence. The Chamber observes that the most recent statements relied on by the Prosecution were taken more than a year ago. In addition, while the death or lack of cooperation of several potential witnesses might necessitate withdrawing certain factual allegations,<sup>32</sup> it does not adequately justify the addition of new factual allegations and new counts which could have been brought based on the original supporting material.

10. The principal issue is whether allowing the proposed amendments would unduly delay the proceedings or otherwise prejudice the Defence. In this respect, the Chamber is *not* persuaded by the Prosecution contention that any resulting prejudice to the Accused is mitigated by the prior disclosures to him. The Appeals Chamber has stated:

The fact that the expansion of counts charged may be derived from material already disclosed to the Accused does not automatically nullify prejudice to the Accused. It is to be assumed that an Accused will prepare his defence on the basis of material facts contained in the indictment, not on

<sup>24</sup> Cf. Amended Indictment, para. 44 (referring to the location of regular meetings at the residences of Joseph Nzirorera and his mother in *Mukingo* commune) with Indictment, para. 11.1 (referring to the location of regular meetings at the residence of Joseph Nzirorera in *Busogo* sector, *Nkuli* commune).

<sup>25</sup> The Appeals Chamber in the *Karemura et al.* case acknowledged that providing more accurate particulars to general allegations in fact enhanced fairness and expedite the trial. See *Karemura et al.* Appeal Decision, paras. 27, 29.

<sup>26</sup> Amended Indictment, paras. 28-45, 69-74 (Counts 1, 4).

<sup>27</sup> See, e.g., Amended Indictment, paras. 7, 8, 29-43, 56, 57, 60, 63, 64, 66-69, 71, 72, 74, 77, 78, 81.

<sup>28</sup> Amended Indictment, paras. 29-43.

<sup>29</sup> Cf. Indictment, para. 19-19.5 (alleging specific conduct at roadblocks in Kigali in April and June 1994) with Amended Indictment, paras. 7, 8, 28, 56, 57, 60.

<sup>30</sup> Amended Indictment, paras. 29-43, 56, 57, 60, 63, 64, 66-68, 77, 78, 81. The Chamber notes that many of the other paragraphs in the proposed Amended also contain new elements.

<sup>31</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 13 May 2005, para. 21 ("*Muvunyi* Appeal Decision").

<sup>32</sup> Reply, para. 33.

the basis of all the material that may support any number of additional charges, or expand the scope of existing charges.<sup>33</sup>

1249

11. Although a date for trial has not yet been set, it follows from the status conference of 12 July 2007 that the earliest possible trial date could be late November 2007.<sup>34</sup> The Chamber considers that permitting the Prosecution's proposed amendments in their entirety at this stage of the proceedings would certainly lead to an unfair tactical advantage if the trial commenced as originally envisioned at the end of this year or in early 2008. The Chamber nonetheless finds it appropriate to allow the Prosecution to make some of its proposed changes to the Indictment, which enhance trial fairness, such as better articulating its theories of criminal responsibility, removing any factual allegations it no longer wishes to pursue, and correcting or supplementing with additional detail any of the existing factual allegations.

12. The Chamber does not permit the Prosecution to add the proposed new counts of conspiracy to commit genocide (paragraphs 28-45) and direct and public incitement to commit genocide (paragraphs 69-74). In addition, the Chamber does not find it in the interests of justice to allow the Prosecution to add new paragraphs which contain vague or general factual allegations, in particular paragraphs 56, 57, 60, and 66.<sup>35</sup> It is clear that allowing these proposed amendments would substantially delay the scheduling and conduct of the proceedings by necessitating further investigations and preparation on the new and expanded charges. This would unnecessarily prolong the Accused's pretrial detention.

13. The Chamber finds it in the interests of justice to permit the remaining proposed amendments. In this respect, the Prosecution has advanced a number of new specific factual allegations in support of the existing charges, notably in paragraphs 63, 64, 67, 68, 77, 78, and 81 of the proposed Amended Indictment. Mindful that the Prosecution proposes to withdraw a number of factual allegations from the Indictment, the Chamber will permit the Prosecution to add these new factual allegations.<sup>36</sup> The Chamber considers that these additional factual allegations are described with sufficient specificity and are similar in character and proximate in time and place to incidents already enumerated in the existing Indictment in order to permit focused investigations by the Defence, if necessary. Moreover, the Prosecution has disclosed additional witness statements which, along with earlier disclosure, contain these allegations, mitigating to some extent any resulting prejudice.

14. No date has yet been set for trial, but the Chamber will take the need for further investigations into account in scheduling the trial in order to allow sufficient time to prepare. At this stage, it cannot see that the amendments will prevent the commencement of trial in early 2008. Any possible prejudice arising during the course of trial from this amendment can be substantially mitigated as the need arises by methods other than denying the amendment, such as granting adjournments or permitting the Accused to recall witnesses for cross-examination.<sup>37</sup>

15. Having reviewed the material tendered by the Prosecution in support of the additional new factual allegations, the Chamber is satisfied that a *prima facie* case exists with respect to the new factual allegations in the Amended Indictment. The Chamber also finds that the new allegations, if

<sup>33</sup> *Muvunyi* Appeal Decision, para. 22.

<sup>34</sup> T. 12 July 2007 pp. 12-13.

<sup>35</sup> The Chamber notes that paragraph 57 of the proposed Amended Indictment describes a specific event of weapons distribution. However, the proposed Amended Indictment does not refer to any specific criminal acts committed as a result of the distribution.

<sup>36</sup> Many of the other new allegations added to the Indictment are background (paras. 1-15) or better articulate the Prosecution's theory of criminal responsibility (paras. 16-27), which the Chamber does not consider problematic. See also footnote 22 above.

<sup>37</sup> See, e.g. *Bizimungu et al* Appeal Decision, para. 16; *Karemura et al* Appeal Decision, para. 28.

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proven, also support the existing charges. The Defence's principal complaints concerning whether the supporting material supports the new allegations pleaded in the proposed Amended Indictment relate to credibility issues and corroboration,<sup>38</sup> which are matters best reserved for consideration at trial.

16. Consequently, the Chamber grants the Prosecution's motion to amend the Indictment, in part, as set forth above. It follows from the Chamber's decision not to allow certain additions that the Prosecution might need to make other clarifying amendments such as removing the crimes of conspiracy and direct and public incitement to commit genocide from the purpose of the joint criminal enterprise as well as certain of its named members. As the Chamber is not permitting the Prosecution to add additional counts, the Chamber sees no reason hold a further additional appearance in order to plead.

**FOR THE FOREGOING REASONS, THE CHAMBER**

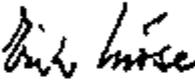
**GRANTS**, in part, the Prosecution's motion to amend the Indictment:

**PERMITS** the Prosecution to withdraw the factual allegations in paragraphs 16, 19 through 19.5, and 20.3 of the Indictment and to make the other proposed amendments set forth in the Amended Indictment annexed to the Motion, except as provided below;

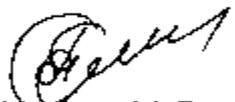
**DENIES** the Prosecution's requests to add the new counts of conspiracy to commit genocide (paragraphs 28-45) and direct and public incitement to commit genocide (paragraphs 69-74) as well as to add paragraphs 56, 57, 60, and 66 of the Amended Indictment;

**ORDERS** the Prosecution to file the Indictment as amended in accordance with this decision in French and English within five days of the filing of this decision.

Arusha, 18 September 2007

  
Erik Mose  
Presiding Judge

  
Jai Ram Reddy  
Judge

  
Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



<sup>38</sup> Response, paras. 20, 165-175.