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International Criminal Tribunal for Rwanda
CHAMBER I

1998 SEP 30 P 4: 54

OR: ENG

Before: Judge Laity Kama, Presiding
Judge Navanethem Pillay
Judge Willian H. Sekule

Registry: Mr. K. M. Mindua

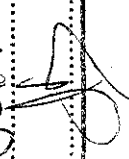
Decision of: 30 September 1998

THE PROSECUTOR
versus
PAULINE NYIRAMASUHUKO and ARSENE SHALOM NTAHOBALI
Case N°: ICTR-97-21-I

THE PROSECUTOR
versus
SYLVAIN NSABIMANA and ALPHONSE NTEZIRYAYO
Case N°: ICTR-97-29A and B-I

THE PROSECUTOR
versus
JOSEPH KANYABASHI
Case N°: ICTR-96-15-T

THE PROSECUTOR
versus
ELIE Ndayambaje
Case N°: ICTR-96-8-T

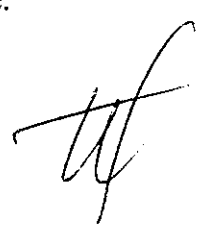
International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME COPIE CERTIFIÉE CONFORME A L'ORIGINAL PAR MOI	NAME / NOM: JOHN M. KIYEYEM	DATE: 30.9.1998
		SIGNATURE: 	

**DECISION ON THE STATUS OF THE HEARINGS FOR THE AMENDMENT
OF THE INDICTMENTS AND FOR DISCLOSURE OF SUPPORTING
MATERIAL**

Office of the Prosecutor: Mr. Chile Eboe-Osuji; Mr. Robert Petit; Mr. Frederic Ossogo.

Counsel for the Defence:

Ms. Nicole Bergevin for Pauline Nyiramasuhuko; Mr. Dominique Tricaud and Ms. Frederique Poitte for Arsene Shalome Ntahobali; Ms. Josette Kadji and Mr. Charles Tchakounte for Sylvain Nsabimana; Mr. Titinga Frederic Pacere for Alphonse Nteziryayo; Mr. Michel Marchand and Mr. Michael Boyer for Joseph Kanyabashi; Ms. Veronique Laurent for Elie Ndayambaje.



THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("the TRIBUNAL"),

SITTING AS Trial Chamber I composed of Judge Laïty Kama presiding, Judge Navanethem Pillay and Judge William H. Sekule;

CONSIDERING that the Prosecutor filed a motion dated 14 August 1998, for joinder of trials of the accused Pauline Nyiramasuhuko, Arsene Shalom Ntahobali, Sylvian Nsabimana, Alphonse Nteziryayo, Joesph Kanbabashi and Elie Ndayambaje;

CONSIDERING that the Prosecutor also filed four motions dated 14 July 1998 and 14 August 1998 respectively, for leave to file amended indictments in respect of all the accused;

CONSIDERING that all six accused have already made their initial appearance, pursuant to Rule 62 of the Tribunal's Rules of Procedure and Evidence (the "Rules");

CONSIDERING that Defence Counsels representing all six accused opposed the Prosecutor's motions;

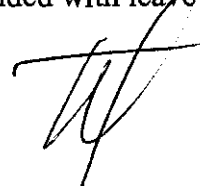
CONSIDERING that prior to the hearing of the motions for amendments of the respective indictments and the motion for joinder, the Parties raised certain preliminary motions which were heard at a hearing on 24 September 1998;

CONSIDERING that the Prosecutor raised a motion in limine, *inter alia*, requesting an order that the hearing for leave to amend the four indictments be held *ex parte* and that all six accused be excluded from participation at this hearing;

CONSIDERING that Defence Counsels raised a motion in limine, *inter alia*, requesting an order compelling the Prosecutor to disclose to the Defence, for the purpose of hearing the motions for amendment of the respective indictments, supporting material filed with the indictment, marked Annexure 'B';

On the status of the hearing for leave to amend the four indictments

1. The Prosecutor, relying on Rule 50 of the Rules, submitted *inter alia*, that:
 - the hearing for leave to amend the indictments must be held *ex parte* and not *inter partes*;
 - the Defence is therefore not entitled to participate in the hearing of the application for leave to amend the indictment.
2. The Defence Counsels submitted that all the accused have pleaded to the present indictments confirmed against them, and as such, they are entitled to be present at the hearing, dealing with the amendments of the indictments.
3. Defence Counsels further submitted that motion for the amendment of the indictments must be heard at an *inter partes* hearing, with the defence participating in the proceedings, since such amendment is sought under Rule 50 and not Rule 47 of the Rules.
4. The Tribunal notes that pursuant to Rule 50 of the Rules, after an initial appearance has been made by an accused, the indictment against that accused may only be amended with leave



of the Trial Chamber.

5. The Tribunal notes that the accused in question have made their initial appearance and pleaded to the various counts in their respective indictments.

6. The Presiding Judge noted at the hearing that the accused at this stage of the proceedings are represented by Counsel and as such they should be able to benefit from the advice of their Counsel.

7. The Tribunal upholds the principle of *Audi alteram partem* and finds that the Prosecutor's motions to amend the existing indictments against all six accused must be dealt with at an *inter partes* hearing, thus implementing the accused's right to participate at the hearing and granting the Defence the opportunity to present their submissions in respect of such amendments.

On the disclosure of Annexure 'B'

8. Defence Counsels submitted *inter alia*, that :

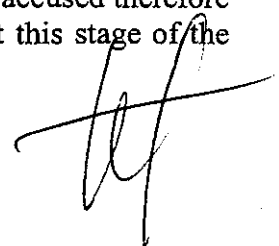
- the accused are entitled to disclosure of Annexure 'B', because it serves to inform the accused of the new factual allegations that led to the Prosecutor's motion to amend the indictment, thus enabling the accused to respond more effectively to the said motion;
- the Prosecutor in her motion to amend the indictment under Rule 50, is incorrectly using the procedure set out in Rule 47 of the Rules;
- the accused are entitled to disclosure of all documentation made available by the Prosecutor to the Judges, for their consideration.

9. The Prosecutor, relying on Rule 66 (A) (i) of the Rules, submitted that Defence are not entitled to Annexure 'B' at this stage of the proceedings since her obligation to disclose supporting material to the Defence only arises after the initial appearance of the accused.

10. The Tribunal notes that in terms of Rule 66 (A) (i), material submitted in support of the indictment at confirmation shall only be disclosed after the accused has made an initial appearance. Therefore, disclosure of any material in support of the proposed amended indictment, at this stage of the proceedings may be construed as pre-mature.

11. The Tribunal notes that Rule 66 is subject to the provisions of Rules 53 and 69. Rule 69 deals with the protection of victims and witnesses. It is further noted that a practice has evolved whereby Parties make application to the Tribunal for the implementation of certain protective measures for witnesses and victims. These applications are generally made after the confirmation of the indictment and after the initial appearance of the accused. Where such measures are in fact granted, this has a direct bearing on the timing, nature and extent of disclosure to the Defence. It is essential for the proper administration of justice to balance the interests of the victims and witnesses for protection and the rights of the accused for disclosure.

12. The Tribunal notes that pursuant to Rule 72, the Defence has the opportunity to raise any objections based on defects in the form of the indictment. This rule further provides that the accused may file a motion raising such objection within a period of sixty days following disclosure by the Prosecutor of supporting material pursuant to Rule 66 (A) (i). The accused therefore suffers no prejudice if disclosure of the supporting material is not made at this stage of the



proceedings.

13. The Tribunal distinguishes between the procedural requirements of Rules 47 and 50. In terms of Rule 47, a single judge reviewing an indictment presented for confirmation, is required to establish from the supporting material that a *prima facie* case exists against the suspect. A Trial Chamber seized with an application for leave to amend an indictment under Rule 50 against an accused who has already been indicted, has no cause to enquire into a *prima facie* basis for the charge. Since such a finding has been made in respect of each of the accused, it is not necessary for the Tribunal to consider the supporting material marked Annexure 'B', which according to the Prosecutor is made up of witness statements and these witnesses have to be protected.

14. In considering the Prosecutor's motions for leave to amend the indictments under Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of these motions and it is for the Defence to respond to these arguments.


FOR THE AFOREGOING REASONS,


THE TRIBUNAL RULES,


(i) that the supporting material marked Annexure 'B', shall not be subject to disclosure to the Defence by the Prosecutor;

(ii) that all hearings for leave to amend the indictments shall be held *inter partes*;

Arusha, 30 September 1998


Laity Kama
Presiding Judge


Navanethem Pillay
Judge


William H. Sekule
Judge

(Seal of the Tribunal)

