



# International Criminal Tribunal for Rwanda

## TRIAL CHAMBER II

OR: ENG

Before:

Judge William H. Sekule, Presiding

Judge Navanethem Pillay Judge Mehmet Güney

Registrar:

Dr. Agwu Ukiwe Okali

Decision of: 12 August 1999

THE PROSECUTOR

SYLVAIN NSABIMANA and **ALPHONSE NTEZIRYAYO** 

Case No. ICTR-97-29-I

# DECISION ON PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN AMENDED INDICTMENT

The Office of the Prosecutor: Japhet Daniel Mono Alphonse Van

Counsel for Alphonse Nteziryayo Mr. Frédéric Pacere

Counsel for Sylvain Nsabimana Mr. Charles Tchakounte



# THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (TRIBUNAL),

SITTING as Trial Chamber II, composed of Judge William H. Sekule presiding, Judge Navanethem Pillay, and Judge Mehmet Güney;

CONSIDERING the Indictment of 14 October 1997 against Sylvain Nsabimana (Nsabimana) and Alphonse Nteziryayo (Nteziryayo), confirmed on 16 October 1997 by Judge Lennart Aspegren;

CONSIDERING the Indictment "incorporating the changes following the confirmation procedure and the decision the Trial Chamber II dated 24 September 1998", received by the Registry on 28 June 1999 (Eng.);

CONSIDERING the Prosecutor's Request for Leave to File an Amended Indictment, dated 14 August 1998;

**CONSIDERING** Nsabimana's Reply to the Prosecutor's Motion for Leave to Amend the Indictment, dated 16 September 1998;

**CONSIDERING**, Nteziryayo's Reply to the Prosecutor's Motion for Leave to Amend the Indictment, dated 7 October 1998;

**CONSIDERING** the parties' submissions to the present motion at the hearing held on 10 August 1999;

NOTING this Chamber's oral decision on 12 August 1999 to this motion.

### Submissions of the Prosecution

In support of this motion, the Prosecution filed a written brief, along with Annex A (a copy of the proposed amended Indictment) and Annex B (supporting materials). Annex B was not disclosed to the Defence.

The Prosecution grounds its motion on Rule 50 of the Rules of Procedure and Evidence (Rules), and submits that:

The new charges accurately reflect the totality of the accused conduct and allow the Prosecution to present the full scope of evidence.

The proposed amended Indictment reflects current jurisprudence, and brings the proposed Indictment into line with current charging practices.

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The proposed amended Indictment is based upon new evidence attained through ongoing investigations after the confirmation of the Indictment, in particular evidence relating to a conspiracy to eliminate the Tutsi population in Rwanda.

The rights of the accused, pursuant to Articles 19(1) and 20(4) of the Statute, will continue to be respected and the Prosecution is ready to disclose new material and to commence trial following the Trial Chamber's decision on joinder.

#### The Defence Submissions

### Nsabimana

Nsabimana submits that a combined reading of Rule 50(A) and Rule 47(G) leads to the conclusion that the amended Indictment must be confirmed. Therefore, these Rules present a legal impediment that prevents the Trial Chamber from hearing the motion.

Nsabimana submits that Rule 50(C) restricts preliminary motions pursuant to Rule 72, to those in respect of new charges in the amended Indictment. And, consequently, that it would be impossible to invoke Rule 66 to request, for example, disclosure of the new supporting material.

Nsabimana submits that there are doubts as to the consistency and reliability of the new evidence that is the basis of the Prosecution motion. And, that the evidence presented does not support the new charges.

Nsabimana submits that amendment of the Indictment would jeopardize his right to a fair and expeditious trial.

### Nteziryayo

Nteziryayo submits that the validity of the present Indictment is in question and that this matter must be addressed prior to the motion for amendment.

Nteziryayo argues that, by re-casting the charges previously contained in the Indictment, the Prosecution intends to compel the Tribunal to void its previous confirmation, initial appearances and decisions. Because the Indictment has already been confirmed and the accused have made their initial appearances, this amounts to a violation of *res judicata*.

Nteziryayo submits that there is no evidence of the meeting of the minds in order to support the charge of conspiracy to commit genocide (new count 1).

Nteziryayo submits that new counts 7 and 8 amount to a different way of bringing forward anew the same allegations that were dismissed by the confirming Judge.

Nteziryayo submits that amendment of the Indictment would hinder, paralyze or delay the administration of justice.

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#### **Deliberations**

As a preliminary matter, the Trial Chamber has already addressed the validity of the present Indictment, in its oral decision of 12 August 1999, rendered in writing on 27 August 1999, pursuant to Nteziryayo's *Preliminary Motions Brought by the Defence Following the Initial Appearance of the Accused.* The parties are referred to the aforementioned decision, which will not be repeated here.

# Res Judicata

There is no violation of res judicata. The initial confirmation of the Indictment will remain valid, as will the initial appearances and Trial Chamber decisions. New pleas, motions and decisions will be based on the new charges or the expansion of the initial counts, as reflected in the proposed amended Indictment. The fact that certain proceedings may be overtaken by events does not violate res judicata.

# (Purported) Impediments Based upon the Rules

The Trial Chamber rejects Nsabimana's objection that is based upon Rule 50(A) and Rule 47(G) of the Rules. The pertinent part of Rule 50(A) states, "[i]f leave to amend is granted, Rule 47(G) and Rule 53 bis apply mutatis mutandis to the amended indictment." The pertinent part of Rule 47(G) states, "[t]he indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal." Relying on these Rules, Nsabimana concludes that the amended Indictment must be confirmed, thereby implying that the amended Indictment must be placed before a single Judge and confirmed afresh. The Trial Chamber disagrees. Pursuant to Rule 50(A), Rule 47(G) applies mutatis mutandis to the amended Indictment. The inclusion of mutatis mutandis means, in this instance, that the main point of Rule 47(G) applies to the amended Indictment even though the Rule may require alteration in order to apply. The main point of Rule 47(G) is that the Indictment shall be retained, certified and distributed in the manner specified, by the Registrar. Thus, the combined reading of Rule 50(A) and Rule 47(G) has no bearing on the process for amending an Indictment.

The Trial Chamber finds no impediment to the motion based upon Rule 50(C). Following an amendment to an Indictment, Rule 50(C) grants the accused a further period of sixty days in order to file *preliminary motions* pursuant to Rule 72, in respect of the new charges. The sixty days begins to run once the Prosecution has disclosed the new supporting materials in relation to the amendments.

Pursuant to Rule 66(A)(i), the Prosecution must disclose supporting material (and prior statements of the accused) within thirty days of the initial appearance. It follows therefore, that where there has been an amendment to an Indictment in the form of new charges, the Prosecution must disclose the supporting material that relates to the new charges, within thirty days of the accused plea on the new charges. If the Prosecution fails to do so, the Defence may bring a motion for disclosure of the new supporting material pursuant to Rule 66 without the need to invoke Rule 72. Accordingly, the said Rules do not present a legal impediment to the Prosecutor's request for leave to file an amended Indictment.





# Issues of Evidence

At this stage, the Prosecution need not show a prima facie case, based upon the evidence, for each new proposed count. Rather, the Prosecution must satisfy the Trial Chamber that there is sufficient ground, both in fact and in law, to support the proposed amendments. In this case, the Trial Chamber finds that sufficient grounds exist to warrant leave to amend the Indictment.

It is not necessary for the Trial Chamber to consider the supporting material (Annex B to the Prosecutor's written brief), in order to decide this motion. The Trial Chamber is moved on the basis of the Prosecution's written brief in support of its motion, and by its oral submissions. Further, the non-disclosure of the supporting material to the Defence does not prejudice the accused. At a later stage, namely within sixty days following the disclosure of the supporting material by the Prosecution, the Defence may challenge, *interalia*, the wording and nature of each new count pursuant to Rule 72 (defects in the form of the Indictment).

The Trial Chamber is not persuaded by Nsabimana's objection based upon the consistency and reliability of the new evidence, nor Nteziryayo's contention that the facts and evidence do not support the new charge of conspiracy to commit genocide. Further, for the purposes of this motion, the Trial Chamber is not concerned with the consistency and reliability of the evidence; the Defence will have an opportunity to test the Prosecution evidence during trial.

The Trial Chamber rejects Nteziryayo's contention that the new counts 7 and 8 are effectively the same allegations that were dismissed at the stage of confirmation by the confirming Judge. The allegations are not the same. Indeed, the Prosecution has relied upon further and/or different facts and has applied those facts to different Articles of the Statute.

## Issues of Delay and Fair Trial

The Trial Chamber is not satisfied that the amendments sought will unduly delay the trial of the accused or that such delay, as may be occasioned, will prejudice the accused. Further, the Trial Chamber is convinced that the amendments requested by the Prosecution are in the interests of justice and will not adversely effect the accused persons right to a fair trial.



### FOR THESE REASONS,

#### THE TRIBUNAL

The Trial Chamber grants the Prosecutor's motion and orders the amendment of the Indictment by adding:

- In relation to SYLVAIN NSABIMANA and ALPHONSE NTEZIRYAYO, the i) count of CONSPIRACY TO COMMIT GENOCIDE, pursuant to Articles 2 (3)(b), 6(1) and 6(3) of the Statute;
- ii) In relation to SYLVAIN NSABIMANA, the count of DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, pursuant to Articles 2(3)(c) and 6(1) of the Statute;
- iii) In relation to SYLVAIN NSABIMANA and ALPHONSE NTEZIRYAYO, the count of CRIMES AGAINST HUMANITY (PERSECUTION), pursuant to Articles 3(h), 6(1) and 6(3) of the Statute;
- iv) In relation to SYLVAIN NSABIMANA and ALPHONSE NTEZIRYAYO, the count of CRIMES AGAINST HUMANITY (OTHER INHUMANE ACTS), pursuant to Articles 3(I), 6(1) and 6(3) of the Statute.

The Trial Chamber further orders;

That the initial counts be expanded as proposed in the amended Indictment, v) namely Annex A to the Prosecutor's Brief.

Decision of:

12 August 1999

Signed:

10 September 1999

William H. Sekule

Judge, Presiding

Judge

Mehmet Güney

Judge

(Seal of the Tribunal)