

Case No. : ICR-98-8-T



**International Criminal Tribunal for Rwanda  
Tribunal Pénal International pour le Rwanda**

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**Trial Chamber II**

**Before:** Judge William Sekule, Presiding  
Judge Mehmet Güney  
Judge Navanethem Pillay

Original : English

**Registry:** Mr. John Kiyeyeu.

**Decision of:** 2 September 1999

**THE PROSECUTOR  
versus  
ELIE NDAYAMBAJE  
Case N°: ICR-96-8-T**

1999 SEP - 2 P 4: 40  
CRIMINAL REGISTRY  
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**DECISION ON THE PROSECUTOR'S REQUEST FOR LEAVE TO FILE AN  
AMENDED INDICTMENT**

Office of the Prosecutor:

Mr. Japhet Mono  
Ms. Celine Tonye  
Mr. Ibukunolu Aloa Babajide  
Mr. Robert Petit

Counsel for the Defence:

Ms. Veronique Laurent.

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Tribunal pénal international pour le Rwanda  
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NAME / NOM: AMINATTA L. R. N'GUM  
SIGNATURE: [Signature] DATE: 02/09/99

Amend.ind./sn/23.8

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the "Tribunal")**

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

CONSIDERING a motion filed by the Prosecutor for leave to amend the indictment against the accused, Elie Ndayambaje (the "accused"), pursuant to Rule 50 of the Rules of Procedure and Evidence (the "Rules");

NOTING that the indictment against the accused, dated 17 June 1996 was confirmed by Judge T.H.Khan on 20 June 1996;

HAVING HEARD the parties at a hearing on 9 August 1999.

**The Prosecutor's Submissions**

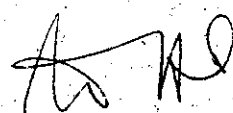
1. The Prosecutor's motion was supported by a brief containing her submissions and two Annexures marked "A" and "B" respectively. According to the Prosecutor, Annexure "B" contains materials and documentary evidence in support of the new counts proposed as amendments to the indictment against the accused.

2. The Prosecutor submitted *inter alia*, that:

2.1 the amendment of the indictment is justified in law. 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;

2.2 the amendment to the indictment is justified on the available evidence against the accused. These additional counts proposed as amendments to the existing indictment accurately reflect the alleged criminal conduct of the accused. The amendments sought are based on evidence presently available to the Prosecutor, which was not available in June 1996 when the indictment against the accused was confirmed. The Prosecutor's on-going investigation have uncovered evidence of a plan of certain individuals in Rwanda, including the accused, to gain political control over the country. Evidence of how this alleged plan was carried out in Butare and the accused's alleged involvement in its execution was also uncovered.

2.3 the accused has a fundamental right to an expeditious hearing but this right must be weighed against the Prosecutor's need to present the full scope of the available evidence, at the trial of the accused. This would entail amending the indictment against the accused, so that all available evidence could be presented at the trial of the accused.



**The Defence Submissions**

3. The Defence submitted *inter alia* that:

3.1. there is a need for clarification as to whether the applicable version of Rule 50 is the rule as it read prior to its amendment in June 1999 or the rule as it presently reads;

3.2 both the previous and present versions of Rule 50 refer to Rules 47(g) and 53 *bis*. The text of the rules as it read prior to its amendment in June 1999 did not have a Rule 53 *bis*;

3.3 an amendment to the Rules could have retrospective effect provided it does not infringe on the rights of the accused. Rule 53 *bis* is not just an amendment to a Rule but an adoption of an entirely new rule and therefore the provisions of Rule 53 *bis* cannot be applicable to this motion;

3.4 the Prosecutor is relying on the same set of allegations for the counts she intends to add to the existing indictment. In the recent case of the Prosecutor v. Kayishema and Ruzindana (ICR-95-1-T), Trial Chamber II found that the same set of facts cannot qualify for cumulative charges;

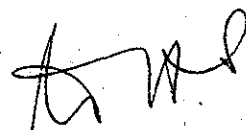
3.5 the Prosecutor's submission that she is relying on evidence gathered in the course of Operation NAKI must be rejected, since this operation was not organised to gather evidence against the accused. Further, evidence of the accused's alleged conduct existed in the Belgian files and the statements of witnesses taken, following Operation NAKI do not provide new evidence to support the charges against the accused;

3.6 if the amendment to the indictment is granted, this could result in an undue delay in the commencement of the trial against the accused, thus causing severe prejudice to the accused. Further, the case against the accused is not legally or factually complex to justify a delay of this nature and therefore any delay in the commencement of the accused's trial is unreasonable;

3.7 the Prosecutor has not made disclosure of Annexure "B". This annexure is essential because it contains the material on which the Prosecutor relies, in support of her motion for leave to amend the indictment against the accused. The accused has the right to have disclosed to him the materials as contained in Annexure "B" and to utilize such materials in response to this motion;

**AFTER HAVING DELIBERATED,**

4. The Trial Chamber notes that Rule 50 has been subject *inter alia* to the following amendments:



(i) Rules 47(G) and 53 *bis* now apply *mutatis mutandis* to Rule 50 (A). This amendment was adopted in at the Plenary held in June 1998 and is applicable to the accused. Rule 53 *bis* which was also adopted at the Plenary in June 1998, makes provision for the service of an indictment on an accused. Where an indictment has been amended, such an indictment will be served on an accused pursuant to the provisions of Rules 47(G) and 53 *bis*;

(ii) the word "that" in the phrase "granted by that Trial Chamber", in Rule 50(A) was replaced by the word "a". This amendment was adopted at the Plenary in June 1999 and came into force immediately thereafter. It is accordingly not retroactively applicable to the accused.

5. The Trial Chamber applies the rulings made by the Appeals Chamber in the case of Anatole Nsengiyumva versus the Prosecutor (ICR-96-12-A) and Joseph Kanyabashi versus the Prosecutor (ICR-96-15-A), to the effect that a motion for leave to amend an indictment must be heard by the Trial Chamber, as constituted for the initial appearance of the accused. In this case the Chamber that conducted the initial appearance of the accused was composed of Judges W.H.Sekule, Y. Ostrovsky and N. Pillay. An exceptional circumstance arose as a consequence of the unavailability of Judge Ostrovsky for medical reasons. The President, by the authority vested in her, pursuant to the Statute of the Tribunal and the Rules, in particular Rules 15(E), 27(A), (B) and (C), assigned Judge M. Güney. to the Chamber to replace Judge Ostrovsky. The President's authority in this regard is recognised in the aforementioned decisions of the Appeals Chamber.

6. Rule 50 does not explicitly prescribe a time limit within which the Prosecutor may move to amend the indictment against the accused, thus the Trial Chamber has the discretion to assess each individual case on its own merits and circumstances. In Prosecutor versus Alfred Musema (ICR-96-13-T) the Trial Chamber held that:

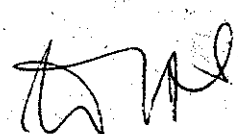
"A key consideration would be whether, and to what extent, the dilatory filing of the motion impacts on the rights of the accused to a fair trial."<sup>1</sup>

7. The Prosecutor is entitled to conduct on-going investigations against the accused and where new evidence has come to light she is obliged to present this evidence at trial. The Prosecutor is also obliged to present the full scope of available evidence at the trial of the accused that accurately reflects the totality of the alleged criminal conduct of the accused, as uncovered by her investigations. In the case of the Prosecutor versus Alfred Musema, it was also held that:

"In order that justice may take its proper course, due consideration must also be given to the Prosecutor's unfettered responsibility to prosecute the accused to the full extent

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<sup>1</sup>Prosecutor versus Alfred Musema, ICR-96-13-T, P4, Para.17



of the law and to present all relevant evidence before the Trial Chamber."<sup>2</sup>

*On whether any amendment to the indictment will cause undue delay in the proceedings against the accused.*

8. The Trial Chamber has an obligation pursuant to Article 19 of the Statute, to ensure that the accused is tried in a fair and expeditious manner and with full respect for the rights of the accused. Article 20 of the Statute guarantees the accused the right to be tried without "undue" delay. The issue is whether the proposed amendments to the indictment, if granted, will cause an "undue" delay in the commencement of the trial of the accused, to the prejudice of the accused.

9. In ascertaining whether a delay in the criminal proceedings against the accused is "undue", it is essential to take into consideration the length of the delay, the gravity, nature and complexity of the case against the accused and the prejudice that may be suffered by the accused. The Defence submission that the accused has been in custody for one thousand five hundred and three days, has little bearing on any possible future delay in the criminal proceedings against the accused, that may arise following an amendment to the indictment. The Trial Chamber has not been persuaded by the Defence submission that an amendment to the indictment would result in an "undue" delay in the commencement of the trial against the accused.

*On the cumulative charges.*

10. On the issue of cumulative charges, as raised by the Defence, the Trial Chamber notes that the principle of cumulative charges was applied by Trial Chamber I<sup>3</sup> in the case of Prosecutor versus Jean Paul Akayesu (ICR-96-4-T) and the accused was convicted on more than one offence based on the same set of facts, whilst in the case of the Prosecutor versus Kayishema and Ruzindana (ICR-95-1-T), before Trial Chamber II<sup>4</sup>, the majority held that the accused could not be convicted for more than one offence on the same set of facts. Both these cases are now being taken on appeal. The Trial Chamber is of the view that the appropriate stage to assess the applicability of cumulative charges is at the close of the Prosecution case, once the evidence has been led, rather than at the stage of confirmation or amendment of the indictment.

*On the non-disclosure of Annexure "B"*

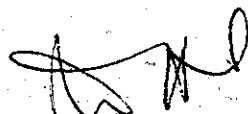
11. The Trial Chamber notes that in support of her motion the Prosecutor submitted under Annexure "B", supporting material to the proposed new counts in the indictment. This

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<sup>2</sup>ibid

<sup>3</sup>Trial Chamber I comprised Judges L. Kama, L. Aspegren and N. Pillay.

<sup>4</sup>Trial Chamber II comprised Judges W. H. Sekule, T. H. Khan and Y. Ostrovsky..



supporting material was not disclosed to the Defence.

12. The Trial Chamber notes that where the Prosecutor's request to add new counts to the indictment is granted, the accused must make an "initial appearance" in accordance with Rules 50(B) and 62 to enter a plea on these new counts. The Prosecutor is thereafter obliged to disclose to the Defence all supporting material in respect of these new counts within thirty days of this "initial appearance", as envisaged in Rule 66 (A)(i) of the Rules. Therefore, disclosure of any material in support of the proposed new counts at this stage of the proceedings may be construed as pre-mature.

13. The Trial Chamber notes that the provisions of Rule 66 must be applied subject to the provisions of Rules 53 and 69. Rule 69 makes provision for the protection of victims and witnesses. Parties generally file motions requesting the implementation of certain protective measures for witnesses and victims after the initial appearance of the accused. Where such measures are granted, this has a direct bearing on the timing, nature and extent of disclosure made to the Defence. It is essential for the proper administration of justice to balance the interests of the victims and witnesses against the right of the accused to disclosure.

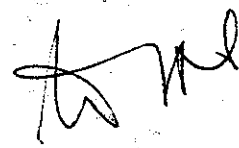
14. The Trial Chamber notes that pursuant to Rule 72, the Defence has the opportunity to raise any objections on defects in the form of the indictment. This Rule further provides that such objections may be raised within sixty days following disclosure of the supporting material. The accused therefore suffers no prejudice if disclosure of the supporting material is not made at this stage of the proceedings.

15. The Trial Chamber distinguishes between the procedural requirements of Rules 47 and 50. Pursuant to 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 a motion, requesting leave to amend an indictment pursuant to Rule 50, against an accused who has already been indicted, has no cause to inquire into a *prima facie* basis for proposed amendments to the indictment. Since such a finding has already been made in respect of the accused, it is not necessary for the Trial Chamber to consider the supporting material tendered as Annexure "B".

16. The Trial Chamber finds that in considering the Prosecutor's motion for leave to amend the indictment, pursuant to Rule 50, the onus is on the Prosecutor to set out the factual basis and legal motivation in support of her motion.

17. The Trial Chamber is not satisfied that amendments to the indictment, if granted will cause an undue delay in the commencement of the trial against the accused, and consequent prejudice to the accused.

18. The Trial Chamber is satisfied that sufficient grounds exist, both in fact and in law, to justify the amendments to the indictment, as requested by the Prosecutor.



**FOR THESE REASONS THE TRIBUNAL,**

**GRANTS** the Prosecutor's motion for the amendment of the indictment against the accused;

**ORDERS** the amendment of the indictment by adding:

(I) the count of CONSPIRACY TO COMMIT GENOCIDE, pursuant to Articles 2(3)(b), 6(1) and 6(3) of the Statute;

(ii) the count of DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, pursuant to Articles 2(3)(c), 6(1) and 6(3) of the Statute;

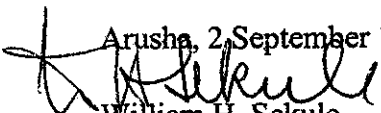
(iii) the count of CRIMES AGAINST HUMANITY (PERSECUTION), pursuant to Articles 3(h), 6(1) and 6(3) of the Statute;


(iv) the count of COMPLICITY TO COMMIT GENOCIDE as a separate and individual count, pursuant to Articles 2(3)(e), 6(1) and 6(3) of the Statute;

(v) individual criminal responsibility, pursuant to Article 6(3) of the Statute, to all existing counts;

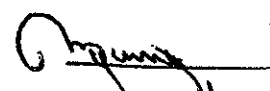
**FURTHER ORDERS** that the indictment reflecting the amendments as ordered above, is filed with the registry and served on the accused immediately.

Arusha, 2 September 1999

  
William H. Sekule  
Presiding Judge

  
Navanethem Pillay  
Judge



  
Mehmet Güney  
Judge