

ICTR-96-12-I  
2 SEPTEMBER 1999  
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ICR 96-12-T



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

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**Trial Chamber II**

**Before:** Judge Navanethem Pillay, Presiding  
Judge Erik Møse  
Judge William H. Sekule

**Original : English**

**Registry:** Ms. Marianne Ben Salimo

**Decision of:** 2 September 1999

**THE PROSECUTOR  
versus  
ANATOLE NSENGIYUMVA**

**Case N°: ICR-96-12-T**

1999 SEP - 2 P 4: 40  
CRIMINAL REGISTRY  
RECEIVED

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

**Office of the Prosecutor:**

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

**Counsel for the Defence:**

Mr. Kennedy Ogetto  
Mr. Gershom Otachi Bw' omanwa

Amend.\s.n\nseng31.8

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

SITTING AS Trial Chamber II, comprising Judge Navanethem Pillay presiding, Judge Erik Møse and Judge William H. Sekule;

CONSIDERING the Prosecutor's written motion dated 30 July 1998, requesting leave to amend the indictment against the accused, Anatole Nsengiyumva (the "accused"), pursuant to Rule 50 of the Rules of Procedure and Evidence (the "Rules");

CONSIDERING the Defence response dated 23 September 1998 and a supplementary brief dated 4 August 1999;

NOTING that the indictment against the accused was confirmed by Judge Ostrovsky on 12 July 1996, pursuant to Rule 47 of the Rules;

HAVING HEARD the parties at a hearing on 11 August 1999.

**The Prosecutor's Submissions**

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.

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

1.1 the amendment to 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;

1.2 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;

1.3 the amendments sought are based on evidence presently available to the Prosecutor, which was not available when the indictment against the accused was confirmed. The Prosecutor's on-going investigation have recently uncovered evidence of a conspiracy to commit Genocide by certain individuals including the accused;

1.4 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 to enable all available evidence to be presented at the trial of the accused. The paramount issue

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is the interest of justice, of which the right of the accused to an expeditious trial is one component.

### **The Defence Submissions**

2. The Defence submitted *inter alia* that:

2.1 on 24 May 1999, the Tribunal ordered the Prosecutor to amend the existing indictment against the accused, within 30 days from the date of that decision. The Prosecutor failed to comply with this order and this non-compliance borders on or amounts to contempt of the Tribunal. On 6 August 1999 the Prosecutor filed a motion seeking a provisional stay in the execution of order. This motion should be considered before the Prosecutor's motion for the amendment of the indictment;

2.2. leave to amend the indictment against the accused falls within the ambit of Rule 72. Rule 72 prescribes a time limit within which motions are to be filed. . This motion is filed out of time and the Prosecutor has not requested a waiver of this time limit;

2.3. the proposed new indictment is fundamentally different from the existing indictment and it cannot be deemed to be an amendment to the existing indictment;

2.4 due to the nature of the proposed amendments the trial of the accused will take an unduly long time and gravely prejudice his rights to be tried without undue delay.

### **AFTER HAVING DELIBERATED,**

3. The Trial Chamber is concerned by the Prosecutor's non-compliance with the decision rendered by Trial Chamber I on 24 May 1999, ordering the Prosecutor to amend the indictment against accused within thirty days from the date of that decision. It notes that on 6 August 1999, long after the period of thirty days has lapsed, the Prosecutor filed a motion requesting a stay in the execution of that decision. The Trial Chamber views the Prosecutor's non-compliance in a serious light and finds that the Prosecutor's conduct is unacceptable.

4. However, the Trial Chamber notes that Prosecutor's non-compliance with the decision of Trial Chamber I is not an impediment to the Prosecutor's motion and accepts the Prosecutor's submission that the requested amendments to the existing indictment incorporates, to some extent, the amendments ordered by Trial Chamber I on 24 May 1999.

5. 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. Annexure "B" was not disclosed to the Defence.

6. 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.

7. 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 and the right of the accused to disclosure.

8. 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.

9. 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 for 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".

10. 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.

11. The Trial Chamber is unpersuaded by Defence Counsel's interpretation of Rules 50 and 72 in respect of this motion. A motion requesting leave to amend an indictment clearly falls within the ambit of Rule 50. It is clear from the reading of Rule 50 that a motion for amendment of the indictment is not subject to the time limits prescribed in Rule 72. The Defence submission that this motion is filed out of time is accordingly rejected.

12. The Trial Chamber is also unpersuaded by Defence submission that the addition of seven new counts to the existing indictment constitutes the creation of a new indictment.

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13. The Trial Chamber is satisfied that amendments to the indictment, if granted, will not result in an undue delay in the commencement of the Trial against the accused, thus not causing prejudice to the accused.

14. 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 leave to amend the existing 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; and also by identifying some of the alleged co-conspirators as M.T. Bagosora, G. Kabiligi and A. Ntabakuze;

(ii) the count of GENOCIDE, pursuant to Articles 2(3)(a), 6(1) and 6(3) of the Statute;

(iii) the count of COMPLICITY IN GENOCIDE, pursuant to Articles 2(3)(e), 6(1) and 6(3) of the Statute;

(iv) the count of CRIMES AGAINST HUMANITY (EXTERMINATION), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute;

(v) the count of CRIMES AGAINST HUMANITY (RAPE), pursuant to Articles 3(g) and 6(3) of the Statute;

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

(vii) the count of VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, pursuant to Articles 4(e) and 6(3) of the Statute;

(viii) Article 6(3) responsibility to the existing count of VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ADDITIONAL PROTOCOL II, pursuant to Articles 4(a) of the Statute;





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**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

Navanethem Pillay  
Presiding Judge

  
Erik Møse  
Judge

  
William H. Sekule  
Judge

(Seal of the Tribunal)