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UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER 1

OR: ENG

Before: Judge Navanethem Pillay, Presiding
Judge Laïty Kama
Judge William H. Sekule

Registry: Ms. Prisca Nyambe
Mr. Antoine Mindua

Decision of: 24 November 1997

THE PROSECUTOR
versus
Ferdinand NAHIMANA

Case N°: ICTR-96-11-T

DECISION ON THE PRELIMINARY MOTION FILED BY THE DEFENCE BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

Office of the Prosecutor:

Mr. James Stewart
Mr. Alphonse Van

Counsel for the Defence:

Mr. Jean-Marie Biju-Duval
Ms. Diane Sénéchal

DEC/PRELMOT/DEF/INDFORM/96-11-T

ICTR-96-11-T

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

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

TAKING INTO ACCOUNT that the accused, Ferdinand NAHIMANA, was arrested in the Republic of Cameroon on 27 March 1996 pursuant to an international warrant of arrest issued by the General Prosecutor of the Republic of Rwanda, and subsequently indicted by the Tribunal on 11 July 1996;

CONSIDERING the Registrar's letter of 12 July 1996 to the Minister of Justice of the Republic of Cameroon by which the Registrar submitted the Tribunal's warrant of arrest and order for surrender along with a copy of the Tribunal's indictment and a statement of the rights of the accused to the Cameroonian authorities with a request for service of the these instruments on the accused;

TAKING NOTE OF THE FACT that the accused was subsequently transferred to the Tribunal's Detention Facilities in Arusha on 23 January 1997 and made his initial appearance before the Tribunal on 19 February 1997 pursuant to Rule 62 of the Rules;

HAVING NOW BEEN SEIZED of a preliminary motion filed by the Defence on 17 April 1997 pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence ("the Rules"), in which Counsel for the Defence raises a number of objections on the form of the Prosecutor's indictment of 12 July 1996 and the basis of the Tribunal's Decision of that same date confirming the indictment, and also against the manner in which the warrant of arrest and the indictment were served on the accused;

HAVING RECEIVED the Prosecutor's brief of 29 May 1997, submitted to the Registry on 13 June 1997, in reply to the Defence Counsel's preliminary motion;

HAVING FURTHER RECEIVED the Defence Counsel's response filed on 18 August 1997 to the Prosecutor's aforementioned brief;

HAVING HEARD the parties during the hearing held on Wednesday 27 August 1997;

CONSIDERING Articles 17(4) and 18 of the Tribunal's Statute (the "Statute") and Rules 5, 47, 55, 72 and 73 of the Rules;

AFTER HAVING DELIBERATED

1. In its written submission, filed pursuant to Rule 72(B), the Defence argues that the indictment as well as the subsequent proceedings should be nullified and that the accused, accordingly, should be released for the following three reasons:

(i) the indictment is defective by virtue of the inaccurate manner in which the facts and the counts are stated in the indictment and because of the cumulation of counts based on the same acts which, in the Defence Counsel's argument, is in violation of the principle of *non-bis-in-idem*;

(ii) the Judge's decision confirming the indictment is defective due to the lack of sufficient evidence in the supporting documentation to substantiate the charges brought against the accused;

(iii) the service of the warrant of arrest and the indictment on the accused is defective since the accused was neither provided with a copy of these instruments nor with a statement of his rights before his transfer to the Tribunal's Detention Facilities.

2. The Trial Chamber will first consider point (ii) relating to the decision confirming the indictment and point (iii) on the manner of service of the indictment

A. ON THE OBJECTION BASED ON DEFECTS IN THE CONFIRMATION OF THE INDICTMENT

3. With respect to point (ii) relating to the decision confirming the indictment, the Chamber strongly maintains that the procedure indicated in Rule 72 (B) refers solely to defects in the form of the indictment and could not be used as grounds to challenge the decision rendered by the confirming Judge.

4.. In his written and oral submissions, the Defence contends that the confirming Judge did not have sufficient evidence or justification to provide reasonable grounds for believing that the suspect had committed the crimes charged against the accused in the indictment, and thus could not legitimately have confirmed the indictment pursuant to Article 18(1) of the Statute and Rule 47(D) of the Rules.

5. The Prosecutor, in her brief, argued to the contrary that the confirming Judge did, in fact, have enough material before him to determine that a *prima facie* case had been established by the Prosecutor. She further asserted that the confirming Judge's discretionary power to review the indictment and decide whether or not there existed sufficient evidence to justify a confirmation of the indictment is not and indeed cannot be subject to appeal and that, anyway, such appeal is inadmissible short of any provision to this effect in the Statute and the Rules.

6. The Trial Chamber observes initially that what the Defence is really asking for is a measure of re-examination or review of the decision by which the Judge confirmed the indictment pursuant to Rule 47 of the Rules. On this point, however, the Chamber considers that neither Rule 47 nor

Rules 72 and 73 of the Rules permit appeals against a decision rendered by a single Judge to confirm an indictment. Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision.

7. The Trial Chamber further recalls that the test to be made by the confirming Judge in establishing whether or not a *prima facie* case has been made out by the Prosecutor is inherently different from the Trial Chamber's evaluation of the evidence brought forward by the parties during trial. At the stage of confirmation of an indictment, notably, the confirming Judge is only required to assess whether or not the Prosecutor has provided documentation of facts carrying sufficient weight to justify a reasonable inference that the suspect has committed crimes falling within the Tribunal's jurisdiction, but which do not have to amount to conclusive evidence of these crimes.

8. The purpose of the confirmation, in other words, is merely to ensure that the investigations carried out by the Prosecutor have reached an acceptable level of probability to justify a belief that the suspect may have committed certain crimes, without going into any specific evaluation of the culpability of the suspect. The autonomous power of discretion exercised by the confirming Judge in this endeavour is by its very nature subjective and could therefore be reviewable in circumstances where, the confirming decision was in flagrant violation of the Statute and/or the Rules or was inconsistent with the fundamental principles of fairness, and had entailed a miscarriage of justice. Under such circumstances only could there be room for consideration of annulment pursuant to the principle included in Rule 5 of the Rules. However, none of these circumstances apply in the present case.

9. Trial Chamber, thus, rejects the Defence Counsel's quest for annulment of the indictment and release of the accused on the basis of defects in the confirmation of the indictment.

B. ON THE OBJECTION BASED ON DEFECTS IN THE MANNER OF SERVICE OF THE INDICTMENT

10. The Defence Counsel has further suggested that, contrary to the provisions in Article 19 of the Statute and Rule 55 of the Rules, the warrant of arrest, the indictment and the statement of the rights of the accused were never served on the accused by the Cameroonian authorities during the period he was detained in Cameroon and that, consequently, the indictment should be rendered null and void and the accused released.

11. The Prosecutor, in response, argues that no evidence has been brought forward so far to support the allegation that the accused was not properly served with the relevant instruments as requested in the Registrar's letter of 12 July 1996 to the Cameroonian Minister of Justice. The presumption is, therefore, that the Cameroonian authorities acted in conformity with the Registrar's request and actually did serve the documents on the accused. Even if this were not the case, however, the Prosecutor holds that lack of service of the indictment on the accused could never result in annulment of this instrument, as the control of internal acts of compliance by a

sovereign State falls outside the Tribunal's jurisdiction.

12. The Trial Chamber reminds that the Registrar's obligation under Rule 55(B) of the Rules is to transmit the warrant of arrest and order for surrender to the national authorities together with a copy of the indictment and a statement of the rights of the accused, and to instruct the national authorities to read out these documents to the accused upon his arrest in a language he understands. Having done so, which in this case is verified by production in Court of a copy of the Registrar's aforementioned letter to the Cameroonian Minister of Justice, the Registrar has complied fully with the requirements contained in Rule 55. The Chamber is not in possession of any verified information of whether or not the warrant of arrest and the accompanying documents were actually served by the Cameroonian authorities on the accused. Even if this did not take place, however, the Chamber cannot but regret this fact, but failure of the Cameroonian authorities to serve the documents on the accused does not constitute any intentional breach of the Statute or the Rules by the Registrar and thus cannot entail the nullification of the indictment as requested by the Defence.

13. The Trial Chamber underscores the need to respect the rights of the accused during all stages of the trials but is unable to verify whether or not the relevant instruments in this case were actually served on the accused. The Chamber notes, however, that any possible defect in the service of these documents was remedied as soon as possible, namely upon the accused's transfer to the Tribunal's Detention Facilities in Arusha, by which time the accused was given a copy of the indictment and the supporting material was submitted to the Defence Counsel. It should also be noted that during the initial appearance hearing, the accused did not not raise any objection with regard to the indictment, but rather pleaded not guilty.

14. For these reasons, the Trial Chamber is of the opinion that the rights of the accused in the present case were respected as far as possible, irrespective of whether or not the warrant of arrest, the indictment and a statement of the rights of the accused were served on the accused in Cameroon by the Cameroonian authorities. The Chamber refuses, therefore, to terminate and nullify the proceedings before it as a consequence of acts of State over which it has no knowledge or control.

C. ON THE OBJECTIONS BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

15. Rule 72(B) of the Rules includes a non-exhaustive list of *pre-trial motions* which the accused may bring forward prior to the trial on its merits, and paragraph (ii) of this provision establishes in particular that the accused may file a motion to challenge *the form of the indictment*, which is what the accused has done in the present case.

16. Article 20(4)(a) of the Statute stipulates that the accused must be informed promptly and in a language he or she understands of the nature and cause of charges against him or her, and Rule 47(B) of the Rules incorporates this obligation by establishing that the indictment shall set

forth the name and particulars of the suspect and a concise statement of the facts of the case and of the crime with which the suspect is charged.

17. The Defence Counsel claims in his written and oral submissions that the indictment should be declared null and void because of serious defects in the form of the indictment. More particularly, the Counsel maintains that the imprecise and erroneous manner in which the facts are stated in the indictment effectively obstruct his possibilities of preparing the defence. He submits, moreover, that the Prosecutor's cumulation of charges based on the same action by the accused is in violation of the principle of *non-bis-in-idem*. In conclusion, the Counsel requests that if the indictment is not annulled, the Prosecutor should at least amend it, in order to include a precise statement of facts for each charge.

18. The Prosecutor has responded in essence, firstly, that the statement of facts in the indictment, concise as it is, does satisfy the requirements of the Statute and the Rules and amply enables the accused to understand and prepare his defence against the charges brought against him. Any request for further details beyond what has already been given to the Defence is but an unjustified request for particulars, which should have been addressed directly to the Prosecutor. Secondly, the Prosecutor argues that the principle of *non-bis-in-idem* is inapplicable in cases, such as the present, where the accused has not already been prosecuted or convicted abroad of any of the crimes for which he now stands indicted before this Tribunal. However, both in her written submissions and oral arguments during the hearing, the Prosecutor signified her willingness to amend the indictment, if the Tribunal so requested.

19. The Trial Chamber notes initially that there is an important distinction to be made between defects in the form and defects in the merits of the indictment. At this stage of the proceedings, the Chamber is bound to examine and dispose of defects in the form only, whereas defects on the merits of the indictment may raise questions of evidence and facts which more appropriately should be considered during trial. For this reason, the Trial Chamber will only deal with objections raised against the vagueness, the lack of sufficient indication of time and against the lack of specification of the charges raised against the accused in the indictment. The Chamber will thereafter consider the objection raised by the Defence regarding the *non-bis-in-idem* principle.

20. As a general observation, the Trial Chamber holds that the accused must be able to recognize the circumstances and the actions attributed to him in the indictment and the supporting material, and must be made to understand how and when his actions under the particular circumstances constituted one or more crimes covered by the Tribunal's jurisdiction. Furthermore, the Trial Chamber interprets the word 'concise statement of the facts' in Rule 47 to mean a brief statement of facts but comprehensive in expression. From this perspective, then, the Chamber will address the various objections raised by the Defence.

On the objections based on the vagueness and imprecision of the facts in the indictment.

21. The Defence submitted that the indictment is vague due to factual imprecision in the

indictment. The statement of facts in the indictment does not give the accused the possibility of knowing in detail the nature and cause of the charge against him.The Defence, in his oral submission, pointed out that the indictment must contain express statements and not just a hypothesis. He further submitted that there are approximately forty seven possible combinations of interpretation of the charges and of the statement of facts in the indictment.

22. The Prosecutor's response is that every indictment is concise in nature and the indictment in this case is sufficient to inform the accused of the charges against him. The indictment complies with Article 17 of the Statute and Rule 47 of the Rules.

23. The Trial Chamber notes that in the case before the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") against **Delalic, Mucic, Delic and Landzo**, IT-96-21-T, the Chamber of first instance held that a particular paragraph of the indictment: "*did not give the accused a specific statement of facts of the case and of the crimes with which he was charged because it alleged at least six different types of conduct over a period of seven months*". The Trial Chamber in this case went on to state that: "*there should be a clear identification of particular acts of participation by the accused*".

24. The Defence further submitted that Count 1 of the charge is vague in that it merely states that the accused conspired with "others" without even knowing who it is alleged that he conspired with.

25. The Prosecutor's response was that the count cannot be void for the sole reason that the identity of the alleged co-conspirator or co-conspirators is not mentioned

26. This Trial Chamber is of the view that in order for the accused to fully understand the charge against him he needs to know who he is alleged to have conspired with. The Trial Chamber notes the decision in the case before the ICTY of the Prosecutor against **Tihomir Blaskic,** case number IT-95-14-PT, in which it was stated that: "*expressions such as "including but not limited to" or "among others" are vague and subject to interpretation and they do not belong in an indictment when it is issued against the accused*".

27. The Trial Chamber therefore holds that Count 1 should be amended so as to indicate the names of the people with whom the accused is alleged to have conspired to commit genocide.

On the lack of any specific time-frame of the alleged crimes in the indictment

28. With regard to the date and time the offences stated in Count 1 were allegedly committed, the Defence points out that reference is made to the period "*between 1 January 1994 and approximately 31 July 1994*". The Tribunal notes, in fact, that the Prosecutor refers to the same period of time in Counts 2, 3 and 4 of the indictment. The Defence submits that such information does not meet the requirement of precision, insofar as it does not enable the accused to place in time the specific acts or omissions he is being asked to answer for.

However, in response to this argument, the Prosecutor submits that the description of a

time-frame as provided in the various counts is sufficient to place in time the acts and crimes with which the accused is charged.

29. The Trial Chamber observes that in addition to making specific reference to the period *"1 January 1994 to approximately 31 July 1994"*, the Prosecutor also refers in the concise statement of facts contained in the indictment to other periods of time as follows:

(a) In paragraph 3.2 the Prosecutor refers to " *In or around 1993* " ;
(b) In paragraph 3.3 the Prosecutor refers to " *During the time of the events alleged in the indictment*";
(c) In paragraph 3.6 the time is referred to as " *From a date unknown to the Prosecutor*"

30. The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged. It is of the opinion, nonetheless, that the temporal and geographic references given by the Prosecutor are not sufficiently precise to enable the accused to unmistakably identify the acts or the sequence of acts for which he is criminally charged in the indictment. The Trial Chamber therefore suggests that the Prosecutor amends the statement of facts in the indictment so as to include more specific indications of the time when and the place where the alleged crimes were committed by the accused.

On the Vagueness of the Counts Against the Accused

31. The Defence submits that the charges stated in Count 2 are vague and do not clearly indicate whether the accused is charged individually under Article 6.1 of the Statute or under Article 6.3 as a superior, or under both provisions.

32. The Prosecutor responded that the accused was, in fact, charged under both provisions and that this had been formulated in the indictment in the simplest possible way; the Prosecutor avers in Count 2 that the accused has, amongst others, committed a crime pursuant to "Articles 6(1) and/or 6(3)" of the Statute.

33. The Chamber considers that, as did Trial Chamber 1 of the ICTY in the case of **Dukic,** in view of the seriousness of the allegations against the accused, he has every right to obtain, and in the most precise manner, the necessary information on the charges against him so as to enable him to prepare his defence effectively and efficiently. In other words, an indictment must always have the appropriate degree of precision.

The Chamber notes that the wording of the charges in question is not precise enough in that it does not provide the accused with information that would enable him to establish a link between his acts and the charges against him. The Chamber therefore suggests that the Prosecutor specifies which acts of the accused are covered by Article 6(1) and which fall under Article 6(3) of the Statute, or if there is a cumulation of charges.

34. The Chamber observes the same degree of vagueness in the expression "other persons"

contained in Count 1. The Chamber is, in fact, of the opinion that this expression must be clarified by mentioning the names or other identifying information concerning the persons with whom the accused allegedly conspired to commit genocide.

On the Principle of Non-bis-in-idem

35. The Defence contends that the cumulation of charges against the accused in the indictment entails a violation of the principle of *non-bis-in-idem*, since he appears to be charged several times for the same act. The Defence further asserts that this principle applies not only in instances where a person is tried before several courts for the same acts, but also in instances where a person is charged several times for the same act before the same court.

36. The Prosecutor responded that the *non-bis-in-idem* principle does not apply at this stage of the proceedings.

37. The Chamber is of the opinion that under Article 9 of the Statute, the principle of *non-bis-in idem* cannot be invoked, as does the Defence, when raising a matter of cumulation of charges, whether the offender has committed several acts each of which constitutes an offence or whether a single act constitutes more than one offence, as distinguished in the legal systems of the Roman-Continental tradition. In fact, Article 9 of the Statute stipulates that :

"1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if :

> *a) The act for which he or she was tried was characterised as an ordinary crime; or*
> *b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.*

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Iinternational Tribunal for Rwanda shall take into acount the extent to which any penalty imposed by a national court on the same person for the same acts has already been served."

In any case and as far as the cumulation of charges is concerned, it is the highest penalty that should be imposed. However, it is evident that we are not at this stage yet.

Finally, it should be pointed out in this regard that in the **Delalic** case, Trial Chamber 1

of the ICTY dismissed the objection raised by the Defence regarding the cumulation of charges on the grounds that the question was only relevant to the penalty if the accused is ultimately found guilty, (see ICTY Decision on the preliminary motion filed by the accused **Delalic** on defects in the form of the indictment, paragraph 24.)

FOR THESE REASONS,

THE TRIBUNAL

REQUESTS the Prosecutor, especially as she does not object thereto, to amend the following parts of the indictment in order to :

(i) specify the time-frames indicated in paragraphs 3.2, 3.3 and 3.6 of the statement of facts; and to

(ii) identify some or all of the persons with whom the accused is alleged to have conspired to commit genocide in Count 1; and finally to

(iii) identify on the one hand the acts or sequence of acts for which the accused himself is held individually responsible for having committed direct and public incitement to genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible as their superior.

INVITES her to make the amendment within 30 days from the date of this Decision.

DISMISSES the Defence Counsel's motion on all other points.

Arusha, 24 November 1997

Navanethem Pillay
Presiding Judge

Laïty Kama
Judge

William H. Sekule
Judge

(Seal of the Tribunal)