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**International Criminal Tribunal for Rwanda**

**TRIAL CHAMBER II**

**OR: ENG**

Before: Judge William H. Sekule, Presiding
Judge Tafazzal H. Khan
Judge Yakov A. Ostrovsky

Registry: Mr. Frederik Harhoff

Decision of: 28 November 1997

**THE PROSECUTOR**
**versus**
**André NTAGERURA**

**Case N°: ICTR-96-10-I**

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

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Office of the Prosecutor:

Mr. Frédéric Ossogo
Ms. Valentina Tsoneva

Counsel for the Defence:

Mr. Fakhy N'Fa Kaba Konate

DEC/PRELMOT/DEF/INDFORM/96-10-I/eng

ICTR-96-10-I

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

SITTING AS Trial Chamber II composed of Judge William H. Sekule, Presiding, Judge, Judge Tafazzal H. Khan and Judge Yakov Ostrovsky;

TAKING INTO ACCOUNT that the accused, André NTAGERURA, was arrested in the Republic of Cameroon on 28 March 1996 pursuant to an international warrant of arrest issued by the General Prosecutor of the Republic of Rwanda;

CONSIDERING THE FACT that the Prosecutor, on 17 April 1996, issued a request to the Cameroonian authorities for provisional measures pursuant to Rule 40 of the Rules of Procedure and Evidence ("the Rules"), and that the accused was subsequently indicted by the Tribunal on 10 August 1996;

CONSIDERING the Registrar's letter of 12 August 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 20 February 1997 pursuant to Rule 62 of the Rules;

HAVING NOW BEEN SEIZED of a preliminary motion filed by the Defence on 21 April 1997 pursuant to Rules 72 and 73 of the Rules of Procedure and Evidence ("the Rules"), in which Counsel for the Defence requested an urgent order for disclosure of evidence and further raised a number of objections against the form of the Prosecutor's indictment of 10 August 1996 and 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 submitted to the Registry on 29 July 1997 in response to the Defence Counsel's preliminary motion;

CONSIDERING the Decision rendered on 24 November 1997 by Trial Chamber I on the preliminary motion filed by the Defence based on defects in the form of the indictment in the **Prosecutor vs Ferdinand Nahimana (Case No. ICTR-96-11-T);**

HAVING HEARD the parties during the hearing held on Wednesday, 8 October 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 calls for an urgent motion for disclosure of the supporting material, and further argues that the indictment of 10 August 1996 as well as the Tribunal's decision confirming the indictment and the warrant of arrest and order for surrender of that same day should be declared null and void, and that the accused, accordingly, should be released for the following reasons:

(i) 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;
(ii) 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 given a statement of his rights before his transfer to the Tribunal's Detention Facilities;
(iii) the indictment is defective by virtue of the vague and inaccurate manner in which the facts and the time-references are stated in the counts of 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*.

2. The Trial Chamber will now consider these points in the same order.

## A. ON THE REQUEST FOR AN URGENT ORDER FOR DISCLOSURE BY THE PROSECUTOR OF THE SUPPORTING MATERIAL

3. In his preliminary motion, the Defence Counsel claims that he has not received all of the supporting material attached to the indictment, which effectively has impeded the accused from preparing his defence and exercising his rights as set forth in Rule 73 of the Rules. For this reason, the Defence Counsel argues, the Trial Chamber should issue a separate and extremely urgent order for disclosure of this material by the Prosecutor to the Defence.

4. The Prosecutor replied in her brief that the supporting material was in fact submitted to the Defence on 23 April 1997, albeit in a redacted form in so far as the names and identifying information of the witnesses had been made illegible pending a decision of the Trial Chamber for protection of the Prosecutor's witnesses.

5. The Trial Chamber notes at this point that the Defence Counsel's request for disclosure has been partly exhausted by the Prosecutor's submission of the redacted supporting material on 23 April 1997 and will therefore abstain from addressing this issue further in a separate order.

The Trial Chamber notes, however, that both parties were in brief excess of the time-limits set forth in Rules 66 and 73 of the Rules as they existed in April 1997 and takes this opportunity to remind the parties of their obligation to duly comply at all times with the requirements of the Rules.

6. The Trial Chamber finds that, in the interests of justice and given the importance of the issues raised in the Defence Counsel's pre-trial motion, and also taking into account that the excess by both parties of the time-limits was insignificant as it were, the motion should be heard and the Trial Chamber will thus continue the examination thereof.

## B. ON THE OBJECTIONS BASED ON DEFECTS IN THE FORM OF THE INDICTMENT

7. As the substance of the issues raised in the Defence Counsel's motion in this case to a large extent is similar to the preliminary motion filed on 17 April 1997 by the Defence in the **Prosecutor vs. Ferdinand Nahimana** (Case No. ICTR-96-11-T), the Trial Chamber's present deliberations concerning the objections against the form of the indictment will follow the line of reasons provided in the Tribunal's decision of 24 November 1997 in that said case.

8. 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.

9. In his written and oral statements, the Defence Counsel maintains that the imprecise and erroneous manner in which the facts are stated in the indictment could not possibly justify the confirmation of the indictment by the confirming Judge and effectively obstructs his possibilities of preparing the defence. For these reasons, the Defence Counsel maintains, the decision confirming the indictment as well as the indictment itself should be declared null and void and the accused be released.

10. The Prosecutor has responded in essence 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. 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.

11. 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. Pursuant to the applicable provision in April 1997 (Rule 73 of the Rules), the Chamber is bound to examine and dispose of defects in the form only, whereas defects in 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.

12. 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 aterial, 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 and the Counts in the Indictment.**

13. The Defence submitted that the indictment is vague due to the vast factual imprecision in the statement of facts and in the counts, which does not give the accused the possibility of knowing in detail the nature and cause of the charges brought against him. In his oral submission, thus, he pointed out that the indictment must contain express statements and not just a hypothesis.

The Defence further contended that Count 1, 2 and 3 of the indictment are ambiguous in that they charge the accused with killing *or* causing serious bodily or mental harm to members of the Tutsi population, which effectively impedes the accused from knowing whether he is supposed to have committed genocide, conspired to commit genocide and being an accomplice in genocide by killing or by causing mental harm to Tutsi victims, or both in combination.

In addition, the Defence Counsel argued that the accused is charged twice with complicity in genocide (Counts one and six) without any indication of the factual difference between these two Counts.

14. The Prosecutor's response was in principle 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 present indictment, accordingly, does comply with Article 17 of the Statute and Rule 47 of the Rules.

The Prosecutor more specifically argued that Counts 1, 2 and 3 in the indictment hold the accused responsible for the "killing *or* (inclusive and not exclusive) causing serious bodily or mental harm to members of the Tutsi population" (see par. 54 of the Prosecutor's brief). The Trial Chamber understands this to mean that the crimes are charged in the alternative in all three Counts.

The Prosecutor finally contended that the two counts of complicity in genocide are inherently different in that Count three charges the accused for being *personally* responsible for the alleged complicity in genocide under Article 6(1) of the Statute, whereas Count six holds the accused responsible for acts of complicity in genocide committed by *his subordinates* under Article 6(3) of the Statute.

15. The Trial Chamber notes that although charges in the alternative in one and the same Count is an acceptable way of framing the charges in an indictment against an accused, the Prosecutor's response in her written brief seems to be misleading in that it claims that the charge of killing is *inclusive* of the charge of causing serious bodily or mental harm to members of the Tutsi population. If this is the case, however, the charges in Counts 1,2 and 3 should reflect this more adequately by indicating that the accused is charged with killing *and* causing serious bodily or mental harm to the victims. It then remains a matter of assessing the evidence during trial whether or not there is sufficient proof to establish that the accused committed genocide, conspiracy to genocide and complicity in genocide by killing and also by causing serious bodily

or mental harm to members of the Tutsi population or, alternatively, whether he committed the alleged crimes only by way of one of these acts.

The Trial Chamber recognises that in the case before the International Criminal Tribunal for the Former Yugoslavia (the "ICTY") against **Delalic et al**, Case No. IT-96-21-T, the Chamber of first instance held that "*there should be a clear identification of particular acts of participation by the accused*". This quest for clarity is particularly relevant when it comes to the two Counts of *complicity* in genocide, since it would seem that an accused cannot be held individually responsible in one and the same Count for the killing of a victim while in the same time being charged for complicity in that same killing.

This Trial Chamber concurs with this view and calls upon the Prosecutor to clarify how exactly the accused is alleged to have committed the crimes included in Counts 1, 2 and 3.

**On the Objections Raised Against the Identification of the Co-conspirators and the Accomplices**

16. The Defence Counsel also objected against the imprecision in the indictment of the identification of the co-conspirators and accomplices of the accused in allegedly commiting genocide in that the indictment does not include any identification thereof.

17. The Prosecutor responded in her written brief that this information is contained in the supporting material and thus is available to the accused.

18. The Trial Chamber notes the decision in the case before the ICTY of the **Prosecutor vs. Tihomir Blaskic,** Case No. 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".*

19. In line with the reasons expressed in these decisions, 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 and who are his alleged accomplices. While the Trial Chamber concedes that the information is indeed available in the supporting material, the Chamber is never the less of the opinion that the indictment should be framed so as to indicate directly and indepen-dently of the supporting material all or at least some of the persons with whom the accused is alleged to have conspired to commit genocide and also with whom he is alleged to have conspired to commit genocide.

**On the Lack of Any Specific Time-frame of the Alleged Crimes in the Indictment**

20. The Defence points out in his motion that the references of time are made to the period between 1 January 1994 and approximately 31 July 1994. The Defence submits that such informa-tion 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.

21. In response to this argument, the Prosecutor submits that the descriptions of a time-frame as provided in the various counts are sufficient to place in time the acts and crimes with which the accused is charged and that they fall anyway within the *ratione temporis* of the Tribunal's jurisdic-tion.

22. The Tribunal notes, in fact, that the Prosecutor refers to the same period of time in all six Counts of the indictment. 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 paragraphs 9 and 12 the Prosecutor refers to *"From 1991 through the period referred to in this indictment"*
(b) In paragraphs 15 and 16 the Prosecutor refers to " *During the period referred to in this indictment*";

23. 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 place 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 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 and the Counts 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 Principle of Non-bis-in-idem**

24. 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.

25. The Prosecutor argues that the principle of *non-bis-in-idem* does not apply at this stage of the proceedings and is inapplicable in cases, such as the present, where the accused has not been prosecuted or convicted abroad of any of the crimes for which he now stands indicted before this Tribunal

26. 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 Roamn-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. *Decision on the preliminary motion filed by the accused Delalcic on defects in the form of the indictment, paragraph 24.*

## C. ON THE OBJECTION BASED ON INSUFFICIENT SUPPORT FOR CONFIRMATION OF THE INDICTMENT

27. In his written and oral submissions, the Defence contends that the confirming Judge did not have sufficient evidence or justification in the supporting material to provide reasonable grounds for believing that the suspect had committed the crimes charged against the accu-sed 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.

28. 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.

29. 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 issue, however, the Chamber recognizes the fact 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. The Chamber wishes to emphasise, in this regard, that only under 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.

30. The Trial Chamber 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 enough documentation of facts to justify a reasonable inference that the suspect has committed crimes falling within the Tribunal's jurisdiction, but these facts do not have to amount to conclusive evidence of the alleged crimes at this stage of the proceedings.

31. 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 discretion thereby exercised by the confirming Judge is by its very nature autonomous and subjective and therefore not reviewable under the present circum-stances, short of any specific provisions to this effect in the Statute or the Rules. For this same reason, furthermore, the confirming Judge is not compelled to expose or explain in great detail the grounds on which the indictment was confirmed, but may confine him- or herself to a reference to the material tendered by the Prosecutor.

Only if the confirming decision would appear to be manifestly inconsistent with fundamental principles of fairness and had entailed a miscarriage of justice could there have been room for consideration by the Trial Chamber of annulment pursuant to the principle included in Rule 5 of the Rules, but this is not at all the case in the present instance.

32. 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.

## D. ON THE OBJECTION BASED ON INCORRRECT SERVICE OF THE INDICTMENT ON THE ACCUSED

33. 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 properly 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.

34. 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.

35. 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, 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 or when this might possibly have taken place. 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.

36. 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 lack of 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.

37. 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 properly 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.

**FOR THESE REASONS,**

**THE TRIBUNAL**

DIRECTS the Prosecutor, to amend the following parts of the indictment and implement the necessary changes:-

(i) specify the time-frames indicated in paragraphs 9 through 16 of the statement of facts and in the six Counts; to

(ii) 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 and complicity in genocide, and on the other hand, the acts or sequence of acts of his subordinates for which he is held responsible as their superior; and to

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

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

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

Arusha, 28 November 1997

William H. Sekule
Presiding Judge

Yakov Ostrovsky
Judge

Tafazzal H. Khan
Judge

(Seal of the Tribunal)