

ICTR-96-17-T
(24-3-98)
(240-233)

240

ICTR
CRIMINAL REGISTRY
RECEIVED

UNITED NATIONS  NATIONS UNIES

1998 MAR 24 P 7-13
International Criminal Tribunal for Rwanda
TRIAL CHAMBER I

OR: ENG

Before: Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry: Mr. Antoine Mindua

Decision of: 23 March 1998

**THE PROSECUTOR
versus
GÉRARD NTAKIRUTIMANA**

Case N° ICTR-96-17-T

**DECISION
ON A PRELIMINARY MOTION FILED BY DEFENCE COUNSEL
FOR AN ORDER TO QUASH COUNTS 1, 2, 3, 6 AND 7
OF THE INDICTMENT**

Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton

Counsel for the Defence:
Mr. E.N.K. Loomu-Ojare

PREL.MOTION / 72(B) (ii) / 96-17-T

LA

ICTR-96-17-T

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

SITTING AS Trial Chamber I composed of Judge Laïty Kama, presiding, Judge Lennart Aspegren and Judge Navanethem Pillay;

CONSIDERING that the accused, Gérard Ntakirutimana, was arrested in Côte d'Ivoire on 29 October 1996 and transferred to the Tribunal's Detention Unit on 30 November 1996, pursuant to an order confirmed by Judge William H. Sekule on 7 September 1996, in accordance with Rule 40*bis*(B) of the Rules of Procedure and Evidence of the Tribunal, adopted on 26 June 1995 (the "Rules");

CONSIDERING that the indictment against the accused was confirmed by Judge Sekule on 7 September 1996, pursuant to Rule 47 of the Rules;

CONSIDERING that the accused made his initial appearance on 2 December 1996 pursuant to Rule 62 of the Rules and pleaded *not guilty* to all seven counts in the indictment;

CONSIDERING that Defence Counsel filed a preliminary motion on 16 April 1997, pursuant to Rule 73 (A) (iii) of the Rules as amended on 4 July 1996, seeking an order to *quash counts 1, 2, 3, 6 and 7* of the said indictment and that Defence Counsel also sought a waiver of the prescribed time limit as set out in Rule 73 (B) of the Rules;

CONSIDERING that the Prosecutor opposed Defence Counsel's motion in her written response of 6 October 1997;

HAVING heard the Parties at a hearing on 10 October 1997;

AFTER HAVING DELIBERATED,

On the waiver of the prescribed time limit

1. The Defence Counsel requested that the prescribed time limit to file preliminary motions pursuant to Rule 73(B) of the Rules, be waived and the Tribunal condone the late filing of his motion. This Rule, as applicable before 5 June 1997, stated that preliminary motions shall be brought by the accused within sixty days from his initial appearance.

2. The Tribunal notes that at present all preliminary motions are brought pursuant to Rule 72 of the Rules, as amended on 5 June 1997. This Rule, as now applicable, states that preliminary

ICTR-96-17-T

motions shall be brought within sixty days following disclosure by the Prosecutor to the Defence, as envisaged by Rule 66(A).

3. The new Rule 72 came into operation after the accused filed his motion and is therefore inapplicable in this case. However, in light of the circumstances, the Tribunal waives the late filing of this motion.

On the quashing of counts

An interpretation of the Statute and the relevant rules

4. Article 17(4) of the Statute of the Tribunal (the "Statute") states that once the Prosecutor has established that a prima facie case exists against the accused, she shall prepare an indictment containing a concise statement of facts and of the crime or crimes with which the accused is being charged.

5. The Tribunal notes that neither the Statute nor the Rules define the term "prima facie" as referred to in Article 17(4) of the Statute, however Rule 47(A) of the Rules provides some guidelines for accessing the term. Rule 47(A) states that if the Prosecutor is satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime she shall prepare and forward an indictment for confirmation.

6. The Tribunal is of the view that the word "reasonable" is to be associated with fairness, moderation, sensibility and sound judgement. The term "reasonable grounds" can be interpreted as facts and circumstances which could justify a reasonable or ordinarily prudent person's belief that a suspect has committed a crime. There must be facts which raise a clear suspicion that the suspect is guilty of committing the offence, for reasonable grounds to exist. These facts must cover the essential elements of the offence it is alleged the suspect committed.

7. The Tribunal considers that the Prosecutor must be in possession of "sufficient evidence" to legally justify her action of preparing and forwarding an indictment for confirmation. The term "sufficient evidence" in Rule 47(A) of the Rules could not mean conclusive evidence or evidence beyond a reasonable doubt. It is merely essential facts, that could result in a conviction, if supported by conclusive evidence. The Tribunal interprets the term "prima facie" in Article 17(4) of the Statute to mean sufficient information which justifies a reasonable suspicion that the suspect did in fact commit the crime for which he is being charged.

8. Article 20(4)(a) of the Statute stipulates that the accused must be informed in detail of the nature and cause of the charge or charges against him. Rule 47(B) of the Rules states that an indictment shall contain the name and particulars of the suspect, a concise statement of the facts of the case and the crime or crimes with which the suspect is charged.

ICTR-96-17-T

9. The Tribunal is of the view that the indictment, at the time of confirmation, has two purposes, the first being to ensure that the allegations against the suspect do constitute an offence within the jurisdiction of the Tribunal, and the second being to inform the suspect in a clear and concise manner the nature of the charges against him. At this stage of the proceedings the purpose of the indictment is not to put the accused in a position to prepare his defence, since the Prosecutor's investigation against the accused may not be complete, but rather to ensure that the accused has full knowledge and understanding of the charges against him and is able to plead to these charges at his initial appearance, in accordance with Rule 62 of the Rules. The accused will have ample opportunity and adequate means to prepare his defence once he has received supporting documentation in accordance with Rule 66(A)(i) and after disclosure of witness statements in terms of Rule 66(A)(ii) of the Rules.

Decisions rendered by the ICTY

10. The Tribunal here notes two decisions by the UN International Criminal Tribunal for the former Yugoslavia (the "ICTY").

11. In its case *The Prosecutor versus Duško Tadić (IT-94-I-T)*, the ICTY found that Rule 47(B) of its Rules, which Rule is similar to Rule 47(B) of the Rules of the Tribunal, had been complied with since the indictment identified the accused, stated paragraph by paragraph the facts of each offence and specified clearly the particular provisions of international humanitarian law that have been violated. (para. 7; Decision on the defence motion on defects in the form of indictment, 14 November 1995). The ICTY in that case also found that paragraph 4 of the indictment lacked the necessary degree of specificity in that it did not provide the accused with any specific or concise statement of facts of the case and of the crimes with which he is charged.

12. In the case *The Prosecutor versus Zejnir Delalić and others (IT-96-21-T)*, the ICTY stated that the principal function of the indictment is to notify the accused in a summary manner as to the nature of the crimes with which he is charged and to present the factual basis for the accusations (Decision on the Preliminary Motions of the accused, 26 April 1996).

General remarks by the Tribunal

13. The Tribunal maintains that an indictment containing the charge against the accused must set out precise and specific allegations against him. The indictment must inform the accused, with sufficient clarity and certainty the nature of the charges against him and the essential facts on which they are based. When the accused makes his initial appearance in terms of Rule 62 of the Rules, he does not have the benefit of disclosure in terms of Rule 66(A)(i) and (ii). It is therefore important that the accused on reading the indictment, or on the indictment being read to him, is able to understand the charges against him, thus enabling him to plead to each and every count in the indictment. In terms of Rule 62(ii), a Trial Chamber before which the accused makes his initial

ICTR-96-17-T

appearance must be satisfied that the accused understands each and every count in the indictment before he pleads to it.

14. Although the accused, at the time of preparing his defence, has the benefit of disclosure in terms of Rules 66(A)(i) and (ii), the indictment still plays an integral part in the preparation of his defence. The supporting materials that accompany the indictment and the copies of witness statements made available to the accused are basically the evidence that amplifies and supports the various counts in the indictment. The indictment is therefore to be seen as a foundation of the Prosecutor's case against the accused.

Count 1

15. Count 1 of the confirmed indictment against Gérard Ntakuritimana alleges that the accused committed genocide, in violation of Article 2(3)(a) of the Statute, in that he "...is responsible for the killings or causing serious bodily or mental harm to members of the tutsi population....." (page 3 of the indictment).

16. Defence Counsel submitted that this count is "...duplex and irregular..." (para. 5 of defence motion) because it charges the accused with the commission of two of the specified acts as set out in Article 2(2) of the Statute (para. 5 of defence motion). In support of his submission, Defence Counsel argued that Article 2(2), under sub-articles (a), (b), (c), (d), and (e) provide for various specific acts by which a perpetrator can commit an offence of genocide and each specific act can only be charged in one count of the indictment.

17. The Prosecutor submitted that count 1 is validly framed and is not duplex. The Rule against duplicity is aimed at preventing more than one offence from being charged against an accused in a single count, so she argued. This rule, according to the Prosecutor, does not prevent different means of committing the same offence from being described in a count.

18. The Tribunal interprets Defence Counsel's use of the word "...duplex.." to mean duplication and will reject his submission that count 1 of the indictment is duplicated.

19. The Tribunal could accept the Prosecutor's submission that a description of several means of committing a single act is allowed, but this is not what she has done in count 1 of the indictment.

20. As noted above, count 1 of the indictment the Prosecutor alleges that the accused is "...responsible for the killing or causing of serious bodily or mental harm to members of the tutsi population..." (page 3 of the indictment). The word "or" suggests that the acts alleged in this count are in the alternative. The Tribunal therefore finds that this count is vague and lacks legal precision. Consequently the Prosecutor should be called upon to specify whether the accused is alleged to have committed acts of genocide under Articles 2(2)(a) or 2(2)(b) or whether she is alleging that the

ICTR-96-17-T

accused committed acts of genocide under both articles.

Count 2

21. In respect of count 2 the Defence Counsel's submissions and the Prosecutor's responses were similar to those concerning count 1.

22. The Tribunal consequently should reject the Defence Counsel's submission that count 2 of the indictment is duplicated. However, the Tribunal is of the opinion that the Prosecutor should be called upon to specify under count 2 which of the acts enumerated under Article 2(2) of the Statute the accused is alleged to have committed that constitute genocide.

Count 3

23. In respect of count 3 the Defence Counsel's submission and the Prosecutor's responses were similar to those concerning counts 1 and 2.

24. The Tribunal consequently should reject Defence Counsel's submission that count 3 of the indictment is duplicated. However the Tribunal is of the opinion that the Prosecutor should be called upon to specify under count 3 which of the acts enumerated under Article 2(2) of the Statute the accused is alleged to have committed that constitute conspiracy to commit genocide.

25. The Prosecutor alleges in count 3, that the accused conspired "...with others.." to commit genocide "...during the months of April through June 1994.." (page 4 of the indictment).

26. The Tribunal estimates that a charge is not an accusation in the abstract but a concrete accusation of an offence alleged to have been committed by the accused. This accusation must have arisen as a result of certain facts that the Prosecutor has in her possession. The Prosecutor must be specific and precise when formulating the counts in the indictment. It is therefore necessary that the Prosecutor, under Article 3, mentions the names or other identifying information of the person or persons the accused is alleged to have conspired with, to commit genocide.

Count 6

27. The Defence Counsel submitted that count 6 of the indictment is vague, speculative, lacks legal precision and does not disclose an offence. In support of this submission, Defence Counsel argued that there is no offence known as "...other inhumane acts.." (para.7) and the Prosecutor must mention what these other inhumane acts are in order for this count to constitute an offence.

28. The Prosecutor's response was to say that count 6 is not vague and that the accused is provided with sufficient information to enable him to understand this count. The accused has had

ICTR-96-17-T

the benefit of disclosure as required under Rule 66(A)(i) and (ii) of the Rules, in redacted form and he will have the benefit of full disclosure before trial. The accused therefore, according to the Prosecutor, will have full knowledge of the case he is to meet. The Prosecutor further submitted that whether or not an act falls within the category of other inhumane acts, under Article 3(i) of the Statute, "...is a matter for the evaluation of the Trial Chamber.." (para. 19 of Prosecutor's response).

29. The Tribunal finds good grounds to reject the Prosecutor's submissions in respect of count 6 and for requesting her to specify the act or acts which the accused is alleged to be responsible for, constituting inhumane acts under Article 3(i) of the Statute.

Count 7

30. Count 7 of the indictment charges the accused with serious violations of Article 3 common to the 1949 Geneva Conventions and of the 1977 Additional Protocol II, as recognized by Article 4 and punishable under Articles 22 and 23 of the Statute.

31. Defence Counsel submitted that count 7 is defective for the reason that it does not disclose an offence and also because it fails to meet the requirements of Article 17(4) of the Statute and Rule 47(B) of the Rules.

30. The Prosecutor did not oppose Defence Counsel's submissions in respect of count 7 but requested that should the Tribunal find that this count or any other count in the indictment is indeed defective, it should direct the Prosecutor to amend the count rather than quash it.

33. The Tribunal also notes that Article 4 of the Statute lists under (a) to (h) the various violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. The words "...shall include, but shall not be limited to.." in Article 4 suggest that the list of violations under this article is not exhaustive. The Prosecutor may indict the accused for one or more of the violations listed under (a) to (h) of Article 4 or for any other act that may constitute a violation under this Article.

34. The Tribunal notes that count 7 alleges that the accused committed or ordered others to commit serious violation of Article 3 common to the Geneva Conventions and of Additional Protocol II but fails to give any indication of the accused's conduct that constitutes these violations. The Prosecutor should therefore be directed to amend this count by stipulating the alleged conduct of the accused that constitutes a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II.

ICTR-96-17-T

FOR THESE REASONS THE TRIBUNAL :-

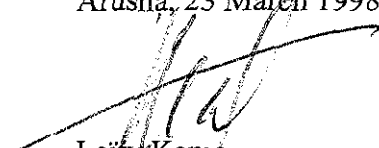
(A) DISMISSES the defence motion to quash counts one, two, three, six and seven of the indictment;

(B) ORDERS the Prosecutor to either withdraw or amend the respective counts in the indictment in the following manner :-

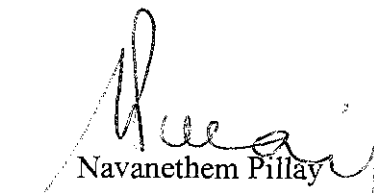
- (i) by specifying in counts one, two, and three which one of the two acts the accused is alleged to have committed, or alternatively whether the accused is alleged to have committed both acts;
- (ii) by specifying in count three, the names or other identifying information of the person or persons the accused is alleged to have conspired with;
- (iii) by specifying in count six, the inhumane act or acts, the accused is alleged to have committed;
- (iv) by specifying in count seven the alleged acts constituting violations of Article 3 common to the Geneva Conventions of 1949 and Additional Protocol II of 1977;

(C) INVITES the Prosecutor to amend the respective counts as ordered, within 30 days from the signing of this order.

Arusha, 23 March 1998


Laity Kama
Presiding Judge


Lennart Aspegren
Judge


Navanethem Pillay
Judge

(Seal of the Tribunal)

