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International Criminal Tribunal for Rwanda

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Before: Judge Tafazzal Hossain Khan

Registry: Ms. Imelda Perry
Ms. Prisca Nyambe
Mr. Lars Plum

Heard on: 24 and 25 March 1998
Decision of: 31 March 1998

THE PROSECUTOR

VERSUS

THÉONESTE BAGOSORA AND 28 OTHERS

Case No. ICTR-98-37-I

DISMISSAL OF INDICTMENT

The Office of the Prosecutor:

Ms. Louise Arbour
Mr. James Stewart
Mr. Mohamed Othman
Mr. Luc Coté
Ms. Jose D'Aoust
Mr. Robert Petit
Mr. Mathias Marcussen
Mr. Matar Diop
Mr. Frank George
Mr. William Egbe

Also Present:

Ms. Mercedeh Momeni
Mr. Alinikisa Mafwenga
Ms. Joyce Ashie

I, Judge Tafazzal Hossain Khan, am seized of a joint indictment for review, submitted by the Prosecutor of the International Criminal Tribunal for Rwanda on 6 March 1998, pursuant to article 17 of the Statute of the International Criminal Tribunal for Rwanda (the "Statute"), against 29 persons charging them with (i) conspiracy to commit genocide, (ii) genocide, (iii) complicity in genocide, (iv) direct and public incitement to commit genocide, (v) crimes against humanity, and (vi) violation of common Article 3 of the 1949 Geneva Conventions and Additional Protocol II, offences stipulated in articles, 2, 3, and 4 of the Statute of the Tribunal.

I. BACKGROUND

As a preliminary matter, I believe it is important to note that on the evening of 10 March 1998, I was presented with a file, by an officer of the Registry, containing the joint indictment against the 29 accused persons, the subject matter of the present proceedings. On 11 March 1998, with a cursory glance at our judicial calender I found that eleven persons named in this indictment had been indicted previously and had made their initial appearance and entered their plea, under rule 62 of the Rules of Procedure and Evidence (the "Rules").

II. INTRODUCTION

At least two cases against two of the accused included in the new indictment were set for presentation of evidence on 12 March and 20 April 1998. In other words, those cases are at trial for the purposes of rule 51(A) of the Rules and fall within the jurisdiction of the Trial Chambers. I therefore, felt it necessary to know exactly how many of the persons named in this indictment, had already been indicted and confirmed. The information supplied by the Registry on 18 March 1998 revealed that I was faced with, *inter alia*, two important threshold questions, namely the question of maintainability of the indictment in its present form, against all named persons and the issue of the jurisdiction of the reviewing Judge. These two legal issues must be addressed prior to all other questions including the merits of this indictment. If I find it legally sound to confirm the indictment in its current form, then the question of examining the facts of each count against all 29 persons will arise. Conversely, if the conclusion is not to confirm, then the question of scrutinizing the evidentiary elements of the materials in each count of the charges will hardly arise.

From the facts supplied, it appears that the present indictment is a composite one and persons with varying legal status have been joined together in one indictment. The 29 named persons can be categorized conveniently into Three Groups according to the procedural stages they have undergone thus far, and the legal status they have already attained. Eleven of the accused against whom indictments have already been confirmed, are in custody and have made their initial appearance, and have cases ripe for the presentation of evidence (the "*First Group*"). The "*Second Group*" is comprised of Five accused persons against whom indictments have been filed previously, with confirmation, but who remain at large. The "*Third Group*" is composed of Thirteen new suspects who are also at large.

The eleven who constitute the First Group are Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatolie Nsengiyumva, Samuel Imanishimwe, Andre Ntagerura, Pauline Nyiramasuhuko, Sylvain Nsabimana, Joseph Kanyabashi, Elie Ndayambaje and Shalom Ntahobali. They are currently in custody at the Tribunal's detention facilities, in Arusha, after having been arrested and transferred to the seat of the Tribunal under orders of the Judges at the request of the Prosecutor. The five accused who constitute the Second Group remain at large and it is unclear when and if their arrest and detention will be possible. Therefore, it is evident that at least 16 persons listed in the new indictment, have already been indicted properly and the same have been duly confirmed by the Judges of this Tribunal, on different dates during 1996 and 1997, in accordance with the provisions of rule 47 of the Rules. The remaining thirteen persons who constitute the Third Group, are new indictees and also remain at large. I have purposely refrained from listing the names of the persons of the last two groups.

It is relevant to note here that the eleven accused of the First Group have been assigned one or two Defence Counsels and have made their initial appearances before the ICTR Trial Chambers, pursuant to rule 62 of the Rules. The assigned counsels of some have presented motions before the appropriate Trial Chamber, on which motions the Chambers have made rulings. These motions address a wide range of procedural and administrative issues, including objections to the form of the indictment, disclosure of evidence by the Prosecutor, witness protection, and severance of crimes or defendants. It would be interesting to note that in the Bagosora case, more than a dozen motions have been presented by the parties, thus far and five of these motions were heard as recently as 12 and 13 March 1998. That so much judicial activity has taken place with regard to these cases, also

gave rise to the question of the competence of the Trial Chambers, the reviewing Judge, and the Prosecutor.

Thus, two questions arise, first, whether the Prosecutor can re-submit, for confirmation, the names of persons in the First Group, for substantially all the same crimes for which they have been charged before, given the current provisions of our Rules; and second, whether a reviewing Judge, under rule 47 of the Rules has jurisdiction to confirm such an indictment, realizing that the cases of some named persons are presently underway before the Trial Chambers, and if so, may he disregard the series of procedural facts and invade the jurisdictional purview of the Trial Chambers?

III. SUBMISSIONS OF THE PROSECUTOR

The learned Prosecutor, along with nine members of her team, appeared at the review hearing under rule 47 of the Rules, on 24 and 25 March 1998. The learned Prosecutor made the principal submissions on both days. Drawing attention to the provisions of article 18 (1) of the Statue and rule 47 (D) of the Rules, the learned Prosecutor stated that the reviewing Judge has limited powers as delineated by the said relevant provisions; that his main or only function is to be satisfied that a *prima facie* case has been established by the OTP, after of course, hearing the Prosecutor's submissions and reviewing the additional material in support of any count that may be presented by her.

When the legal complexities of the matter were raised, involving, *inter alia*, the very question of jurisdiction of the reviewing Judge, the learned Prosecutor was candid enough to agree that a Judge could not be prevented from examining the question of his jurisdiction, as it is his legal right. The learned Prosecutor advanced arguments on the validity and maintainability of the indictment in its present composite form. The remaining submissions made by her are briefly enumerated below.

1. She submitted that it was the statutory obligation of the Prosecutor, to put forth new evidence which has come into her possession in the last few months, showing that the 1994 Rwandan genocide was pre-planned. This gave impetus to the filing of the indictment in questions. The new evidence will assist the Tribunal to fulfill its mandate, object and purpose, as provided in the

Preamble to the Statute, *ie.*, to prosecute those responsible for the serious violations of international humanitarian law.

2. The evidence implicates persons already before the Tribunal, in a broad conspiracy with others not yet charged. Hence, according to the Prosecutor, the filing of a new indictment is the only valid procedure provided for in the Statute and the Rules to join all the accused.

3. The Prosecutor submitted that there are no provisions which allow for motions for the joinder of accused already separately indicted while there are express provisions for motions for amendments and severance. Furthermore, it is clear from the structure of the Rules that rules 47, 48, 49 must be read together and that an indictment can from its inception join several accused.

4. She further contended that rule 50 provides for amendment of the existing indictments. This, however, according to the Prosecutor is not an appropriate method of proceeding in the present case. The indictment against Bagosora and 28 others is a different indictment, as it adds substantial new charges against the accused, namely conspiracy. Only four of the 29 proposed accused in the indictment are already charged with conspiracy. Of these, three are charged with conspiracy on a local level, and not at the national level as alleged in the new indictment. Therefore, even for these accused the charge of conspiracy is a substantially new one.

5. Even if it were possible under the Rules, seeking amendments of some 13 indictments, charging 16 accused, before a number of confirming Judges or Trial Chambers, is not feasible and would certainly lead to conflicting decisions.

6. After explaining the difficulties involved in withdrawing the existing indictments, before the confirmation of the new one, the learned Prosecutor stated that she would not consider it prudent to withdraw the existing indictments prior to confirmation of the new one, as it would create a legal vacuum. This would not properly reflect the intention of the Prosecutor, which is to substitute a comprehensive indictment for the existing ones, and not simply to abandon them.

7. The fact that an indictment has been confirmed does not confer on Trial Chamber exclusive jurisdiction over an accused. Important powers remain with the confirming Judge such as those

provided for in rules 50 and 51. Moreover, the cases in question have not yet come to trial. The jurisdiction of a Judge acting under rule 47, according to the learned Prosecutor, is therefore, not restricted by the existence of other proceedings affecting the same persons as those named in the indictment under review.

8. Should the present indictment be confirmed, the Prosecutor will, in the appropriate forum, seek leave to withdraw the indictment against the 16 accused who are the subject of existing indictments.

9. The fact that the Trial Chambers have taken various procedural steps in the existing indictments does not, according to the learned Prosecutor, limit in any way the jurisdiction of the confirming Judge. Furthermore, she argued that the confirming Judge has jurisdiction to review an indictment, which may include charges against persons already charged in other indictments even for the same crime on similar facts. The implication here was that the confirming judge does have jurisdiction to confirm indictments which may be overlapping, to some degree, with other existing indictments.

10. The learned Prosecutor added that the Trial Chamber that is set to hear the evidence is not seized of the case until the commencement of the trial, which according to the Prosecutor, is when hearing on the merits begins with the presentation of evidence.

11. The learned Prosecutor also submitted that the jurisdiction of the Trial Chambers, when hearing pre-trial matters, is different, but not greater than the jurisdiction conferred by the Statute and the Rules to a confirming Judge.

IV. ANALYSIS OF PROCEDURAL ISSUES

I have enumerated the arguments advanced by the learned Prosecutor. It is necessary to emphasize at this stage that, with the limited jurisdiction with which I am entrusted, in my capacity as a reviewing Judge, I purposely refrain from venturing into debates regarding each of the learned Prosecutor's submissions. I am of the opinion that it would be imprudent and indiscrete for me to render a decision on these issues, which I believe do not arise in the instant discussion. That is to

say, the present matter for discussion only warrants my opinion on (1) the legal competence of the Prosecutor to bring a joint and composite *de novo* indictment in its current form and, (2) the issue of my jurisdiction with due regard to the overlapping indictments.

1. Competence of the Prosecutor

Although I agree with the learned Prosecutor's position that, under article 15 of the Statute, it is her duty to continue her investigations into matters within the jurisdiction of this Tribunal, on consideration of the relevant provisions of the Statute and the Rules, it seems to me that the Prosecutor has little legal competence to present this indictment in its present form. In other words, she may not file a substitute joint indictment on substantially all the same allegations and crimes as alleged in the existing cases against the persons in First Group, whose status is that of an accused person having made their initial appearance. The Prosecutor, in my view, can not proceed against this group while the previous cases are pending before the Chambers.

If the Prosecutor in her continuing investigations has, in fact, collected information which may jointly implicate new suspects and the existing accused for a specific offense, in my opinion she must follow the provision of rules 50 (amendment of indictments) or 51 (withdrawal of indictments) of the Rules, and perhaps rule 72 (preliminary motions), which despite the Prosecutor's arguments, is not exhaustive in its language on the quality or quantity of preliminary motions that could be filed. In doing so, she is not empowered with the sole discretion over the matter because the Rules require that the Trial Chamber, if at trial, would render a judicial decision, in presence of the accused, thereby ensuring fairness by maintaining all the mandatory checks and balances. Rule 47 cannot be used as a panacea for all the difficulties that the learned Prosecutor may confront during this process. Although such an approach may seem time consuming, under no circumstances can rule 47 supersede the mandatory provision of the other rules. It goes without saying that the Prosecutor shall have to pursue this endeavor within the framework of the Rules and the mandate contained in article 19 (1) of the Statute.

2. Jurisdiction of the Trial Chamber vis-a-vis the Reviewing Judge

The second question before me is whether I have the legal competence to confirm the joint indictment in its current form. That is to say, does a reviewing Judge have jurisdiction over persons who have been indicted previously and have made an initial appearance, in accordance with rule 62 of the Rules before a Trial Chamber?

It is necessary again to refer to rules 50 (amendment of indictments) and 51 (withdrawal of indictments) of the Rules for a full appreciation of the question of when jurisdiction actually shifts from the confirming Judge to the Trial Chamber. The framers of the Rules used the phrase "if at trial" in rules 50 and 51 without further explanation. Fortunately, to date there is no definitive statement from the learned Judges of the ICTR as to when a trial commences, either. However, it is my opinion that a trial begins when an accused person enters a plea, at the time of his initial appearance, under rule 62, thereby changing the jurisdictional purview of the question from the confirming Judge to the Trial Chamber. This is indeed contrary to the submissions of the learned Prosecutor, who forcefully argued that the trial phase of proceedings begin with the presentation of evidence under rule 85.

Though it was not my intention to burden this decision with the controversies that surround this expression, "at trial," it has now become necessary, in view of the submissions of the learned Prosecutor, to trace the development of the position taken by our sister Tribunal, the International Criminal Tribunal for the Former Yugoslavia, ("ICTY"), in order to shed some light on the matter. Rules 50 and 51 of the Rules of the ICTY also contains the phrase "if at trial". The discussion was initiated by Judge Adolphus Karibi-Whyte in his decision of 19 April 1996, when he declined to exercise jurisdiction over the withdrawal of the indictment against Djukic. (*Prosecutor v. Djukic*, Case no. IT-96-20-T).

The learned Judge based his decision on the rationale that, although he had been the confirming Judge in the matter, he no longer had jurisdiction over the case, as the accused had entered a plea at his initial appearance. Under rule 51 (A) of the ICTY Rules it is only with the leave of the Trial Chamber that an indictment may be withdrawn, once the accused has made an initial appearance. Accordingly, the Prosecution presented the same motion to the Trial Chamber, which assumed jurisdiction but rejected the motion on the merits, holding that the accused's ill health was not a valid reason to withdraw an indictment. This decision was appealed by the Prosecution, on the

grounds that 1) Judge Karibi-Whyte erred in declining to exercise jurisdiction and, 2) the assumption of jurisdiction by the Trial Chamber was also in error, the contention being that a trial begins when the parties commence the presentation of evidence, upon which a court must eventually determine guilt or innocence. However, because the accused died while the decision was pending, the question remained unresolved.

For clarification of the matter, the ICTY, in December of 1996, amended its Rules. At the Twelfth Plenary Session, the participants of the Plenary replaced the words "at trial" with "after the presentation of evidence in terms of Rule 85, has commenced" in the text of rules 50 and 51 of the ICTY Rules. There were, however, other developments between December 1996 and November 1997 when the ICTY Rules were re-amended with regard to this issue. Rule 50(A) of the ICTY now stands as follows:

> "The Prosecutor may withdraw an indictment, without leave, at any time before its confirmation, but thereafter, until the *initial appearance* of the accused before a Trial Chamber pursuant to Rule 62, only with leave of the Judge who confirmed it. *At or after such initial appearance*, amendment of an indictment may *only* be made by motion before that Trial Chamber pursuant to rule 73." (Emphasis added.)

Therefore, it is reasonable to conclude that the latest amendment to this rule reinforces my view that when an accused enters a plea at his initial appearance, matters involving the crimes for which he has been brought before the Tribunal then fall within the jurisdiction of the Trial Chamber which heard his plea, initially. Furthermore, it is noteworthy that the amended rule 50 (B) is now more stringent, in that it requires additional initial appearances, *before the Trial Chamber*, by the accused each time the indictment is amended with new charges. The ICTY rule now reads,

> If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber, in accordance with Rule 62, a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charge.

I can therefore conclude that the learned Prosecutor was aware of the latest position of the law pertaining to the question of when jurisdiction shifts from the confirming Judge to the Trial Chamber. Moreover, there have been no inconsistent interpretation of rules 50 and 51 of the Rules

by ICTR judges, necessitating amendments. Hence, I reiterate my opinion that a trial begins when the accused enters a plea under rule 62, shifting jurisdiction over an accused to the Trial Chamber.

Permissibility of Overlapping Indictments

In this context, it is necessary to address the issue of the overlapping indictments. On consideration of the relevant provisions of the Statute and the Rules, it appears to me that the Prosecutor has little legal competence to file a new joint indictment on almost the same allegations and crimes as alleged in the previous cases against the persons of the First Group who now maintain accused status. The Prosecutor, in my view, can not proceed against them in the manner she has chosen to proceed, keeping the old pending cases intact against them before the Chambers, over which the Chambers have exclusive jurisdiction. If she had deemed it necessary to add charges to the pending cases, she could have easily done so by approaching the appropriate Chamber, *inter alia*, under rule 50. There is thus no dearth of enabling provisions in the rules. It is important to note here that proceedings under any one of the said rule would have compulsorily afforded an opportunity to the defence to appear before the Chamber and place their cases and the learned judges of the Chambers would have decided the motions on merits.

An obvious fact with which we are faced is that the Prosecutor's approach is an attempt to include the First Group, in the instant indictment, depriving them of the opportunity to be heard. This is because, as it is well known, the proceedings under rule 47 of the Rules are Ex parte and the accused has no right to participate. Such an attempt is unacceptable. But hearings of this nature before the Trial Chambers are compulsorily done in presence of the parties, in consonance with the mandate stipulated in article 19 of the Statute. The Tribunal is also under a duty to see that the "proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused." This mandate is not only confined to the Judges of the Tribunal, but equally extends to the Prosecutor as she is one of the important and integral organs of the Tribunal according to article 10 of the Statute and is, bound to act in accordance with the Rules of Procedure and Evidence, and cannot circumvent them in order to suit convenience, or for the sake of mere expedience and eagerness to consolidate cases.

In this context, it is pertinent to state some indisputable facts which will clarify the matter. In September 1997, the learned counsel representing the Prosecution in the case against Théoneste

Bagosora announced that the Prosecution would take steps for joinder of Bagosora (Case ICTR-96-7-T) with Elie Ndayambaje (Case ICTR-95-8-T) under the appropriate rule. However, no steps were taken in that direction. These cases were posted in the judicial calender, fixing the date for hearing on 12 March and 20 April, 1998 respectively. But on 6 March, 1998 the Prosecution filed the present indictment joining the said two accused along with 27 others. The moot question is, whether this new strategy for joinder of the accused of the First and Second groups is legally tenable. Can such an approach be given countenance to, in the face of clear and express provisions of the mandatory Rules for joinder of accused. This procedure, that is, the only legal procedure, gives the Defence opportunity to appear and place its case and it gives the learned Judges of the Chamber an opportunity to scrutinize the facts closely and may allow or disallow the motion for joinder depending upon merits of the evidence placed before it.

A. Competence As To The First Group

For the attempted joinder of the First Group in one case, in my view, the learned counsels of the OTP ought to have resorted to the provisions of the legal procedure in accordance with the Rules by filing a motion for joinder to the appropriate Chamber or Chambers, which would have afforded an opportunity to the Defence to present their case. To confirm the present indictment against the said eleven accused by a single Judge in its current form will not only amount to circumvention of the provisions of the relevant rules addressing joinder of the accused, and also the provisions relating to joinder of crimes, but also an invasion upon the jurisdiction of the Chambers who are seized of the previous pending cases and some of which are ripe for hearing. If it is argued that the present indictment is a new one in the sense that an additional charge of "conspiracy to commit genocide" against the First and Second Group has been attached to the previous ones, then what we are left with is an amendment of the previous indictments. Thus, the logical course to follow for the Prosecutor would be to approach the appropriate Trial Chamber in accordance with rule 50 of the Rules.

The provisions of the said rules cannot be circumvented by bringing a new indictment, keeping in mind the pending cases on almost entirely the same allegations and for the same crimes. The Prosecutor cannot argue with certainty that all the charges in the new indictment against the First Group are wholly new and are completely distinct from the previous ones, pending for trial, to constitute a new case. The only claim the Prosecutor makes is that a new crime, namely, "conspiracy to commit genocide" has been added in the new indictment. This calls for amendment

of the previous indictments under rule 50 of the Rules. The short cut method is untenable in law in the facts and circumstances of the case. Had the Prosecutor joined the said eleven accused after withdrawing the pending cases (indictments) against them legally under rule 51 of the Rules with the leave of Trial Chamber, possibly no exception could have been taken to such an approach.

Joinder of the First Group, with the five accused of the Second Group and the thirteen accused of the Third Group, who are still at large will gravely prejudice the accused of the first category as the possibility of arrest remains uncertain. It would be a derogation from the spirit of the imperative duty imposed upon the Tribunal to ensure that a trial is fair and expeditious as stipulated in article 19(1) of the Statute. Such actions would also violate the right of the eleven accused to a trial without undue delay, which the authors of the Statute have guaranteed in Article 20(4)(c) of the Statute. Although article 19(1), also addressing the rights of the accused, refers to the Trial Chambers only, in my opinion, the salutary principle enshrined therein equally merits the attention of the Prosecutor, who is an integral organ of the Tribunal at all stages. For the reasons stated above, I must decline jurisdiction over the First Group.

B. Competence As To The Second Group

The analysis of the situation of the Second Group is comparatively simpler. Because persons in this group have not reached the trial stage, they fall within the jurisdiction of the *previously* confirming Judges. As mentioned, the Office of the Prosecutor had previously brought charges against these persons before confirming Judges. Because these persons remain at large and have not made an initial appearance before a chamber, it is my opinion that jurisdiction lies with the Judges who confirmed their indictments. Here again, I must decline jurisdiction.

C. Competence As To The Third Group

The present indictment against the new thirteen accused of the Third Category is permissible and there is no apparent legal complications. But it is undesirable to join them with the accused of the First Group as the very important mandate of ensuring fairness and expeditious trials, as contained in article 19(1) and also the accused's right "to be tried without undue delay"as contained in article 20(4)(c) of the Statute impair such attempts. Furthermore, the Prosecutor firmly expressed her unwillingness to split the present indictment as she views the said indictment as an indivisible package.

Hence, it is observed that if the Prosecution decides to legally withdraw the previous cases (indictments) against the said First and Second Groups, I, as the reviewing Judge, will have no difficulty in confirming the present indictment against them, should I be satisfied that a *prima facie* case can be established by the Prosecutor.

Additionally, the Prosecutor requested an order for non-disclosure according to rule 53 (A) and (C), submitting that in the interest of Justice, the information contained in or pertaining to the instant indictment not be disclosed to the public, until further order, as it may jeopardize future operations by her office.

V. CONCLUSION

In view of the foregoing it is held;

1. that for the reasons assigned in the body of this decision, the present joint indictment against the 29 persons constituting Three Groups, is not maintainable in its current form and that I have no jurisdiction to confirm this indictment against the eleven persons of the First Group, as the existing cases against them are within the jurisdiction of the Trial Chamber;

2. that I cannot exercise jurisdiction over the five persons of the Second Group as they are under the jurisdiction of the previously confirming Judges, and that;

3. the Third Group may be indictable, however, due to the Prosecutor's insistence on maintaining the indictment as a whole, I shall refrain from determining the merits of the charges, as it pertains to this group;

4. that in the interest of justice and in light of the exceptional circumstances in this case, the request for non-disclosure should be granted.

VI. ORDER

In view of the foregoing, the obvious course for me to follow is to **DISMISS** the indictment, filed on 6 March 1998, which I accordingly do, without further examination of the merits of the charges.

I **ORDER** the non-disclosure of the instant indictment or any part thereof, or any information pertaining to it.

Tafazzal Hossain Khan
Judge

Dated this 31st day of March 1998
in Arusha, Tanzania

Seal of the Tribunal