Case No. ICTR-97-29-A-T

UNITED NATIONS NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER II

OR: ENG.

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

Registry: Mr. John Kiyeyeu

Date of hearing: 9 July 1998

THE PROSECUTOR
VERSUS
SYLVAIN NSABIMANA

Case No. ICTR-97-29A-T

DECISION ON THE DEFENCE MOTION FOR THE AMENDMENT OF THE INDICTMENT, WITHDRAWAL OF CERTAIN CHARGES AND PROTECTIVE MEASURES FOR WITNESSES

The Office of the Prosecutor:

Mr. Frederic Ossogo

Counsel for the Defence:

Mr. Charles Tchakounte Patie

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

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

CONSIDERING the indictment submitted by the Prosecutor dated 14 October 1997 against Sylvain Nsabimana which was confirmed by a decision of this Tribunal rendered on 16 October 1997 by Judge Aspegren ("the confirming Judge");

CONSIDERING the initial appearance of the accused Sylvain Nsabimana which took place on 24 October 1997;

BEING SEIZED OF a defence motion filed on 25 April 1998 based upon rule 72 of Rules of Procedure and Evidence ("the Rules") in which the Defence seeks to amend the indictment on the basis of defect in form and seeks to dismiss certain charges as well as seeking protective measures for the defence witnesses;

NOTING the Prosecutor's response to the motion filed on 7 July 1998;

CONSIDERING rules 72 and 73 of the Rules pertaining to preliminary motions and motions generally, respectively;

TAKING INTO ACCOUNT Article 19(1) and 21 of the Statute of the Tribunal ("the Statute") and rule 75 of the Rules dealing with protective measures;

CONSIDERING Articles 17(4) and 18 of the Statute and rules 5, 47, 55 of the Rules;

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 arguments of the parties on 9 July 1998.

ARGUMENTS BY THE PARTIES

Defence Submissions

A. Regarding Amendment to the Indictment Due to Defects in Form

The Defence Counsel stated that the indictment does not meet the require legal standards. He submitted:

(a) that there existed vagueness in the concise statement of facts such as the dates regarding the appointment of the accused as the Prefect of Butare, the massacres in

Butare, the Tutsi refuge in the *Ecole Evangeliste du Rwanda* ("E.E.R."), the beating up of the Tutsi as well as the killing of the Tutsi by the Interahamwe as referred to in paragraphs 3.5, 3.13 and 3.14 of the concise statement of facts respectively;

(b) that it was unclear which ethnic group was killed or how the accused facilitated murder;

(c) that there was insufficient information to prove the allegation that the accused was indifferent when the massacres occurred (paragraph 3.13);

(d) that there were some ambiguous phrases used such as: "relatively calm" in paragraph 3.9, and "during the events referred to in this indictment"and reference to the words "facilitation" and "encouraged" in paragraph 3.12, "incitement" in paragraph 3.13 and reference to the phrase "who were either beaten up or killed by soldiers or taken to the neighbouring forest where many of them were executed" in paragraph 3.14;"

(e) that the information regarding the manner in which the accused is alleged to have incited the population to commit the massacres in paragraph 3.13 of the statement and how he encouraged the killers in paragraph 3.12 lacked clarity;

(f) that the role of the accused in planning the massacres referred in paragraph 4 of the statement needed some elaboration;

(g) that the information on the acts of omission were insufficient such as the inadequate facts to explain why the accused failed to take any measures or why the accused did not punish his subordinates and whether the accused had the power and means to punish his subordinates.

B. Dismissal of The Counts

On this issue, the Defence Counsel submitted:

(a) that the counts are vague. For example, that there is lack of evidence in the statement to support the counts, particularly, counts 1 and 2 that there is no evidence to show that the accused incited the massacres in count 1 (Genocide) nor is there evidence to show that he planned the massacres or that the subordinates were ready to incite the population. There is also no indication of omissions referred to in count 2 of the indictment and the relationship between the facts and the counts is not established yet the facts should correspond with the crimes charged against the accused;

(b) that counts 3 and 4 of the indictment should be withdrawn because the two counts dealing with crimes against humanity (murder) and crimes against humanity (extermination) in Article 3 of the Statute emanate from the same facts, that is, as part of "widespread or systematic attack against a civilian population."

C. Regarding Protective measures for the Defence Witnesses

The Defence Counsel, referring to Article 21 of the Statute and to rules 69, 72, 73 and 75 of the Rules, made general submissions on the protection of the Defence witnesses. He stated further:

(a) that the potential witnesses, just as in all other cases before this Tribunal, will face harm to their person and are endangered in person and property. He referred to the assassination of Mr. Seth Sendanshonga in May 1998 in Nairobi, Kenya, who was a potential witness for the Defence, as an example of the danger facing the potential witnesses;

(b) that the Trial Chamber should take judicial notice of the danger posed to the potential witnesses pursuant to rule 94 of the Rules since it was common knowledge that witnesses are scattered worldwide, always fleeing and continuously being threatened;

(c) that the witnesses should be allowed to move freely in order to testify before the Tribunal and that they should be guaranteed a safe return to the countries in which they have been residing;

(d) that the Defence should be permitted to use pseudonyms and witnesses should not appear in open court;

(e) that pursuant to rule 34 of the Rules, the Trial Chamber should direct the Registrar to contact the potential witnesses in Burundi, Canada, The United kingdom, Mozambique, Italy, Rwanda, Kenya, Cameroon Côte D'Voire, Senegal, Tanzania and Austria, among others.

Submissions of the Prosecutor:

The Prosecutor observed that the written text submitted by the Defence was based upon rule 72 of the Rules whereas the oral submission included rule 50 of the Rules. He then contended as follows:

(a) that it is only the Prosecutor who could request that an indictment be amended and not the Defence;

(b) that according to the 24 November 1997 decision of Trial Chamber I in the case of *The Prosecutor vs Ferdinand Nahimana (* ICTR-96-11-T) in which it was stated that what the accused required to know are the circumstances in which he committed the acts and that pursuant to rule 47 of the Rules, which requires that the indictment have concise facts, the prosecution has satisfied that requirement if the indictment and all the supporting materials are read together;

(c) that with respect to the vagueness of the periods within which the accused is alleged to have committed the crimes mentioned in the indictment, it is difficult to specify the periods and the exact nature of the massive crimes given the situation in which the events in Rwanda occurred;

(d) that reference to the period between "1 January and 31 December 1994" was only indicative of the temporal jurisdiction of the Tribunal and that the dates given, such as 19 April 1994, correspond to those given to the Prosecutor by the witnesses in their statements;

(e) that the phrase "relatively calm" in paragraph 3.9 of the statement shows that the situation in Butare was not absolutely calm and is just comparative to other places in Rwanda at the time;

(f) that it is not a requirement that certain words should be used in the concise statement of facts hence the use of the word "facilitation" is in order provided that in the counts the language of the Statute is used;

(g) that the Prosecutor could not give a precise date as to when the Tutsi were "either beaten up or killed by soldiers or taken to neighbouring forest where many of them were executed" in paragraph 3.14 of the statement because the acts did not occur once but took place on a regular basis;

(h) that the counts in 1 and 2 of the indictment have been set out according to the requirements of Article 3 of the Statute;

(i) that it would not be proper to withdrawal counts 3 and 4 of the indictment because 'murder' and 'extermination' are different crimes;

(j) that raising the issue of the accumulation of counts is premature because according to the *Nahimana* and *Ntagerura* decisions, the issues of accumulation of counts are for the court to examine at the end of the trial;

(k) that the Defence motion on protective measures for their witnesses should be dismissed because it is defective since it did not provide specific information about the witnesses, namely, the number and categorization of witnesses and the basis for the application;

(l) that rule 94 of the Rules cannot be applied without referring to any report or affidavits or other supporting documents.

Rejoinder by The Defence:

In reply, the Defence stated:

(a) that rules 50, 51, 72 and 73 of the Rules apply to both parties hence the Tribunal should guarantee the rights of the accused;

(b) that the Prosecutor should have referred to the supporting materials when the confirming judge was considering the indictment and not after its confirmation, and that any reference to witness statements is premature since the evidence is not yet

before the Trial Chamber;

(c) that he maintains his objections to the current form of the indictment as stated earlier.

DELIBERATIONS:

The findings of the Trial Chamber are set out below.

As the substance of the issues raised in the Defence motion are to a large extent 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 take into account Tribunal's decision of 24 November 1997 in that case.

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 concise statement of facts. In other words, the accused 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 interpretes the phrase "concise statement of the facts" in rule 47 to mean "a brief statement of facts but comprehensive in expression."as defined in the case *Nahimana*(supra).

On the defects in the indictment, the Trial Chamber has noted the imprecise dates and is also aware of the difficulties the Prosecutor is facing in providing precise dates but is of the view that there is a need for further clarification.

On the issue of vagueness of counts in the indictment, Article 20(4)(a) of the Statute stipulates that the accused must be informed promptly and in detail in a language he or she understands of the nature and cause of charges against him or her. This is provided for under rule 47(B) of the Rules which requires 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.

The Trial Chamber has read the concise statement of facts in this indictment. We underscore the need to have the precise statement of facts correspond to and explain the specific charges. The Prosecutor should also ensure that the facts used as a basis for the charges are clear enough so that the accused will not have to refer to the witness statements.

As a general rule, indictments are expected to be drafted in a precise manner. In the instant case, the accused is entitled to further information so that he can prepare his defence effectively and efficiently. Specifically, the Prosecutor should provide additional information to indicate the manner in which the accused is linked to the alleged acts that form the basis of the counts. It is our view that, generally, the indictment has provided some link between the concise statement of facts and the counts but in some cases, more detailed information is required to make the charges clearer.

To that end, the Prosecutor should give further explanation of the words "facilitated," and "encouraged" in paragraph 3.12 of the statement of concise facts to enable the accused to sufficiently

understand the counts brought against him without having to wait for the discovery of the witness statements.

With regard to the time periods mentioned in the concise statement of facts, we note that the period "1 January-31 December 1994" is *ratione temporis* of the Tribunal's jurisdiction.

Additionally, we are conscious that the period mentioned may not be as precise as the defence may wish, but given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times when the acts alleged in concise facts occurred. It is our opinion, therefore, that the time frames mentioned are sufficiently precise to enable the accused to know the acts for which he is charged in the indictment.

Regarding the motion on protective measures for the defence witnesses, it is our view that the substance of the motion is insufficient as it has only listed the countries in which the witnesses reside. The Defence Counsel has not specified precise information about the witnesses neither has he stated the actual problems faced by the witnesses wherever they are. He has not even indicated whether the potential witnesses have expressed a desire to secure the Tribunal's protection.

The relevant provisions of rule 75 of the Rules which provide the conditions for considering such applications have not been observed. Hence, in this regard, the Trial Chamber cannot, pursuant to rule 94 of the Rules, take judicial notice of the problems facing the potential witnesses. However, in the case of *The Prosecutor vs Joseph Kanyabashi* (ICTR- 96-15-T), the Trial Chamber, in its decision of 25 November 1997, stated that there is always a need for substantiation of requests for the protection of witnesses. Therefore, in the instant case, the relief sought should, *inter alia*, specify both the legal and factual basis upon which the measures sought are based.

FOR THESE REASONS,

THE TRIBUNAL

1. **DIRECTS** the Prosecutor, to amend the following parts of the indictment within thirty days and implement the following changes:

(i) elaborate on the following words and phrases: "facilitated," "encouraged," "during the events referred to in this indictment" in paragraph 3.12 of the statement of concise facts;

(ii) explain further the acts which are attributed to the soldiers in paragraph 3.14 of the concise statement of facts;

(iii) indicate briefly how, in paragraph 3.13 of the concise statement of facts, the population was "incited" to massacre the Tutsi;

(iv) specify the role of the accused in planning the events under paragraph 4.

2. **INVITES** the Defence to file a fresh motion, if they so wish, providing both the factual and

legal basis for its application on the protection of its witnesses.

3. **DISMISSES** the defence motion on all other points.

Arusha, 24 September 1998.

William H. Sekule
Presiding Judge

Yakov A. Ostrovsky
Judge

Tafazzal Hossaine Khan
Judge

SEAL OF THE TRIBUNAL