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(8-9-98)

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International Criminal Tribunal for Rwanda

CHAMBER I

1998 SEP -8 P 11: 53

OR: ENG

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

Registry: Mr. K. M. Mindua

Decision of: 4 September 1998

**THE PROSECUTOR**  
versus  
**PAULINE NYIRAMASUHUKO**  
and  
**ARSENE SHALOM NTAHOBALI**

Case N°: ICTR-97-21-I

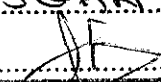
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**DECISION ON THE PRELIMINARY MOTION BY DEFENCE  
COUNSEL ON DEFECTS IN THE FORM OF INDICTMENT**

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Office of the Prosecutor:  
Mr. James Stewart

Counsel for the Defence:  
Ms Frédérique Poitte

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda  
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NAME / NOM: JOHN KINEYEM  
SIGNATURE:  DATE: 8-9-1998

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**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 Arsene Shalom Ntahobali (the "accused") was arrested in Kenya on 24 July 1997 and transferred to the seat of the Tribunal on the same day, pursuant to an order confirmed by Judge Yakov Ostrovsky on 29 May 1997;

CONSIDERING that the accused made his initial appearance on 17 October 1997 pursuant to Rule 62 of the Tribunal's Rules of Procedure and Evidence (the "Rules") and pleaded not guilty to all seven counts in the indictment;

CONSIDERING that Defence Counsel filed a preliminary motion on 19 February 1998, pursuant to Rule 73 (A) (iii) of the Rules, seeking an order to amend paragraphs 3.1 to 3.12 and counts 1 to 7 in the indictment;

CONSIDERING that the Prosecutor opposed Defence Counsel's motion and filed a written response dated 23 February 1998, with the Registry;

HAVING heard the Parties at a hearing on 25 February 1998.

**On the amendment of the indictment**

*An interpretation of the relevant provisions of the Statute and the Rules.*

1. 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 the crime or crimes with which the accused is being charged.
2. Furthermore, Rule 47(A) of the Rules 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.
3. The Tribunal refers to its decision of 25 November 1997, in the case of Prosecutor versus Gérard Ntakirutimana (ICTR -96-17-T). There that the term "prima facie" as envisaged in Article 17(4) of the Statute was defined as sufficient information which justifies a reasonable suspicion that the suspect did in fact commit the crime or crimes for which he is charged and the term "sufficient evidence" in Rule 47(A) of the rules was interpreted to mean essential facts, that when supported by

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evidence, could result in a conviction. This did not mean conclusive evidence or evidence beyond a reasonable doubt.

4. Furthermore, 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 for which the accused is charged.

5. The Tribunal, after having considered Articles 17(4) and 20(4)(a) of the Statute and Rules 47(A) and (B) of the Rules, finds that the indictment at the time of its confirmation must set out a prima facie case against the accused and the allegations therein must constitute an offence within the jurisdiction of the Tribunal. The indictment must also identify the suspect and inform him or her in a clear and concise manner the nature of the charges against him or her and the facts on which they are based.

*Two decisions rendered by the ICTY*

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

7. In the case of *The Prosecutor versus Duško Tadić* (IT-94-I-T), the ICTY, in its decision of 14 November 1995, found that Rule 47(B) of the Rules 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. The ICTY in this 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.

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

*Review of the indictment*

9. 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.

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10. The Tribunal notes that, although the accused at the time of preparing his defence has the benefit of disclosure pursuant to Rules 66(A)(i) and (ii) of the Rules, 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 can therefore be seen as a foundation of the Prosecutor's case against the accused.

11. The Defence Counsel submitted that the indictment is defective because "...it fails to specify the period, place, victims, or perpetrators and, further, to define the role played by the accused in any of the events alleged to engage his criminal responsibility." (paragraph 40 of Defence motion)

12. The Prosecutor submitted that the indictment is not defective and on reading the indictment one must take into account the facts described in the indictment and the supporting material, as well as the particular circumstances of the conflict in Rwanda. (paragraph 27 of Prosecutor's response)

13. The Tribunal refers to its decision of 24 November 1997 in the case of Prosecutor versus Ferdinand Nahimana (ICTR-96-11-T), wherein it stated that "...the accused must be able to recognise the circumstances and the actions attributed to him in the indictment and in the supporting material...". Whilst it is essential to read the indictment together with the supporting material, the indictment on its own must be able to present clear and concise charges against the accused, to enable the accused to understand the charges. This is particularly important since the accused does not have the benefit of the supporting material at his initial appearance.

*The time frame the alleged offences were committed*

14. The Defence Counsel submitted that paragraph 3.1 of the indictment lacks precision because it refers to a period "...between the 1st of April and July 31st 1994." Defence Counsel also submitted that paragraphs 3.2, 3.3, and 3.4 which refer to "During the events referred to in this indictment..." and paragraphs 3.8; 3.9 and 3.11 which refer to "During the period of events referred to in paragraph 3.1..." are also vague and lack legal precision.

15. The Prosecutor submitted that the supporting material which was made available to the accused pursuant to Rule 66(i) of the Rules, completes the information concerning these periods in question. The Prosecutor, in paragraphs 31, 32, 33 and 34 of her written response cites the relevant portions of the supporting material to illustrate her submission.

16. The Tribunal finds that the indictment and the supporting material, if read together, sufficiently indicates the time frame the alleged offences took place.

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*The sites and locations at which the offences were allegedly committed*

17. The Defence Counsel submitted that the indictment is vague and imprecise because counts 1 to 5 fail to give sufficient information of the various sites and locations of the alleged offences. In support of her submission, the Defence Counsel referred to various terms and expressions such as "...near.."; "...in the Prefecture.." and "...various locations.." to illustrate the vagueness and imprecision in the description of the sites where the alleged offences had taken place.

18. The Prosecutor submitted that there is sufficient information in the indictment and in the supporting documentation to enable the accused to identify the sites where the alleged offence had taken place. The Prosecutor, in support of her submission quoted certain parts of the supporting documentation in her written response.

19. The Defence Counsel, in response to the allegation that a roadblock was set up near the house of the accused, as alleged in paragraph 3.8 of the indictment, averred that the home of the accused is located about one hundred metres from a military camp.

20. The Tribunal finds that the indictment if read with the supporting material sufficiently indicates where the offences allegedly took place. The various extracts from witness statements that form part of the supporting material indicate with sufficient specificity the various sites and locations of the alleged offences. Furthermore, the Defence Counsel's submission that the home of the accused is near a military camp is a matter for evidence at trial and should not be raised at this stage of the proceedings.

*The alleged role played by the accused*

*Count 1*

21. *Count 1* of the indictment charges the accused with Genocide. In respect of this count, the Defence Counsel submitted that :

(i) the indictment contains no act attributable to the accused that can be construed as an act of genocide and it merely concludes that the accused killed members of the Tutsi population without specifying when, how and under what circumstances these murders were allegedly committed;

(ii) Article 2 of the Statute defines acts of Genocide as being committed with intent to destroy, in whole or in part a national, ethnic, racial, or religious group. It is therefore essential for the indictment to provide the factual circumstances that make it possible to characterise such a situation.

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22. The Prosecutor submitted that :

(i) pursuant to Article 6(1) of the Statute a person who planned, instigated, ordered, committed or aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the Statute shall be individually responsible for that crime;

(ii) paragraphs 3.8 to 3.12 of the indictment and the various extracts from witness statements that are referred to in the supporting document that accompany the indictment indicate with precision the alleged acts committed by the accused that not only comprise the crime of Genocide but also Crimes against Humanity and violation of Article 3 common to the Geneva Conventions and or Additional Protocol II.

23. The Tribunal finds that the indictment when read with the supporting material sufficiently indicates the alleged conduct of the accused that constitutes genocide.

*Count 2*

24. *Count 2* or the indictment charges the accused with complicity in genocide. In respect of this count the Defence Counsel submitted that :-

(i) the Prosecutor alleges that the accused acted with certain accomplices who are, members of the militia and soldiers, all of whom are unknown to her. This is evident in Paragraph 3.8 of the indictment where the Prosecutor refers to "...soldiers and other unknown accomplices.." and in paragraph 3.9 of the indictment where the Prosecutor refers to "...members of the militia known as interahamwe, as well as that of soldiers..". This count is therefore vague and lacks precision;

(ii) pursuant to Article 2(3) of the Statute, Genocide and Complicity in Genocide are separate offences and constitute separate and distinct acts. The Prosecutor has erred in that she charges the accused as a ring leader in *count 1* and as an accomplice in *count 2* for the same crime of genocide based on the same circumstances of time and place and on the same vague allegations

25. The Prosecutor submitted that paragraphs 3.8 to 3.12 of the indictment, as well as extracts from the various witness statements referred to in the supporting material sufficiently identify the accomplices the accused is alleged to have acted with.

26. The Tribunal notes that the supporting material indicates that the accused allegedly acted with co- accused, Pauline Nyiramasuhuko, a person named Kazungu as well as the interahamwe and accordingly finds that sufficient identification is made in respect of some of the accomplices.

27. The Tribunal notes that in the cases of the Prosecutor v. Duško Tadić (IT-94-I-T; decision on the defects in the form of the indictment) and Zejnil Delalić and three others ( IT-96-21-T; decision on the defects in the form of the indictment), the ICTY held that where an accused is

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charged with more than one offence on the same set of facts, this matter is only relevant to sentencing if the accused is ultimately convicted of the charges in question. The Tribunal adopts this view and finds that similar reasoning is applicable here.

*Count 3*

28. *Count 3* of the indictment charges the accused with crimes against humanity, pursuant to Article 3(a) of the Statute.

29. In respect of this count, the Defence Counsel submitted that the concept of a crime against humanity presupposes that the act was committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The facts mentioned in 3.1 to 3.12 of the concise statement of facts in the indictment are insufficient to allow for the characterisation of such a situation and it also fails to establish the direct or personal participation of the accused in widespread or systematic killings or rapes of Tutsi victims.

30. In response, the Prosecutor submitted that the widespread or systematic attacks against the Tutsi civilian population is demonstrated *prima facie* in paragraph 3.3 of the indictment and in the supporting material. The supporting material also sufficiently indicates the accused's participation in systematic killings.

31. The Tribunal finds that there is sufficient information in the supporting material to support the allegation that there was a wide spread or systematic attack against the Tutsi population and the accused participated in this widespread or systematic attack.

*Counts 4 ; 5 and 7*

32. *Counts 4, 5 and 7* charge the accused with serious violations of Article 3 common to the Geneva Conventions and of additional protocol II, pursuant to Articles 4 (a) and 4 (e) of the Statute.

33. The Defence Counsel submitted that counts 4, 5 and 7 of the indictment do not give the accused a clear indication of the violations of the Geneva Conventions with which he is charged. There is no indication as to how, where and against whom these acts were allegedly committed.

34. The Prosecutor submitted that sufficient information in respect of counts 4, 5 and 7 are given in the various extracts of witness statements referred to in the supporting material.

35. The Tribunal finds that the supporting material is sufficient to enable the accused to

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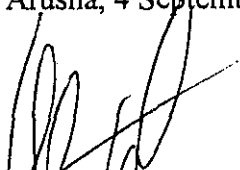
ascertain the acts which are alleged to constitute violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, with which he is charged in counts 4, 5 and 7 of the indictment.

**FOR THESE REASONS,**

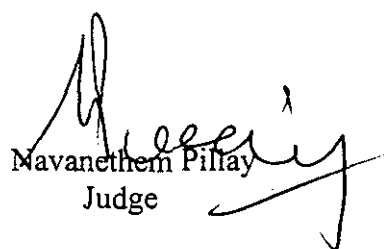
**THE TRIBUNAL**

**DISMISSES** the defence motion seeking an order to amend the indictment.

Arusha, 4 September 1998

  
Laly Kama  
Presiding Judge

  
Lennart Aspegren  
Judge

  
Navanethem Pillay  
Judge

