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UNITED NATIONS **NATIONS UNIES**

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Trial Chamber II

ORG:ENG.

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

Registry: Mr. John M. Kiyeyeu

THE PROSECUTOR
versus
EMANNUEL BAGAMBIKI
SAMUEL IMANISHIMWE
YUSSIF MUNYAKAZI

Case No. ICTR-97-36-(I)

DECISION ON THE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT

For the Prosecution:

Mr. William Egbe

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: MR. AHIOHE MIHIUA
SIGNATURE: ..... DATE: 25.9.1998

For the Defence:

Ms. Marie Louise Mbida Kanse Tah
Mr. Georges So'O

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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 filed on 9 October 1997 by the Prosecutor against Emmanuel Bagambiki, Samuel Imanishimwe and Yusuf Munyakazi pursuant to article 17 of the Statute of the Tribunal ("the Statute");

CONSIDERING FURTHER the indictment against Samuel Imanishimwe ("the accused") which was confirmed by Judge Lennart Aspegren on 10 October 1997;

TAKING NOTE of the initial appearance of the accused which took place on 27 November 1997;

HAVING BEEN SEIZED of a preliminary motion filed by the Defence on 24 March 1998, ("Defence Motion") contending that due to defects in the form of the indictment, against the accused, the Prosecutor should be ordered to "redefine the facts;"

HAVING RECEIVED the Prosecutor's written reply ("Prosecutor's Reply"), filed on 24 March 1998, in which she submitted that the Defence Motion should be dismissed as the indictment complies with the Statute and the Rules of Evidence and Procedure ("the Rules");

HAVING HEARD the parties during an open session of 26 March 1998.

AFTER HAVING DELIBERATED:

1. In its written motion and at the hearing the Defence argued that the Prosecutor is obliged to state precise facts of the crime or crimes with which the accused is charged in the indictment. If this obligation is not met, the Defence contended, the accused's right to be "informed, in detail, of the nature and cause of the charge against him," as guaranteed under article 20(4)(a) of the Statute, would be violated. (Defence Motion, p. 3).

2. Additionally, the Defence averred that the indictment was drafted in a vague manner and supported by insufficient and questionable documentation. The Defence further argued that the accused and others were inappropriately charged with the same crimes. Therefore, the Defence claimed that the Prosecutor should be ordered to further clarify the facts, without which it could not prepare an adequate defence.

3. The Prosecutor's representative responded that first, the Defence Motion joined two issues, which could not be addressed by the Trial Chamber simultaneously. He stated that the claims in the instant motion, that the evidence against the accused is insufficient to support the charges and that there is a lack of a concise statement of facts, were essentially arguments that there were defects in the merits and defects in the form of the indictment, respectively, which constitute distinctly different issues. At this stage of the proceedings, the Prosecution claimed, the Trial "Chamber is bound to examine and dispose of issues relating to defects in [the] form" of the indictment only. (Prosecutor's Reply, para. 37.) Defects in the merits are questions that should be addressed, as evidentiary questions, once the trial begins.

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4. Next, the Prosecution claimed that in the indictment a concise statement of facts was provided along with the crimes charged. The said indictment was then disclosed to the Defence on 8 October 1997, giving him sufficient notice to prepare for trial. Therefore, the Prosecution submitted that the only question remaining for the Trial Chamber to resolve is whether the time frame, within which the alleged crimes were committed, were sufficiently described.

On the Defects in the Form of the Indictment Due to an Insufficient Concise Statement of the Facts Against the Accused

5. As a preliminary matter, the Trial Chamber notes that at this stage of the proceedings, issues concerning the merits of the indictment are not yet ripe for consideration. Therefore, we will limit the scope of the analysis in this decision to the possible defects in the form of the indictment only. Rule 72(B) of the Rules contains a non-exhaustive list of pre-trial motions which the accused may bring forth prior to the commencement of the trial on the merits. Sub-section (ii) of this rule provides the accused with the right to object to the form of the indictment. Thus, the Trial Chamber recognizes the right of the accused to bring forth such objections.

6. The Statute, through article 20(4)(a), guarantees the accused the right "To be informed promptly, and in detail, in a language he or she understands of the nature and cause of the charges against him." In addition, rule 47(B) of the Rules states "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 . . . ." (Emphasis added.) The Trial Chamber notes that neither the Statute nor the Rules define the phrase "concise statement of facts."

7. Although the Rules do not define the phrase "concise statement of the facts," as provided in rule 47, there is sufficient persuasive precedent, in the decisions of this Tribunal as well as the decisions of the International Criminal Tribunal for the Former Yugoslavia, to guide the Trial Chamber in reaching a decision with regard to this matter. The Trial Chamber recalls the decision of 24 November 1997, in the case of the *Prosecutor v. Ferdinand Nahimana* (ICTR-96-11-T), where the Tribunal interpreted the phrase in question to mean "a brief statement of facts but comprehensive in expression." (Para. 20.) With this interpretation as a foundation, the Trial Chamber will address the objections raised by the Defence in the instant motion.

8. The Defence claims that counts 7, 8, 9, 10 and 13 are drafted and presented in such a manner that "it [is] impossible for the Tribunal to know which facts correspond with which crimes" due to "the wide range of facts and the disorderly definition of the identical facts." (Defence Motion, Para. 7.) Although it is true that in all of the abovementioned counts the Prosecutor refers to paragraphs 3.17, 3.18, 3.20, 3.25 and 3.30, of the concise statement of facts, it is clear that more than one crime may arise out of the same act or set of acts. Therefore, the Trial Chamber observes that no difficulties arise from the use of overlapping facts.

If the intention of the Defence was to raise the principle of *non-bis-in idem,* that is, the inappropriate accumulation of charges, then the Trial Chamber again must refer to the *Nahimana* decision, *supra*, (paras. 35 - 37) in which the Tribunal held that this question also could not be addressed at this stage of the proceedings.

9. The Defence submitted that counts 11, 12 and 19 of the indictment were vaguely drafted, in terms of the facts and the law, but only provided the Trial Chamber with details of his objection to

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count 12 at the oral presentation of this motion. The Defence states that count 12 of the indictment charges the accused with crimes against humanity under article 3(f) of the Statute, (torture as a part of a widespread and systematic attack against any civilian population) and was based on paragraphs 3.24 and 3.25 of the concise statement of facts, of which the former did not appear to refer to any acts of torture. It would be reasonable to read paragraph 3.24 however, as a foundation for paragraph 3.25, which in fact does include allegations of torture at the Cyangugu Barracks. Thus, the Trial Chamber is of the opinion that there is no need for further clarification of that particular count.

10. The Trial Chamber has reviewed also counts 11 and 19 of the indictment. It appears that count 11 (crimes against humanity) provides the accused with information that would enable him to establish a link between his acts, that is allegedly imprisoning civilians, and the criminal charges brought against him by the Prosecutor. In particular paragraph 3.22 of the concise statement of facts states that "refugees [escorted there by the accused] could not leave the stadium which was guarded by gendarmes." The accused allegedly exercised *de facto* authority over the said gendarmes. Therefore, we find that the information provided in count 11 is sufficient to allow the accused to begin to prepare his defence.

11. Count 19 charges the accused persons and others with conspiracy to commit genocide. Paragraphs 3.12 through 3.30 of the statement of facts are articulated in such a way that the Prosecutor's intent to join the accused with Emmanuel Bagambiki and Yussuf Munyakazi, in their alleged criminal acts and omissions, is intelligible. However, the Trial Chamber notes that in paragraph 3.14 reference to the phrase "*held a large number* of meetings among themselves, *or* with others . . . ," without supplying further details, renders this paragraph vague and by extension count 19 inadequately supported. (Emphasis added.)

FOR ALL THE FORGOING REASONS THE TRIAL CHAMBER:

ORDERS the Prosecution to clarify paragraph 3.14 of the concise statement of facts by providing further information with regard to the alleged meetings referred to in that paragraph. Specifically, the Prosecution should present details, such as the approximate dates, locations and the purpose of these meetings, so far as possible, and also clarify whether the accused persons and others named in the indictment were the only persons present at these meetings or if others, not named in the indictment, were present also.

DISMISSES the Defence Motion on all other points.

Arusha, 24 September 1998.

Yakov A. Ostrovsky
Judge

Tafazzal Hossain Khan
Judge

Judge Sekule appends a separate opinion, on the issue of count 19, to this decision.

Seal of the Tribunal

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YUSUF MUNYAKAZI

Case No. ICTR-97-36-I

SEPARATE OPINION OF JUDGE SEKULE ON THE DECISION OF THE DEFENCE MOTION ON DEFECTS IN THE FORM OF THE INDICTMENT

The Office of the Prosecutor:

Mr. William T. Egbe

Counsel for Samuel Imanishimwe

Ms. Marie Louise Mbida Kanse Tah
Mr. Georges So'o

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I have carefully considered the issues presented in the Defence motion and opine as follows:

With regard to count 19:

I do not agree with the inclusion of persons who are specifically named but not formally charged ("named others") within count 19. I reiterate the observations I made regarding count 19 in another separate opinion in this case. The pertinent portion of my opinion read as follows;

> *My reasons for agreeing with the Defence motion as it concerns the removal of the named others are as follows:*
>
> *First, as a matter of law, the conspiracy to commit genocide charge mentioned in count 19 is complete as it already includes three persons. Accordingly, in the instant case, there is no legal need to specifically name others when the phrase "and others" would suffice.*
>
> *Second, there may be prejudice to the accused due to evidence which may be adduced during the trial which pertains to the named others but implicates the accused. In this scenario, the Defence may not be able to challenge this evidence because the pertinent matters may be within the particular knowledge of the named others, who are not present or represented. Indeed, one of the named others may be the pivotal conspirator.*
>
> *Third, the inclusion of the named others in count 19 presents a serious risk of prejudice to them because evidence will need to be adduced by the Prosecution to show the alleged linkage between the named others and the accused. Obviously, the named others will not be represented by counsel at the trial and, therefore, they will not have the opportunity to contest evidence which implicates them in conspiracy. To include the named others in count 19 may violate the spirit of Article 20(4)(d) of the Statute which requires that the trial of an accused should be in his or her presence.*

For the above reasons, in that decision I opined that the named others in count 19 should be deleted. Regarding the present motion, I reiterate the above opinion. Furthermore, any call for additional information in paragragh 3.14 or the relevant concise statement of facts should *specifically apply to the persons charged.*

Regarding all other issues:

I share and endorse the majority opinion.

Arusha, 24 September 1998.

William H. Sekule
Presiding Judge

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