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, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John M. Kiyeyeu

THE PROSECUTOR
versus
ALOYS NTABAKUZE
GRATIEN KABILIGI

Case No

ICTR-97-34-T

DECISION ON THE DEFENCE PRELIMINARY MOTIONS RELATING TO DEFECTS IN THE FORM AND SUBSTANCE OF THE INDICTMENT

For the Office of the Prosecutor:

Mr. William Egbe

For Aloys Ntabakuze:

Ms. Simonette Rakotondramanitra

For Gratien Kabiligi:

Mr. Jean Yaovi Degli

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 THAT a joint indictment was issued against Aloys Ntabakuze and Gratien Kabiligi charging each accused with Genocide, Crimes Against Humanity, complicity in genocide, violations of common Article 3 to the 1949 Geneva Conventions, and of the 1977 Additional Protocol II thereto, which was confirmed on 15 October 1997 by Judge Aspegren;

TAKING INTO ACCOUNT that pursuant to rule 62 of the Rules of Procedure and Evidence ("the Rules") the initial appearances of Ntabakuze and Kabiligi were held on 24 October 1997 and 17 February 1998, respectively, at which time both accused pleaded not guiltily to all counts of the indictment;

BEING NOW SEIZED of Defence motions filed on 19 February 1998 (Natabakuze) and 23 February 1998 (Kabiligi), requesting the Trial Chamber to address the issue of defects in the form and substance of the indictment by either nullifying the indictment and releasing the accused or, alternatively, ordering the Prosecutor to amend the indictment;[1]

CONSIDERING THAT in response to the Natabakuze motion the prosecution filed a response on 11 May 1998;

HAVING HEARD the arguments of the parties on 14 May 1998.

ARGUMENTS OF THE PARTIES

1. The Defence counsel for *Ntabakuze* argued that the indictment should be annulled because of violations of rules 40 *bis* (G) (extension of provisional detention) and 40 *bis* (J) (appearance before a judge during provisional detention). Counsel submitted that Ntabakuze's provisional detention, after his transfer to the United Nations Detention Facilities, was extended without sufficient grounds. Another reason for the annulment of proceedings, the defence counsel contended, was the violation of rule 55(B) of the Rules (warrants of arrest) in that at the time of his arrest, he was not informed of the existence of any arrest orders or a search warrant. Furthermore, she claimed, that Ntabakuze's "personal documents, which had nothing to do with the alleged acts against him, were seized and kept by the investigators." (Natabakuze motion, p. 5)

2. In further support for her argument for nullity, Ntabakuze's defence counsel stated that the delay in the disclosure process by the Office of the Prosecutor ("OTP") violated rule 66 and that to date no trial date has been agreed upon for the commencement of her client's trial which constitutes a violation of rule 20(4) of the Rules (right to a trial without undue delay).

3. General arguments, made by Ntabakuze's counsel, regarding the defects in the form of the indictment were that it was highly confused, and the said indictment contained imprecise facts. She

---

[1]In the same motion, the defence for both accused persons also requested severance of trials. The Trial Chamber addressed that portion of the request in a separate decision, dated 30 September 1998.

further stated that the supporting documents were not disclosed to the defence in a timely manner. She added that paragraph 2.9 of the precise statement of facts contained many errors regarding the particulars of Ntabakuze, specifically that her client did not receive a paratrooper's certificate on the date specified and that not all his promotions within the military were mentioned.

4. Counsel then proceeded to object to the following paragraphs in the concise statement of facts for the reasons below:

> Paragraph 2.12 was imprecise because it did not include dates and places where the accused allegedly made anti-Tutsi speeches; paragraph 2.17 failed to give details as to where, exactly, the meeting took place; paragraph 2.18 lacked precision with regard to the types of liaison and communications exchanged; paragraph 2.24 did not mention a time and place for the alleged support that was provided to the presidential unit; paragraph 2.25 failed to include information regarding the location of the meetings with his subordinates; paragraph 2.26 does not state where the mentioned roadblocks were located and who the victims may have been and what role was played by the accused; and paragraphs 2.27 and 2.28 allege the murder of several Tutsi leaders and the Tutsi population, but did not mention the role of Ntabakuze.

5. Because counts 6 through 10 of the indictment are based on the above mentioned paragraphs, the Counsel contended, and for each crime in these counts the same facts are described in different manners, this indictment should be declared null or, in the alternative, it should be amended.

6. The counsel for *Kabiligi* stated that he shared the position of Ntabakuze's counsel with regard to the manner in which the indictment was drafted. He elaborated that there was a need, in accordance with rule 47(B) of the Rules, to provide precise details. Due to this lack of precision, the counsel argued, the Defence would be unable to prepare its case.

7. The counsel for Kabiligi then made the following three points. First, he noted that all counts of the indictment, which concern Kabiligi, (1 through 5) are based on paragraphs 2.21 and 2.29, yet paragraphs 2.24 and 2.25 concern Ntabakuze only. Second, Counsel argued that a person could not be charged with several offences arising out of the same facts. Third, he noted that the first and second counts of the indictment charge Kabiligi with genocide and complicity in genocide. This matter needed clarification, the counsel stated, as one person could not be the perpetrator and an accomplice for the same offense. He therefore, requested that the Trial Chamber order that the indictment be reviewed by the OTP and amended.

8. In response to the contentions of the Defence, the *Prosecutor* argued that the indictment had been confirmed in accordance with the Rules and therefore contained sufficient information for the purpose of proceeding with the case at this time. She further stated that the request for particulars was premature because issues involving the merits of the case could not be addressed prior to the actual presentation of evidence at trial.

9. With regard to the question of whether it would be legally acceptable for several offences to be charged on the basis of the same or similar facts, the Prosecutor averred that in fact a particular criminal conduct can lend itself to a variety of offences. Finally, the Prosecutor expressed her willingness to amend the indictment in the direction of more specificity, but not on substance of the matter.

DELIBERATIONS

10. 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, as we have in our previous decisions, that neither the Statute nor the Rules define the phrase "concise statement of facts." See, e.g., the Decision of the Trial Chamber on the Defence Motion on Defects in the Form of the Indictment, *The Prosecutor v. Samuel Imanishimwe and Others*, ICTR-97-36-I (24 September 1998).

11. 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.

12. The Defence for both accused claim that the concise statement of facts is presented in such a manner that render the indictment vague and incomprehensible. It is the opinion of the Trial Chamber that in paragraphs 2.11 and 2.12, the Prosecutor should provide additional details, in as much as possible, with regard to the *times and the places* of the alleged speeches and/or meetings in order to allow the Defence to prepare its case. However, in so far as the issues raised with the other paragraphs, we find that the inaccuracies raised are either inconsequential, for example paragraph 2.9's misstatement regarding the date on which Ntabakuze received his paratrooper's certificate, or are matters of substance and should be addressed during the presentation of evidence.

13. Furthermore, Kabiligi's contention that paragraphs 2.24 and 2.25 should be deemed inapplicable to the case against him because these paragraphs only mention Ntabakuze, is inappropriate. All counts against Kabiligi are brought under Articles 6(1) and/or 6(3) of the Statute (individual responsibility and command responsibility, respectively). As the Chief of Military Operations within the General Staff of the Rwandan Army, during the events in question, Kabiligi was Ntabakuze's superior. Therefore, Kabiligi had command authority over the acts or omissions of Ntabakuze who held the rank of Major and was the Commander of Para-Commando Battalion in Kigali. Consequently, there is no reason for the Trial Chamber to order the Prosecutor to clarify these points at this stage.

14. Although it is true that in all of the counts 1 through 5 (concerning Kabiligi) and counts 6 through 10 (concerning Ntabakuze) the Prosecutor refers to the same sets of paragraphs 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. Concerning the contentions of Kabiligi that one cannot be both perpetrator and accomplice, the Trial Chamber takes note of Tribunal's Judgement in *The Prosecutor v. Jean Paul Akayesu*, (ICTR-96-4-T) dated 2 September 1998. In that case, the Tribunal concluded that "an individual cannot thus be both the principle perpetrator of a particular act and an accomplice thereto." (para. 532). The Tribunal then proceeded to remark that "the accused cannot obviously be found guilty of both these crimes." (para. 700). Therefore, the Trial Chamber finds that it is acceptable to charge

an accused with both of these crimes, because the responsibility of determining the merits of the charges, and ultimately the finding of innocence or guilt will rest with the Chamber.

15. If the intention of the Defence, in raising an objection to the abovementioned paragraphs, was to raise the principle of *non-bis-in idem*, that is, the inappropriate accumulation of charges, then the Trial Chamber again refers to the *Nahimana* decision, *supra*, (paras. 35 - 37) in which the Tribunal held that this question could not be addressed at this stage of the proceedings. We remind the Defence that under rules 73 and 95 of the Rules questions of this nature may be raised after the start of the presentation of evidence.

15. All other matters regarding the alleged failure by the Tribunal to abide by the legal provisions of rules 40 *bis* (G) and (J), 55, 66(A)(i) of the Rules and 20(4) of the Statute, do not relate to the subject of the instant motions. These issues were addressed during routine audiences such as the hearings on the provisional detention of the accused.

FOR ALL THE FORGOING REASONS THE TRIAL CHAMBER:

ORDERS the Prosecution to clarify paragraphs 2.11 and 2.12 by providing approximate times and locations where the accused persons allegedly made anti-Tutsi speeches.

DISMISSES the Defence motions on all other points.

Arusha, 5 October 1998

William H. Sekule
Judge

Yakov A. Ostrovsky
Judge

Tafazzal Hossain Khan
Judge

Seal of the Tribunal