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UNITED NATIONS



NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER II

OR: ENG

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

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 21 May 1999

THE PROSECUTOR

v.

SYLVAIN NSABIMANA and
ALPHONSE NTEZIRYAYO

Case No. ICTR-97-29-I

**DECISION ON THE PROSECUTOR'S URGENT MOTION FOR STAY
OF EXECUTION OF DECISION OF 24 SEPTEMBER 1998
&
DECISION ON NSABIMANA'S MOTION FOR WITHDRAWAL OF
THE INDICTMENT AND IMMEDIATE RELEASE**

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Titinga Frédéric Pacere

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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NAME / NOM: *Dr. M. N. K. M. Antonio*

SIGNATURE: *[Signature]* DATE: *17.06.1999*

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (TRIBUNAL),

SITTING as Trial Chamber II, composed of Presiding Judge William H. Sekule, Judge Yakov Ostrovsky and Judge Tafazzal H. Khan;

CONSIDERING the Statute of the Tribunal (Statute) and the Rules of Evidence and Procedure (Rules);

CONSIDERING the Indictment of 14 October 1997 against Sylvain Nsabimana (Nsabimana) and Alphonse Nteziryayo (Nteziryayo), confirmed on 16 October 1997 by Judge Lennart Aspegren;

NOTING the 16 October 1997 decision under Rule 54 to issue separate case numbers for the two Accused, the resultant confusion, and that one case should exist, *The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*, Case No. ICTR-97-29-I;

CONSIDERING Nsabimana's initial appearance on 24 October 1997 and not guilty pleas to all five counts;

CONSIDERING Nsabimana's motion to sever, set a date for status conference, and return of personal effects of 19 November 1997;

CONSIDERING Nsabimana's motion for the amendment of the indictment, withdrawal of certain charges and protective measures for witnesses of 23 April 1998 (English translation filed 9 July 1998);

CONSIDERING Nsabimana's request to the Prosecutor on 12 June 1998 for amendment of the Indictment;

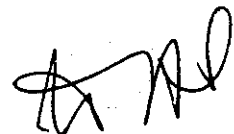
CONSIDERING this Chamber's "*Decision on the Defence Motion for Orders to Sever Proceedings, Set a Date for a Status Conference and for the Return of Personal Effects*" of 8 July 1998, which included denying severance;

CONSIDERING Nteziryayo's initial appearance on 17 August 1998 and not guilty pleas to all six counts;

NOTING that the Prosecution's motion of 17 August 1998 to join this case, with that of Elie Ndayambaje, Joseph Kanyabashi, Pauline Nyiramasuhuko and Arsene Shalom Ntahobali, is still pending before this Chamber;

NOTING the Appeals Chamber decision of 3 June 1999 in *The Prosecutor v. Joseph Kanyabashi* (Case No. ICTR-96-15-1) and the rulings regarding joinder;

CONSIDERING the Prosecution's motion of 18 August 1998 entitled "*Prosecutor's Request for Leave to File an Amended Indictment*" to which was attached, as Annex A, a new proposed amended Indictment.



Case No. ICTR-97-29-I

CONSIDERING Nteziryayo's "*Brief in Response of the Accused Against the Prosecutor's Requests for Leave to Amend the 14 October 1997 Indictment Confirmed on 16 October 1997*" (English translation filed 10 November 1998);

NOTING that the Prosecution's motion to amend is still pending before this Chamber;

NOTING the Appeals Chamber decision of 3 June 1999 in *The Prosecutor v. Joseph Kanyabashi* (Case No. ICTR-96-15-1) regarding leave to amend an Indictment;

CONSIDERING this Chamber's "*Decision on the Defence Motion for the Amendment of the Indictment, Withdrawal of Certain Charges and Protective Measures for Witnesses*" of 24 September 1998 (decision of 24 September 1998);

CONSIDERING the Prosecution's Urgent Motion (Urgent Motion) of 28 September 1998;

CONSIDERING the Prosecutor's "*Indictment (as modified during the confirmation process)*" of 18 November 1998, which purportedly incorporated the "the corrections demanded by the Confirming Judge during the confirmation hearing on 16 October 1997";

CONSIDERING Nsabimana's motion entitled "*Defence Motion for the Withdrawal of Any Indictment against the Accused and for His Consequent Immediate Release*" of 25 January 1999 (dated 10 January 1999) (English translation filed 30 March 1999);

CONSIDERING the Prosecutor's brief in response of 6 April 1999;

CONSIDERING in particular paragraph 31 of the Prosecutor's brief in response of 6 April 1999 which states that "the Tribunal could defer decision on the requests for amendments, [and] joinder of cases....";

CONSIDERING the parties' submissions at the hearing held on 21 April 1999 on Nsabimana's motion entitled "*Defence Motion for the Withdrawal of Any Indictment against the Accused and for His Consequent Immediate Release*" of 25 January 1999;

CONSIDERING this Chamber's oral decision on 21 April 1999 denying Nsabimana's motion entitled "*Defence Motion for the Withdrawal of Any Indictment against the Accused and for His Consequent Immediate Release*" of 25 January 1999;

CONSIDERING the parties' submissions at the hearing held on 18 May 1999 on the Prosecution's Urgent Motion (Urgent Motion) of 28 September 1998;

NOW DECIDES the Prosecution's Urgent Motion (Urgent Motion) of 28 September 1998;

NOW REITERATES in writing the decision of 21 April 1999 on Nsabimana's Motion for withdrawal of the Indictment and immediate release of 30 March 1999.



LEGAL BASIS FOR URGENT MOTION

1. On 28 September 1998, the Prosecution filed the Urgent Motion under Rule 54, moving for a stay of execution of this Chamber's decision of 24 September 1998. Rule 54 provides, in part, that a Trial Chamber may issue an order as may be necessary for the purposes of the preparation or conduct of the trial.
2. The Defence contended, at the hearing, that the Prosecutor's urgent motion was not well founded or, in other words, inadmissible under Rule 54. The Defence also contended that the Prosecution was seeking to circumvent Rule 72(D) in that a stay of execution amounted to an unauthorised appeal of a decision.
3. This Chamber finds that the motion for a stay of execution of a Trial Chamber's decision in this case falls within the purview of Rule 54. This Chamber also finds that Rule 72(D)'s prohibition of certain appeals does not preclude a party from moving for a stay of execution of a decision. Thus, under Rule 54, there exists a legal basis for a motion for stay of execution, and this Chamber finds the Urgent Motion admissible.

THE EFFECT OF THIS CHAMBER'S NOT GRANTING THE URGENT MOTION

4. Having found that the Prosecutor's Urgent Motion is admissible, this Chamber now analyses the effect or legal significance of this Chamber's not granting to date the Prosecutor's motion for stay of execution of the decision of 24 September 1998. This Chamber notes that the Urgent Motion (of 28 September 1998) was not heard until 18 May 1999 and not decided until today, more than eight months after filing.¹ Thus, the Indictment confirmed 16 October 1997 constitutes the current charging document; and to date, this Chamber has not granted any stay, and the decision of 24 September 1998 remains in effect.
5. In fact, at the hearing on 18 May 1999, the Prosecution stated that "it is clear that the Court Order [of 24 September 1998] is still intact and has not been complied with" (Eng. transcript, at 6) and that the Prosecution had the capacity to comply immediately. (*Ibid.* at 22.) The Prosecution's representations make it difficult to understand, in the absence of this Chamber's granting the Urgent Motion, why the Prosecution failed to comply with the decision of 24 September 1998. The Prosecution's inaction is tantamount to the assertion that the mere filing of its Urgent Motion relieved them of the duty to comply. This is not so.
6. The Prosecution asserted, in motions and at the hearing, several reasons for making the Urgent Motion. First, the Prosecution sought to avoid duplication of work, namely amending the Indictment in accordance with the decision of 24 September 1998 and again amending the Indictment in accordance with the Prosecution's pending motion to amend. In other words, if this Chamber granted the Prosecution's motion to amend the Indictment (of 18 August 1998), this would supersede this Chamber's decision of 24 September 1998. Second, the Prosecution sought to secure sufficient time to comply with the decision of 24 September 1998. Third, the proposed amended Indictment "may well have addressed the orders of the Chamber in its decision of 24 September 1998." (Urgent Motion, at para. 2(ii).)

¹This Chamber notes various causes of this long delay. The Registry's failure to notify the Chamber of the Urgent Motion and schedule a timely hearing contributed to the delay.

7. This Chamber finds that the failure to hold a timely hearing on the Urgent Motion does not relieve the Prosecution from complying with previous Tribunal orders. Thus, an order of the Tribunal must stand and have effect unless the Tribunal issues a superseding order. Here, the Prosecution, for many months, has failed to comply with this Chamber's decision of 24 September 1998, which ordered relatively simple amendments.

8. This Chamber finds the Prosecutor's reasons for the Urgent Motion and non-compliance with the decision of 24 September 1998 to be not particularly compelling. This Chamber further finds that compliance with the decision of 24 September 1998 would have caused no legal prejudice to the Prosecution's case.

9. When faced with a situation requiring either: (1) the possible duplication of work; or (2) non-compliance with this Chamber's decision, this Chamber hopes that in the future the Prosecution will elect to do the former.

10. This Chamber also notes that the Prosecution may have had a remedy to its purported predicament. For example, the Prosecution could have renewed its urgent motion, contacted the Registry to confirm the scheduling of a hearing, or made a separate motion for urgent review of its motion to amend (of 18 August 1998).

11. The Prosecution, in the alternative (should this Chamber deny the Urgent Motion) moved "that the period of 30 days be enlarged so that we comply with the Order immediately." (Hearing of 18 May 1999, Eng. Transcript, at 23.)

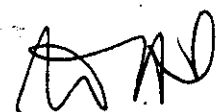
DEFENCE MOTION FOR WITHDRAWAL OF INDICTMENT AND RELEASE

12. Nsabimana filed a motion entitled "*Defence Motion for the Withdrawal of Any Indictment against the Accused and for His Consequent Immediate Release*" on 25 January 1999 (dated 10 January 1999) (English translation filed 30 March 1999). Nsabimana alleges that the Prosecutor has failed to comply with this Chamber's decision of 24 September 1998, that there are further defects in the Indictment, and seeks withdrawal of the indictment and immediate release, under Rules 51 and 73. This Chamber heard the motion on 21 April 1999.

13. The Prosecution, in its brief in response, asserts that under Rule 51 the power to withdraw an indictment is exclusive to the Prosecutor, and, thus, Nsabimana's motion is inadmissible. The Prosecution does not state what constitutes the appropriate remedy for non-compliance with the decision of 24 September 1998.

14. At the hearing of 21 April 1999, this Chamber orally denied the defence motion and found that there is "no legal grounds to grant that order." (Eng. Transcript, at 60.)

15. This Chamber already has found that the Prosecution was not in compliance, but finds that immediate compliance with the decision of 24 September 1998 will satisfy the court as to any alleged remaining defects. This Chamber finds that Rule 51 does not provide Nsabimana a remedy, nor does his purported Rule 73 motion warrant withdrawal and release. Regarding an appropriate remedy for non-compliance, this Chamber admonishes the Prosecution for its non-compliance.



FOR THESE REASONS,

AFTER HAVING DELIVERED,

THE TRIBUNAL

ORDERS the Prosecutor to comply with this Chamber's decision of 24 September 1998 (ordering the Prosecutor to amend the existing Indictment in certain respects) within fourteen (14) days of the date of the filing of this decision in the original English;

DENIES the Prosecutor's Urgent Motion (filed 28 September 1998) for a stay of execution of this Chamber's decision of 24 September 1998 as requested, because interests of justice require compliance;


ORDERS the Prosecutor to make the corrections to the Indictment as instructed by the confirming Judge on 16 October 1997, but only where such corrections do not conflict with the decision of 24 September 1998;

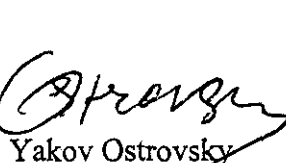
DENIES Nsabimana's motion for the withdrawal of the indictment and immediate release;


ADMONISHES the Prosecution for failing to comply with this Chamber's decision of 24 September 1998.

DIRECTS the Registry, under Rule 54, to re-number this case, "*The Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo*," as one single case, Case No. ICTR-97-29-I, and create a single index.

Arusha, 21 May 1999.


William H. Sekule
Judge, Presiding


Yakov Ostrovsky
Judge


Tafazzal H. Khan
Judge

(Seal of the Tribunal)

