UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

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TRIAL CHAMBER I

OR : ENG

Before: Judge Laïty Kama, Presiding Judge
Judge Taffazzal Khan
Judge Navanethem Pillay

Registry: Mr. Antoine K. M. Mindua

Decision of: 24 May 1999

THE PROSECUTOR
versus
ANATOLE NSENGIYUMVA

Case No. ICTR-96-12-I

DECISION ON THE DEFENCE MOTION TO STRIKE OUT THE INDICTMENT

The Office of the Prosecutor:

Mr. Udo Gehring

Counsel for the Accused:

Mr. Kennedy N. Ogetto
Mr. Otachi Omanwa

Nsengmv/form indict/7/7/98

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

SITTING as Trial Chamber I of the Tribunal, composed of Judge Laïty Kama as Presiding Judge, Judge Taffazzal H. Khan and Judge Navanethem Pillay ("the Trial Chamber");

CONSIDERING the indictment filed on 22 July 1996 by the Prosecutor against Anatole Nsengiyumva (the "accused") pursuant to Article 17 of the Statute of the Tribunal (the "Statute") and Rule 47 of the Rules of Procedure and Evidence of the Tribunal (the "Rules"), on the basis that there was sufficient evidence to provide reasonable grounds for believing that he has committed direct and public incitement to commit genocide, crimes against humanity and violations of Article 3 common to the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto;

CONSIDERING the decision confirming this indictment, signed by Judge Yakov Ostrovsky on 12 July 1996;

CONSIDERING the initial appearance of the accused which took place on 19 February 1997;

BEING SEIZED OF the Defence motion filed on 18 January 1998 seeking an order for the striking out of the indictment on the ground that it is defective;

CONSIDERING THAT the Prosecutor did not file a written response but responded orally as indicated below;

HAVING HEARD the parties during the hearing of 5 May 1998;

TAKING INTO ACCOUNT Articles 17(4), 18, 20 and 21 of the Tribunal's Statute (the "Statute") and Rules 5, 47, 55, 72 and 73 of the Rules;

TAKING NOTE of the Decision rendered by Trial Chamber 1 on 24 November 1997 in the case *The Prosecutor versus Ferdinand Nahimana* (Case No. ICTR- 96-11-T) and the Decision rendered by Trial Chamber II of 28 November 1997 in the case of *The Prosecutor versus Andre Ntegerura* (Case No. ICTR-96-10-T);

CONSIDERING THAT on the day of the hearing herein stated, the Defence Counsel applied for extension of time within which to file a preliminary motion and that this Trial Chamber held that pursuant to rule 66(A) of the Rules, the defence was within the stipulated period of sixty days since the time begins to run from the moment the final disclosure is made.

ARGUMENTS BY THE PARTIES

The Defence:

The Defence Counsel submitted that the concise statement should be struck out for being insufficient and inadequate to support the indictment because it lacks specific information as indicated below:-

(a) that in paragraph 4.1 of the statement, it is not stated whether the Tutsis were either a

were either a racial or an ethnic group and in paragraph 4.4 of the concise statement of facts does not disclose who the participants of the meeting were or any further information about the meeting;

(b) that further, paragraph 4.8 of the concise statement of facts which gives rise to Count No. 1 is very vague in respect to the time element therefore, the accused cannot adequately prepare his defence. For example, reference is made to the acts in issue being committed "during the months of April through June 1994," a long period, which would incapacitate the accused from knowing the exact time frame within which he is alleged to have committed the offence. Hence, following the Nahimana case, the Trial Chamber should with respect to the time periods, hold that there is insufficient information;

(c) that in Count 1 of the Indictment regarding the crime of 'Direct and Public Incitement to commit Genocide,' it is not specified whether the accused ordered that the victims be killed or be bodily harmed or mentally harmed thereby presenting all of them as possible alternatives. In addition, the Prosecutor does not state whether the accused is alleged to have destroyed a group either 'in whole or in part.' Consequently, the two phrases are also given as alternatives;

(d) that Count 2 of the Indictment does not specify who the Tutsi civilian murdered was nor does it allege that he was killed either as being part of 'a widespread or systematic attack.' In this way, the Prosecutor again failed to indicate on which aspect she was relying;

(e) that Count 3 of the Indictment refers to 'other inhumane acts' committed as being a part of the Crimes Against Humanity without elaborating what these acts were. This phrase could encompass many possible acts. Further, that the counts on Crimes Against Humanity fail to specify which motive the accused is alleged to have: whether political, ethnic or racial grounds. Moreover, reference to 'other inhumane acts,'which is of a descriptive nature, is just a fall back on the residual provision of the Article;

(f) that in Count 4 of the Indictment, it is alleged that the accused committed violations of Article 3 common to the Geneva Conventions but the offences therein are not described in clear precise terms as would be required in a criminal charge of this nature;

(g) that in paragraphs 4.6 and 4.7 of the concise statement of facts, where it is alleged that some people actually carried out particular acts as subordinates of the accused, there should have been a disclosure of these people to enable the accused to understand fully the charges facing him;

(h) that providing the name of a victim would not be inconsistent with rule 75 of the Rules but rather, it would enhance the right of the accused to know the charges against him;

(i) that from the manner in which the facts are set out in the concise statement of facts, it is unclear whether the accused had the *mens rea* or the intent, for example, when he presided over the meetings mentioned in paragraphs 4.4 and 4.8 of the concise statement of facts. In addition, paragraphs 4.2 and 4.3 of the concise statement of facts do not show a clear nexus linking the events to the acts of the accused;

(j) that there is no connection in terms of sequence or in terms of intent between the death of the President and the alleged orders given by the accused. The charges should clearly indicate if the accused was doing whatever he did in the framework of a policy to exterminate a race of a group of people and so on;

(k) that the Prosecutor cannot claim that she is the only one who has a right to amend an indictment because pursuant to rule 72 (B) (ii) of the Rules, the accused can object in respect to defects in the form of the indictment;

(l) that in any case, under rule 50 of the Rules, the Trial Chamber has the power to amend the Indictment upon application by the Prosecutor but even then, the Trial Chamber is not bound to automatically grant the Prosecutor's request.

The Prosecutor:

The Prosecutor contended :

(a) that the pursuant to rule 47 of the Rules, the concise statement of facts must be precise and short containing only the necessary information to allow the accused to identify the events the Prosecutor intends to prove and that in the instant case, this has been done sufficiently. For example, reference has been made to a meeting on the morning of April 7 1994 before several hundred Interahamwe militia at Umuganda Stadium in Gisenyi Prefecture where the accused is alleged to have incited people to kill;

(b) that paragraphs 4.4 and 4.5 of the concise statement of facts describe two meetings interchangeably and these meetings are sufficiently identifiable: in the first meeting there is no reference to the Rwandan Armed Forces(" R.A.F.") yet in the second meeting there is reference to the R.A.F. and moreover, both meetings were intended to kill Tutsis so the accused is in a position to know what is in issue;

(c) that in paragraph 4.8 of the concise statement of facts, reference is made to the "month of April through June 1994" but that date is not the one which provides the characteristic information. What is important is the reference to a meeting in Umuganda Stadium in Gisenyi Prefecture, a clearly defined place with definite participants. Furthermore, the fact that the accused held a meeting at that place even once as specified, is sufficient for purposes of the count;

(d) that Articles 2 to 4 of the Statute does not impose upon the Prosecutor the requirement to identify the victims. However, that fact notwithstanding, the sequence of events described in paragraphs 4.6 and 4.7 of the concise statement of facts, where a Tutsi man and his family were ordered to get in a truck and subsequently the man was killed, are so peculiar that the accused could easily identify with what he is being charged;

(e) that further there is no need for specifying which of the interchangeable elements of a crime the Prosecutor intends to prove because the "or" used in the Statute in describing the crime does not indicate a strict alternative but means "or/and" and is intended to broaden that description rather than limit it. However, the concise statement of facts and the Indictment have both actually specified that the ethnic group of the people killed were

Tutsis and this would be sufficient information because everyone knows who the Tutsi are in Rwanda;

(f) that the Prosecutor does not have to specify that there was " killing or causing serious bodily and mental harm to members of the group" because this is a legal question. In any case, the events which occurred in the afternoon of 7th of April 1994 were a peculiar sequence of events as they occurred a day after the death of President Habyalimana, a very characteristic date in the history of Rwanda;

(g) that the requisite *mens rea* can never be proved directly. It has to be proved by circumstantial evidence, unless there is a confession. In the instant case, the *mens rea* exists because allegations have been made to show that the accused had incited people to kill the Tutsi and the occasions where the Tutsi were killed are clearly sequenced;

(h) that pursuant to rule 72 (B) (ii) of the Rules, the Chamber has jurisdiction to order that the defects in the Indictment be cured through an amendment. Hence, the Trial Chamber cannot just strike out the Indictment since it is the legal basis for the detention of the accused.

Reply By The Defence:

The Defence Counsel replied:

(a) that it has been demonstrated that the Prosecutor has not actually finalized the disclosure of documents. Hence, the Defence would be in an uncertain position as to which further documents the Prosecutor would produce concerning the meetings;

(b) that the Defence must know in advance what the Prosecution intends to prove at the hearing so that it can adequately prepare its defence. For example, if the accused wished to plead the defence of alibi, he should be in a position to do so without any problem;

(c) that given the manner in which the events are set out in the indictment, it does not appear that there is a *mens rea* or that there is a policy element in what happened;

(d) that the burden of proof is on the Prosecution to prove that the accused is guilty of the offences with which he is charged. To this end, the Prosecutor must give the accused sufficient information about the charges to enable him to adequately prepare himself.

DELIBERATIONS:

With respect to the *Objections Based on Defects in the Form of the Indictment*

1. We observe that the substance of the issues raised in the Defence Counsel's motion in this case 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 take into consideration the line of reasoning provided in the Tribunal's decision of 24 November 1997.

2. Article 20 (4) (a) of the Statute stipulates that the accused must be informed promptly and in a language he or she understands of the nature and cause of charges against him or her, and rule 47 (B) of the Rules incorporates this obligation by establishing that the Indictment shall set forth the name and particulars of the suspect, a concise statement of the facts of the case and the crime with which the suspect is charged.

3. The Trial Chamber ,pursuant to the applicable provision in rule 73 of the Rules is called upon to examine and dispose of defects in the form. From this perspective, the Trial Chamber will address the objections raised in the motion.

4. 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 supporting material, and 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 takes judicial notice of the definition of the phrase 'concise statement of the facts' in rule 47 as defined in the *Nahimana* case to mean a brief statement of facts but comprehensive in expression.

5. We also note that in the said case, the accused was charged with the offence of conspiracy to commit Genocide which is not the position in the instant case.

On the Objections Based on the Vagueness and Imprecision of the Facts and the Counts in the Indictment.

6. The Trial Chamber notes the submissions of each party on this point as stated above. We are of the view that the Indictment must contain express statements of fact and not just a hypothesis or probabilities. Hence, Counts 3 and 4 of the Indictment must specify the names and /or the categories of the subordinates with whom the accused is alleged to have acted.

7. The Trial Chamber finds that paragraphs 4.4 and 4.5 of the concise statement of facts contain sufficient detail to enable the accused to be on notice as to which meetings he is alleged to have participated. As for other meetings, which the Prosecutor may come up with, that is speculative at this stage.

8. The events described in paragraph 4.6 of the concise statement of facts are sufficient to support an alleged participation in carrying out the Other Inhumane Acts mentioned in Count 3 of the Indictment. For example, the reference to Article 3(i) and the inclusion of the elements of the offence of Crimes Against Humanity in Count 3 of the indictment are adequate to enable the accused to identify what he is being charged with. In addition, there is no need to make reference to "killing *or* causing serious bodily or mental harm to members of the Tutsis population" as this would be a matter of evidence to be adduced before the Trial Chamber.

On the Lack of Any Specific Time-frame of the Alleged Crimes in the Indictment

9. This Trial Chamber has noted the reference made to " the months of April through June 1994 "in paragraph 4.8 of the concise statement of facts and Count 1 of the Indictment. The Trial Chamber has also observed that in addition to making specific reference to that period,

the phrase "in or around the month of April 1994" is also used in Counts 2, 3 and 4 of the Indictment.

10. The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and place of the acts with which the accused is charged. It is of the opinion that in the present case, the time periods given by the Prosecutor are precise as can be expected in the circumstances.

FOR THESE REASONS, THE TRIBUNAL

1. DIRECTS the Prosecutor, to amend the following parts of the Indictment and implement the necessary changes:-

(i) Identify the names or the categorization of subordinates who are alleged to have committed the acts specified in paragraph 4.7 of the concise statement of facts, provide more information about the sequence of acts of the accused's subordinates for which he is alleged to be responsible as their superior; and to

(ii) identify the names and/ or the categorization of the persons whom the accused is alleged to have ordered to kill civilians in paragraph 4.4 of the concise statement of facts.

2. INVITES her to make the amendment within 30 days from the date of this Decision.

3. DISMISSES the motion of the Defence on all other points.

Arusha, 24 May 1999

Laïty Kama	Tafazzal H. Khan	Navanethem Pillay
Presiding Judge	Judge	Judge

(Seal of the Tribunal)