UNITED NATIONS

International Criminal Tribunal for Rwanda

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TRIAL CHAMBER II

OR: ENG

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Before: Judge William H. Sekule, Presiding Judge Navanethem Pillay Judge Mehmet Güney

Registrar: Dr. Agwu Ukiwe Okali

Decision of: 27 August 1999

THE PROSECUTOR

v. SYLVAIN NSABIMANA and ALPHONSE NTEZIRYAYO

Case No. ICTR-97-29-I

DECISION ON NTEZIRYAYO'S PRELIMINARY MOTIONS BROUGHT BY THE DEFENCE FOLLOWING THE INITIAL APPEARANCE OF THE ACCUSED

The Office of the Prosecutor: Japhet Daniel Mono Alphonse Van

Counsel for Alphonse Nteziryayo Titinga Frédéric Pacere

> International Criminal Tribunal for Rwanda Tribunal penal international pour le Rwanda

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (TRIBUNAL),

SITTING as Trial Chamber II, composed of Judge William H. Sekule presiding, Judge Judge Navanethem Pillay, and Judge Mehmet Güney.

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;

CONSIDERING the letter from the Registrar of the ICTR to Honourable Yarga Larba, Minister of Justice, Keeper of the Seal, Ouagadougou, Burkina Faso, dated 16 October 1997 and the *Preuve de Signification* signed by the said Minister of Justice, dated 22 October 1997.

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 the not guilty pleas to all six counts;

CONSIDERING the Chamber II "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 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 Nteziryayo's brief entitled *Preliminary Motions Brought by the Defence* Following the Initial Appearance of the Accused, dated 12 October 1998;

CONSIDERING the Prosecutor's Brief in Reply to the Preliminary Motions Brought by the Defence Against the Indictment Which Served as a Basis for the Initial Appearance of the Accused, dated 19 March 1999;

CONSIDERING the parties' submissions to the present motion at the hearing held on 11 August 1999;

CONSIDERING this Chamber's oral decision on 21 April 1999 and the subsequent written decision of 21 May 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;

NOTING the 21 May 1999 decision on Decision on the Prosecutor's Urgent Motion for

Stay of Execution of Decision of 24 September 1998 and Decision on Nsabimana's Motion for Withdrawal of the Indictment and Immediate Release in Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo, Case No. ICTR-97-29-I;

HEREBY REITERATES the oral decision rendered on 12.8.99 pursuant to Nteziryayo's *Preliminary Motions Brought by the Defence Following the Initial Appearance of the Accused.*

LEGAL BASIS FOR URGENT MOTION

The Chamber considers that the Defence motion is admissible. The Chamber finds that Nteziryayo's Preliminary Motions were received by facsimile on 14 October 1998, which is within the prescribed time limit. In any event, the Trial Chamber at the hearing on this motion ruled to waive the time limit should the motion be time barred.

THE DEFENCE ARGUMENTS

The Defence raises six main arguments.

1. The (In)Validity of the Indictment due to Want of Amendment

Nteziryayo asserts that the Indictment against Nsabimana and Nteziryayo which served as the basis for his initial appearance was invalid, non-existent, as not being the one which the confirming Judge had ruled as proper. Nteziryayo argues that the Indictment was invalid because the Prosecution had failed to make the amendments requested by the confirming Judge.

The Prosecution asserts that Nteziryayo misconstrues the decision confirming the Indictment and that that decision indicates that the said amendments had been made before confirmation. And, that the Prosecution had in fact made the requested amendments prior to the confirming Judge issuing his decision confirming the Indictment.

The Trial Chamber notes that there exists an issue of fact regarding if and when the said amendments to the Indictment were made. Having reviewed the case file the Trial Chamber finds, contrary to the Prosecution's submission, that the said amendments had not been made in writing to the Indictment of 14 October 1997 against Nsabimana and Nteziryayo (the Indictment), prior to the decision confirming the Indictment of 16 October 1997. The documents necessary to settle this basic point are readily available to both parties. However, the Prosecution apparently did not peruse these documents and thus made incorrect submissions of fact.

Indeed, at the initial appearance of Nteziryayo on 17 August 1998, the Presiding Judge raised the issue of the amendments and noted that they had not been made. During this hearing, the Prosecution confirmed that it had previously committed to making the

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amendments and, following the hearing, would draft a new indictment reflecting the changes. On 18 November 1998, the Prosecution filed what they termed a "modified indictment as confirmed by the decision of Mr. Justice Aspegren on 16 October 1997 The original indictment dated 14 October 1997 was amended orally in the confirmation procedure, as recorded in the decision confirming the indictment." The Trial Chamber does not rule out the assertion that the Indictment dated 14 October 1997 was amended orally.

The failure of the Prosecution to amend in writing the Indictment initially presented for confirmation, does not render the confirmed Indictment of 14 October 1997 invalid. Trial Chamber II's decision of 21 May 1999 entitled Decision on the Prosecutor's Urgent Motion for Stay of Execution of Decision of 24 September 1998 and Decision on Nsabimana's Motion for Withdrawal of the Indictment and Immediate Release in Prosecutor v. Sylvain Nsabimana and Alphonse Nteziryayo, addressed a similar issue in relation to the same Indictment. The Trial Chamber's decision of 24 September 1998 requested the Prosecution to make specified amendments to the Indictment against Nsabimana and Nteziryayo, some of which corresponded to the amendments referred to in the Confirmation Order. The Prosecution failed to make these amendments. Nsabimana subsequently brought his Motion for Withdrawal of the Indictment and Immediate Release, based upon the Prosecution's said failure to amend. In response to Nsabimana's motion the Trial Chamber held;

"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 noncompliance, this Chamber admonishes the Prosecution for its non-compliance."

This Trial Chamber concurs with the reasoning in the above-mentioned decision. The Indictment, confirmed on 16 October 1997, was a valid Indictment and there is no legal ground to order withdrawal and release. Furthermore, contrary to the defence contention, the fact that the Indictment pre-dates the Confirmation Order in no way effects the validity of the Indictment.

2. The (In)Validity of the Indictment due to Improper Joinder

Nteziryayo argues that the (joint) Indictment was invalid because it incorrectly joined two accused.

The Prosecution submit that the Sub-Rules 47 B-D of the Rules of Procedure and Evidence (the Rules) do not prohibit the two accused persons being included in the same Indictment.

The decision confirming the Indictment, dated 16 October 1997, directed the Registrar "to register the accused Sylvain Nsabimana and Alphonse Nteziryayo as two

separate cases and to attribute to each of their cases its own file number." The said decision did not order that the Indictment be severed. Furthermore, in its decision of 8 July 1998, the Trial Chamber dismissed the Defence motion for severance of the two accused. Accordingly, the inclusion of the two accused persons in the same Indictment does not render the Indictment invalid; and, the Defence is out of order in raising a matter which has already been disposed of by the Trial Chamber.

In any event, all purported defects that may or may not have existed have been subsequently cured at the initial appearance of the accused. The Trial Chamber considers that Nteziryayo has not suffered prejudice due to the purported defects.

3. The (In)Validity of the Initial Appearance

Nteziryayo asserts that his initial appearance of 17 August 1998 is null and void because it was based upon an invalid Indictment.

The Trial Chamber finds no merit in the defence contention. As discussed above, the Indictment was valid at the time of the initial appearance. Furthermore, the amendments referred to above pertained to three parts of the Indictment of 14 October 1997. Only one of these, the amendment to Count 11, related to Nteziryayo. During the initial appearance of 17 August 1998, the Indictment (in particular Count 11) was read to Nteziryayo incorporating the amendments required by the confirmation order. Therefore, Nteziryayo pleaded to the Indictment in its amended form. For this reason, and for those discussed above, Nteziryayo has no sound legal ground to claim that his initial appearance was invalid.

4. The (In)Validity of the Arrest (Warrant)

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Nteziryayo asserts that his arrest was invalid because the arrest warrant was not accompanied by a valid certified Indictment stamped with the seal of the Tribunal.

The Prosecution submits that the warrant of arrest is valid and that it is a separate and distinct legal document from the Indictment.

The Defence admits that the warrant of arrest was accompanied by the Indictment. The warrant of arrest and the Indictment were transferred to the Ministry of Justice in Bukina Faso in October 1997. The warrant of arrest did bear the seal of the Tribunal; the Indictment did not. However, Rule 47(G) which requires that the Indictment bear the seal of the Tribunal, was not adopted until 1998. Therefore, Nteziryayo's argument that the arrest was invalid because the Indictment served upon him did not bear the seal of the Tribunal is untenable.

In any event, the purpose of providing an indictment upon arrest is to inform the accused of the nature of the charges. In this case, the accompanying Indictment fulfilled the purpose of Rule 55.

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5. The Charges of Genocide and Complicity in Genocide.

Nteziryayo argues that the charges of genocide and complicity in genocide charged together are unlawful and should be dismissed. Or, in the alternative that the charge of genocide should be dismissed and only the charge of complicity remain.

The Prosecution submits that such a submission within a preliminary motion is not covered under Sub-Rule 72(B) and therefore that the Tribunal may not rule on this issue at this stage.

The Trial Chamber will not rule on this issue at this stage. The matter may be properly addressed on the merits after the evidence has been presented.

6. The Charges of Crimes Against Humanity

The Defence contends that the charges of crimes against humanity (Counts 9 & 10) are unlawful since "crimes against humanity" is only the chapeau and that the charges should only contain the specific crimes of "murder" and "extermination".

The Prosecution submits that the charges are lawful and properly framed.

The Trial Chamber finds no substance in the submissions of the Defence. 'Crimes against humanity' are crimes committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack including, murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution (on political, racial or religious grounds), and other inhumane acts. And, under the ICTR Statute, the crimes must be based on discriminatory grounds.

In the Indictment the Prosecutor has followed the language of the Statute: to wit, Count 9 states that Nteziryayo "is responsible for murdering civilians as part of a widespread or systematic attack against a civilian population . . . and thereby committed a CRIME AGAINST HUMANITY, stipulated in Article $3(a) \ldots$ ". Count 10 states that Nteziryayo "is responsible for exterminating civilians as part of a widespread or systematic attack against a civilian population . . . and thereby committed a CRIME AGAINST HUMANITY, stipulated in Article $3(b) \ldots$ ". As such, Counts 9 and 10 are clear and properly framed.

FOR THESE REASONS,

THE TRIBUNAL

DENIES Nteziryayo's motion in its entirety;

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ADMONISHES the Prosecution for failing to make the amendments to the Indictment as directed by the Confirming Judge and for making incorrect submissions of fact in this regard.

Arusha, 27 August 1999.

William H. Sekule Judge, Presiding

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(Seal of the Tribunal)