

3603
EX
ICTR-97-29-T
2-MAR-2000
(3603-3597)

Trial Chamber II

Before Judges: Laity Kama, Presiding
William Sekule,
Mehmet Güney

Registry: Mr. John Kiyeyu

Decision rendered on: 2 March 2000

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THE PROSECUTOR

vs.

ALPHONSE NTEZIRYAYO

Case No. ICTR-97-29-T

**DECISION ON THE PRELIMINARY MOTION BROUGHT BY THE DEFENCE
FOLLOWING THE SECOND INITIAL APPEARANCE OF THE ACCUSED**

Office of the Prosecutor:

Japhet Daniel Mono
Ms. Andra Mobberley
Ibukunolu Alao Babajide

Counsel for the Defence:

Titinga Frederic Pacere, Lead Counsel
Calvin Saunders, Co-counsel



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

Sitting as Trial Chamber II, composed of Judge Laity Kama (Presiding), Judge William Sekule and Judge Mehmet Güney,

Considering the indictment filed by the Prosecutor on 14 October 1997 against Alphonse Nteziryayo (the Accused) and Sylvain Nsabimana and the decision confirming said indictment signed by Judge Lennart Aspegren on 16 October 1997,

Considering the initial appearance of 17 October 1998 at which the accused pleaded not guilty to the six counts brought against him,

Considering Trial Chamber II decision of 8 July 1998 following Motion filed by Defence for Sylvain Nsabimana seeking *inter alia* the severance of the trial of the accused from that of Sylvain Nsabimana,

Considering the preliminary motions filed by Defence and the decision rendered in relation thereto by Trial Chamber II on 27 August 1999,

Considering the motion filed by the Prosecutor on 14 August 1998 for leave to amend the initial indictment; which leave was subsequently granted from the Bench by Trial Chamber II on 12 August 1999 and formalized in writing on 10 September 1999,

Considering the second initial appearance of the accused on 13 August 1999 at which he pleaded not guilty to three new charges,

Considering Trial Chamber II decision of 5 October 1999 allowing the joinder of the trial of the accused and his co-accused Sylvain Nsabimana with those of Pauline Nyiramasuhuko, Arsène Shalom Ntahobali, Joseph Kanyabashi and Elie Ndayambaje,

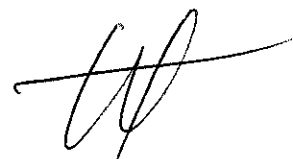
Being seized of a motion by Defence dated 21 October 1999 raising preliminary objections to the second initial appearance of the accused,

Considering the Prosecutor's response to said motion filed on 31 December 1999,

Being seized subsequently of a second Defence motion dated 20 February 2000 requesting that the Prosecutor's response be communicated to the Defence in French,

Considering that the French translation of the Prosecutor's response was filed with the Registry on 24 February 2000 and subsequently transmitted to the Defence;

Having heard the parties at a hearing scheduled for that purpose on 28 February 2000.



The Arguments of the Parties

The Defence

1. Relying on Rules 50 (C) and 72 (A) and (B) of the Rules, Defence argues in the main:

On the facts of the case as set forth in the record:

- 1.1. That there is no evidence in the record that the accused held public functions and that the Prosecutor failed to mention that the accused was not held in high esteem by some of his colleagues in the army because he was too conciliatory towards the Tutsis and dissident Hutus and that his assignment to the civilian self-defence programme without any real functions was a feigned disgrace;
- 1.2 That the accused did not play any critical role in training, especially for offensive purposes, and that the military training given to the population did not constitute a criminal offence as such;
- 1.3 That, as for his role as the *préfet* of Butare, he was so appointed at or about 20 June 1994 under exceptional circumstances, obviously to implicate him since it was done without any consultation;
- 1.4 That, even assuming he was present for ten days following his assignment, the accused, whose very life was in danger, could not have committed any criminal acts and, accordingly, should be given special treatment;

On the impossible prior joinder of the proceedings against Alphonse Nteziryayo and Sylvain Nsabimana

- 1.5 That, save for the Prosecutor's allegation that one accused succeeded the other as the head of the Butare *Préfecture*, nothing in either accused's record proves that they had occasion to work together or to join in a conspiracy and an agreement to commit genocide;
- 1.6 That at the hearing of 10 August 1999, the Prosecutor failed to address the case of the accused whereas his concerns were divergent from those of his co-accused, Sylvain Nsabimana, and that the Prosecutor had confined her remarks to her submissions on the latter;
- 1.7 That the intent of the confirming Judge who had directed the Registry in his decision of 16 October 1997 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*" was not complied with before the initial appearance and that, accordingly, *the proceedings and the decision resulting from such initial appearance were null and void*";
- 1.8 That Defence having already adduced this argument in its motion of 12 October 1998, the Chamber had replied, in its 12 August 1999 decision, that the case of Sylvain Nsabimana had been joined with his in a previous decision;



- 1.9 That by virtue of the fact that this was a decision rendered previously, it was necessarily unknown to the accused thus seriously infringing upon the rights of the Defence and warranting therefore that the first initial appearance be set aside;

On the violation of the rights of the Defence

- 1.10 That the second initial appearance having taken place on 13 August 1999 in the morning, the Accused was not afforded the minimum time to study the new charges contained in the amended indictment having only received said indictment on 12 August 1999, the day before said initial appearance, at 4.05 p.m.;

- 1.11 That there was therefore a manifest violation of the rights of the Defence and cause, consequently, for ruling the second initial appearance null and void;

On the unlawful multiple charges as principal perpetrator of and accomplice to the same offence and nullity of the Prosecution for genocide and complicity in genocide

- 1.12 That in view of its relevance, Defence was again raising this objection, which had already been adduced in its motion of 12 October 1998, and reiterating its view that complicity was an anticipatory crime and that there was therefore cause to set aside the indictment as unlawful on this charge;

2. Consequently, Defence seeks the annulment of the indictment due to the aforementioned improprieties.

The Prosecutor

3. In response to the arguments of the Defence, the Prosecutor submits in the main:

On the facts of the Case as set forth in the Case file

- 3.1 That the various inadequacies alleged by Defence are matters for trial on the merits and that Defence will have the opportunity at said trial to tender evidence substantiating its allegations;

On the impossible prior joinder of the Proceedings of Alphonse Nteziryayo and Sylvain Nsabimana

- 3.2 That the rulings of Trial Chamber II respectively on 8 July 1998, 27 August 1999 and 10 September 1999 all support the validity of the initial joinder of Alphonse Nteziryayo and Sylvain Nsabimana;

- 3.3 That the Defence Motion of 21 October 1999 did not raise fresh grounds to warrant a review of the joinder arising from the amended indictment; in addition, as no issue of defect in the form as provided under Rule 72 (B) (ii) of the Rules is being raised, there is cause to invoke the *res judicata* principle;

- 3.4 That, with regard to Defence argument that the Prosecutor failed to address the case of the accused and only confined herself to referring to the arguments filed



on the co-accused, Sylvain Nsabimana, the Prosecutor submits that oral submissions at hearings are meant to supplement written briefs and that if Defence deemed this to be an infringement of the rights of the accused, it should have so submitted when the motion for joinder was up for consideration;

- 3.5 That, contrary to the claims of the Defence, the amended indictment does indeed contain evidence which, on the whole, points to the existence of a common transaction between the co-accused in perpetuating the genocide of the Tutsi population in Butare;

On the violation of the rights of the Defence

- 3.6 That the Prosecutor's preliminary motion seeking amendment to the indictment was filed on 17 August 1998, almost a calendar year before the amended indictment was confirmed by Trial Chamber; that the Defence thus had sufficient time to review the proposed amendments and, in addition, had not sought an adjournment of the initial appearance;
- 3.7 Furthermore, the Prosecutor submits that this does not constitute an objection within the meaning of Rule 72;

On the unlawfulness of concurrent charges as the principal perpetrator or accomplice in the same offence and the nullity of the proceedings for genocide and complicity in genocide:

- 3.8 The Prosecutor submits that the 27 September 1998 decision had already ruled on the approach to Defence objection to simultaneous charging on counts alleging genocide and complicity in genocide and accordingly that the *res judicata* principle had to be evoked in the instant again and an affirmation that the matter could only be properly addressed on the merits after the evidence has been presented;
4. The Prosecutor accordingly requested the Trial Chamber to dismiss the Defence motion.

AFTER HAVING DELIBERATED,

Whereas Rule 72 (B) of the Rules, dealing with preliminary motions, provides:

"Preliminary motions by the accused are:

- (i) Objections based on lack of jurisdiction;*
- (ii) Objections based on defects in the form of the indictment;*
- (iii) Applications for severance of crimes joined in one indictment under Rule 49, or for separate trials under Rule 82 (B);*
- (iv) Objections based on the denial of request for assignment of counsel.*

That the Chamber holds that, in the Defence motion, only the issue of the multiple charges as principal perpetrator of and accomplice to the same offence can indeed be construed as a preliminary motion within the meaning of Rule 72 (B) in that it is based on defects in the form of the indictment;

Whereas, in addition, the Chamber has decided to address the other three objections raised by the Defence even though they are not construed as constituting preliminary motions;

Firstly, on the unlawful multiple charges as principal perpetrator of and accomplice to the same offence and nullity of the prosecution for genocide and complicity in genocide:

Whereas the Chamber recalls that said objection had already been raised by Defence in its motion of 12 October 1998 and considered by Trial Chamber II in its decision of 12 August 1999;

That a Trial Chamber having ruled on the matter and Defence not having mentioned any new facts that might have emerged in the meantime, the Chamber is of the view that the *res judicata* principle shall stand in the instant;

That the Chamber shall confine itself to averring that the offences committed by the accused as principal perpetrator or as an accomplice shall be determined only in the course of trial on the merits;

On the various factual improprieties alleged by Defence, the Chamber is of the view that Defence objection is based on a matter of fact which can only be addressed during the trial on the merits;

On the impossible prior joinder of the proceedings against Alphonse Nteziryayo and Sylvain Nsabimana:

Whereas the Chamber recalls that Trial Chamber II had already ruled on this matter in its decision of 8 July 1998 in "*Prosecutor v. Nsabimana*" and that said preliminary motion had further been raised directly by Defence for the accused prompting the Chamber to confirm its earlier decision of 12 August 1999;

That, it is necessary in the instant to uphold the *res judicata* principle, as submitted by the Prosecutor;

That, in addition, the Chamber notes that in its decision of 5 October 1999, it expressly allowed the joinder of the trial of the accused with those of five others, including Sylvain Nsabimana;

Whereas, on the Defence allegation that, at the hearing of 10 August 1999, the Prosecutor had failed to address the case of the accused, the Chamber holds that if Defence had deemed the matter essential, it should have raised it during said hearing;

On the violation of the rights of the Defence:

Whereas on the Defence allegation that it did not have sufficient time to prepare itself for the initial appearance on the new charges brought on the basis of the amended indictment of 12 August 1999, the Chamber wishes to recall, firstly, that sub-Rule 50 (B) provides that "*a further appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges*;

That in any case, the Chamber considers that if Defence had deemed it necessary to be given more time to prepare itself, it should have made it known no later than at the initial appearance hearing;

IN LIGHT OF THE ABOVE,

The Chamber deems it necessary in the instant to dismiss the Defence motion in every respect;

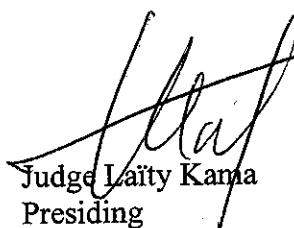
FOR THE ABOVEMENTIONED REASONS,


THE TRIBUNAL HEREBY,

DISMISSES the preliminary motion brought by Defence on the multiple charges as principal perpetrator of and accomplice to the crime of genocide;

SETS ASIDE the Defence Motion in every respect.

Arusha, 2 March 2000


Judge Laity Kama
Presiding


Judge William H. Sekule


Judge Mehmet Güney

(Seal of the Tribunal)