

ICTR-96-12-I
13-4-2000
(1770-1763)

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INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA
TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA

TRIAL CHAMBER III

OR: ENG

Before: Judge Lloyd George Williams, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registrar: Dr. Agwu U. Okali

Decision of: 13 April 2000

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THE PROSECUTOR
v.
ANATOLE NSENGIYUMVA

Case No. ICTR-96-12-I

**DECISION ON THE DEFENCE MOTIONS OBJECTING
TO THE JURISDICTION OF THE TRIAL CHAMBER
ON THE AMENDED INDICTMENT**

The Office of the Prosecutor:

Carla Del Ponte
David Spencer
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Holo Makwaia

Defence Counsel for the Accused:

Kennedy Ogetto
Gershom Otachi B'Omanwa

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: MUZIGA-NARRISON
SIGNATURE: [Signature] DATE: 13/April/2000

INTRODUCTION

1. The International Criminal Tribunal for Rwanda (Tribunal), sits today as Trial Chamber III, composed of Judges Lloyd George Williams, Presiding, William H. Sekule (as assigned by the President), and Pavel Dolenc.
2. On 12 August 1999, Trial Chamber II granted the Prosecution's motion to amend the indictment against the Accused Anatole Nsengiyumva (Nsengiyumva). The same day, the Prosecution filed the amended indictment.
3. On 11 October 1999, Counsel for Nsengiyumva filed the "Motion by the Defence Raising Objection to the Jurisdiction of the Trial Chamber on the Amended Indictment" (Motion on Jurisdiction).
4. On 2 December 1999, Counsel for Nsengiyumva also filed the "Defence Motion Raising Objection on the Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment" (Motion on Personal Jurisdiction).
5. On 28 January 2000, Counsel for Nsengiyumva filed a "Corrigendum" to the Motion on Jurisdiction.
6. On 2 February 2000, the Prosecution filed the "Prosecutor's Reply to the Motion by the Defence Raising Objection to the Jurisdiction of the Trial Chamber on the Amended Indictment" (Prosecution Reply to the Motion on Jurisdiction) with five annexes attached.
7. On 7 and 8 February 2000, the Trial Chamber heard the parties at a hearing regarding the issue of jurisdiction raised in these two motions.
8. On 30 March 2000, the Prosecution filed its "Prosecutor's Brief in Response to the Defence's Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment" (Prosecution Response to Motion on Personal Jurisdiction).

SUBMISSIONS OF THE DEFENCE

1. *Motion on Jurisdiction*

9. Nsengiyumva's Motion on Jurisdiction relates to two aspects of jurisdiction, namely: (1) lack of temporal jurisdiction (*ratione temporis*), and; (2) lack of subject-matter jurisdiction (*ratione materiae*).
10. Counsel for Nsengiyumva submits that the provisions of Articles 1 and 7 of the Tribunal's Statute (Statute) regarding temporal jurisdiction are clear and plain, and no circumstances would warrant an interpretation other than a literal one. To interpret these Articles, like a treaty, the Trial Chamber should pay attention to the intention of the framers or authors of the Statute. This includes the Commission of Experts established by the United Nations General Assembly.

11. Counsel for Nsengiyumva argues that the crime of conspiracy is totally independent from the actual crimes the parties conspired to commit, and the crime of conspiracy is completely committed once the agreement is entered into. Counsel for Nsengiyumva cites various authorities for this proposition. Consequently, if a conspiracy was committed before 1994 (outside the Tribunal's temporal jurisdiction), the crime of conspiracy falls outside the jurisdiction of the Tribunal.

12. Counsel for Nsengiyumva challenges paragraphs 5.1, 5.5, 5.9, 5.10, 5.15, 5.16, 5.21, and 5.23 of the indictment's concise statement of facts because they allege acts before 1 January 1994, which is clearly outside the time frame set out in the Statute. In addition, the time frame in some of these paragraphs is vague or unspecified and makes it impossible to determine if they fall within the Statute's temporal jurisdiction.

13. Regarding "subject-matter" jurisdiction, Counsel for Nsengiyumva contends that the Tribunal can only exercise jurisdiction over an indictment or a count if the subject-matter (i.e. the crime) as set out, clearly falls within the crimes set out in the Statute and includes the *actus reus* and the *mens rea*. Paragraphs 5.5, 5.9, 5.10, and 5.26 support Counts 1, 2, 3, 5, 6, 8, 9, and 10, but fail to disclose any offence, or show all the elements of an offence.

14. At the hearing, Counsel for Nsengiyumva argued that the indictment may contain only matters that disclose an offence, not matters that are merely relevant or linked. See Transcript of 8 February 2000, at page 136.

15. Nsengiyumva's Motion for Jurisdiction prays that the Trial Chamber decline to try the accused on the amended indictment for the lack of jurisdiction.

2. Motion on Personal Jurisdiction

16. Counsel for Nsengiyumva files his Motion on Personal Jurisdiction as a preliminary motion under Rule 72(B)(i) and (ii), objecting to a lack of jurisdiction and objecting to defects in the form of the indictment, respectively.

17. The Defence argues that a number of paragraphs in the indictment set out allegations to which the Accused is not a party or refer to the Accused, not as an individual, but as part of the armed forces or the FAR. The Defence contends that paragraphs 5.19, 5.29, 5.31, 5.32, 6.6, 6.7, 6.9, 6.32, 6.34 and 6.35 of the concise statement of facts are defective and do not allege any specific indictable conduct of the Accused. The allegations are primarily against the Rwanda armed forces as an institution, and not against the Accused.

18. The Defence prays that the Trial Chamber declare itself lacking jurisdiction to adjudicate on acts allegedly done by an institution.

SUBMISSIONS OF THE PROSECUTION

1. *Prosecutor's Reply to Nsengiyumva's Motion on Jurisdiction*

19. The Prosecution argues that Counsel for Nsengiyumva's interpretation of the notion of temporal jurisdiction under Articles 1 and 7 of the Statute is incorrect and unfounded. The Prosecution submits that the historical interpretation of the Vienna Convention on the Law of Treaties, as proposed by Counsel for Nsengiyumva, is incorrect and the Trial Chamber should apply a grammatical interpretation.

20. The Prosecution contends that the disputed paragraphs may well be related to allegations dating before 1994. These allegations are "not distinct and independent crimes." They relate to the continuation of events, clarify, supplement the substantive charges, and explain the historical background. These allegations also are admissible evidence under the Statute and Rule 89, and do not deny the Trial Chamber of temporal jurisdiction. Article 7 does not regulate the admissibility of evidence.

21. The Prosecution further contends that "conspiracy to commit genocide is a continuous crime." The Prosecution relies upon the case of *Josef Alstötter and Others*, before the United States Military Tribunal, Nuremberg, in 1947, in which that Tribunal admitted evidence beyond its temporal jurisdiction because "such acts are relevant upon the charges [and] [n]one of these acts is charged as an independent offence in this particular indictment." Prosecution Reply to the Motion on Jurisdiction, Annex 4 (citing 6 Law Reports of War Criminals, at page 73). The Prosecution contends that allegations dating before 1994 on conspiracy show intent.

22. The Prosecution argues that the Nsengiyumva's Motion on Jurisdiction is "premature in law" in its objection to subject matter jurisdiction because the Prosecution will prove the constituent elements of the crimes at trial on the merits, and not at this stage of the proceedings. Simply, there is subject matter jurisdiction because the charges fall within the scope of Articles 2 to 4 of the Statute. See Transcript of 8 February 2000, at pages 114-18. The Prosecution cites Rule 89 and ICTR and ICTY case law on evidence.

23. The Prosecution submits that the Trial Chamber should deny Nsengiyumva's Motion on Jurisdiction.

DELIBERATION

General Observations

24. Rule 47(C) reads (in part): "[t]he indictment shall set forth . . . a concise statement of the facts of the case and of the crime with which the suspect is charged". The Trial Chamber interprets that the Prosecution may include in an indictment allegations that are not strictly related to the elements of the crimes themselves. Here, it is important to distinguish between the words "crime" and "case" as they appear in Rule 47(C). The "crime" means any of the offences enumerated in Articles 2 to 4 of the Statute. The "case" has a broader meaning and includes relevant allegations of facts or circumstances that relate to the Prosecution's entire theory of a case that paint

a more full picture of the events of a given case for other purposes, including *inter alia* providing context, showing relationships, demonstrating the large-scale nature of the crimes, or proving elements of the crimes by inference to acts dating before 1994. The Trial Chamber finds that the Defence submission that the indictment’s concise statement of the facts is limited strictly to the crimes is erroneous. The Trial Chamber finds that under Rule 47(C) the Prosecution may allege facts of its case which go beyond the more limited scope (temporal or otherwise) of the crimes.

25. The Trial Chamber notes that the Motion on Personal Jurisdiction makes two objections: one based on jurisdiction (pursuant to Rule 72(B)(i)); and one based on defects in the form of the indictment (pursuant to Rule 72(B)(ii)). Because the objection based on jurisdiction overlaps with the separately filed Motion for Jurisdiction, and for purposes of judicial economy, the Trial Chamber decides these two Defence motions at the same time. The Trial Chamber, however, limits its ruling on the Motion on Personal Jurisdiction to the objection based on a lack of jurisdiction, and does not decide the objection based on a defect in the form of the indictment. The Trial Chamber will decide the objection based on a defect in the form of the indictment at a later time because this objection was not scheduled for a hearing, nor fully argued.

26. The Trial Chamber, in its deliberations, has not considered Prosecution Response to Motion on Personal Jurisdiction, filed on 30 March 2000, because it is untimely and because the Defence did not have an opportunity to respond to it.

Temporal Jurisdiction

27. The parties do not dispute that the temporal jurisdiction of the Tribunal is limited to crimes committed in the year 1994. Articles 1 and 7 of the Statute are clear in this regard. The matter in dispute is whether the indictment’s concise statement of facts may or may not include allegations dating before 1994 and, subsequently, whether such allegations are admissible at trial. The Trial Chamber accepts the Prosecution’s submission that allegations dating before 1994 do not constitute independent crimes. These allegations merely represent what the Prosecution intends to offer as relevant and admissible evidence of crimes occurring in 1994, or relate to the continuation of events, clarify, and are supplementary to the substantive charges.

Temporal Jurisdiction and Conspiracy Charge

28. As to the conspiracy charge, the Trial Chamber finds that the limited temporal jurisdiction of the Tribunal does not bar evidence of an alleged conspiracy of which the agreement was made before 1994. To the contrary, evidence of a pre-1994 conspiracy may be admissible and relevant in showing the commission of a conspiracy in 1994. Conspiracy is a “continuing crime.” *See generally* Peter Gillies, Criminal Law, at page 702 (4th edition 1997). Because conspiracy is a continuing crime, then events that took place outside the period of the Statute can be taken into account if it can be shown that the conspiracy continued into the relevant period of the Statute. Evidence before 1994 may show when the conspiracy actually commenced. All activities prior to 1 January 1994, so far as they related to the conspiracy, may be relevant.

29. In *Liangsiriprasert v. U.S. Government & another*, (1990) 2 AER 866, Privy Council, at page 875 (emphasis added), Lord Griffiths in his speech said as follows:

I agree that the convictions for conspiracy against those respondents can be supported on another ground, namely, that they conspired together in this country notwithstanding the fact that they were abroad when they entered into the agreement which was the essence of the conspiracy. That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed.

30. In *Director of Public Prosecutions v. Doot & Others*, (1973) A.C. page 807, House of Lords, Viscount Dilhorne in his speech stated as follows:

Though the offence of conspiracy is complete when the agreement to do the unlawful act is made and it is not necessary for the prosecution to do more than prove the making of such an agreement, a conspiracy does not end with the making of the agreement. It continues so long as the parties to the agreement intend to carry it out. It may be joined by others, some may leave it.

Lord Salmon in his speech stated as follows:

That agreement was and remained a continuing agreement and they continued to conspire until the offence they were conspiring to commit was in fact committed.

Lord Pearson in his speech stated as follows:

But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as the performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of its performance or by abandonment or frustration or however it may be.

The Trial Chamber notes that the Defence, at the hearing, cited the Appeal Court decision in *Doot*, which was overruled by the above decision of the House of Lords.

31. The Trial Chamber also finds persuasive the case of *Josef Alstötter and Others*, before the United States Military Tribunal, Nuremberg, in 1947, in which that Tribunal admitted evidence beyond its temporal jurisdiction because "such acts are relevant upon the charges [and] [n]one of these acts is charged as an independent offence in this particular indictment." See Prosecution Reply to Kabiligi's Motion, Annex 4 (citing 6 Law Reports of War Criminals, at page 73). The Military Tribunal in *Alstötter* continued:

. . . either prosecution or defence [has] the right to offer in evidence any fact or circumstance occurring before [outside the Tribunal's temporal jurisdiction] or after September, 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity *Id.*

32. It is clear from the authorities and the nature of the offence of conspiracy that there is a conspiracy once an agreement is made but a conspiracy does not end with the making of the agreement, as was submitted by Counsel for the Defence. It will continue so long as there are two or more parties to it intending to carry out the design. That agreement was and remained a continuing agreement while they continued to conspire.

33. The Trial Chamber also notes the present pre-trial stage of the proceedings. The indictment's concise statement of facts contains allegations of the Prosecution's case and the crime of conspiracy that the Prosecution seeks to prove at trial, and which the Defence will have the opportunity to challenge. As the finder of fact, the Trial Chamber ultimately will decide which facts occurred in 1994 and constitute the crime of conspiracy, and which facts occurred outside 1994, at trial.

Subject Matter Jurisdiction

34. The Trial Chamber does not read in isolation the paragraphs of the indictment challenged by the Defence. The Trial Chamber reads them in conjunction with, and in the context of, the other paragraphs relating to the crimes and the entire text of the indictment. The facts alleged in the challenged paragraphs show the development of events that culminated in the alleged commission of crimes. Of the allegations contained in the challenged paragraphs (membership on a commission; circulation of a report; meetings in a military camp; the presence of the Accused during inflammatory statements; establishing a list of enemies), none alone constitute independent crimes. These allegations, however, are permissible because they show events that culminated in the alleged commission of crimes. The Trial Chamber, therefore, finds this objection without merit.

Personal Jurisdiction

35. The parties also dispute whether the indictment may allege an association to the military and whether such reference violates the Tribunal's jurisdiction over natural persons because Article 5 of the Statute reads (emphasis added):

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

36. As to jurisdiction over natural persons under Article 5, the Trial Chamber finds that all of the counts charge the Accused individually and fall within the scope of Articles 2 to 4 of the Statute. The indictment does not charge the Rwandan Armed Forces; it charges Nsengiyumva, who was a member of the Rwandan Armed Forces; hence, the reference to that force. The indictment, however, charges him solely as an

individual. The Trial Chamber finds that the counts in the indictment satisfy the requirement of Article 5 of jurisdiction over natural persons.

37. For the above reasons, the Trial Chamber:

- (a) **DENIES** the “Motion by the Defence Raising Objection to the Jurisdiction of the Trial Chamber on the Amended Indictment”;
- (b) **DENIES** the “Defence Motion Raising Objection on the Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment” insofar as it relates to jurisdiction.

Arusha, 13 April 2000.



Lloyd George Williams
Judge, Presiding



William H. Sekule
Judge

Pavel Dolenc
Judge

Seal of the Tribunal

