



OR: ENG

TRIAL CHAMBER II

Before: Judge Laïty Kama, Presiding
Judge William H. Sekule
Judge Pavel Dolenc

Registry: Agwu U. Okali

Decision of: 21 June 2000

THE PROSECUTOR
v.
Eliezer NIYITEGEKA
Case No. ICTR-96-14-T

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**DECISION ON THE PRELIMINARY MOTION OF THE DEFENCE
(OBJECTIONS BASED ON LACK OF JURISDICTION AND
DEFECTS IN THE FORM OF THE INDICTMENT) and
ON THE URGENT DEFENSE MOTION
SEEKING STAY OF PROCEEDINGS**

The Office of the Prosecutor:
Ken Flemming
Don Webster
Ifeoma Ojemeni

Counsel for the Accused:
Sylvia Geraghty

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“the Tribunal”),

SITTING as Trial Chamber II composed of Judge Laïty Kama, Presiding, Judge William H. Sekule, and Judge Pavel Dolenc as assigned by the President to temporarily replace Judge Mehmet Güney;

BEING SEIZED of a motion filed on 11 April 2000 by the Defence, entitled; Urgent Preliminary Motion: Objections Based on Lack of Jurisdiction and Defects in the Form of Indictment, (the “Preliminary Motion”);

BEING SEIZED of a motion by the Defence, filed on 20 April 2000, entitled; Urgent Defence Motion: Seeking Stay of Proceedings Pending Final Decision/Judgement on Urgent Preliminary Defence Motion, filed on 11 April, (“The Motion Seeking Stay of Proceedings”)

CONSIDERING the three responses from the Prosecutor for the above two motions filed respectively 15 May 2000, 17 May 2000, and the Supplementary Prosecutor’s Response to: (i) Urgent Preliminary Defence Motion: Objections Based on Lack of Jurisdiction and Defects in the Form of the Indictment; (ii) Urgent Defence Motion Seeking Stay of Proceedings, and (iii) Defence Motion Objecting to the Prosecutor’s Request for Leave to File an Amended Indictment, on the Grounds of, *inter alia*, Abuse of process, Inadmissibility and Lack of Jurisdiction. filed on 30 May 2000, “The Supplementary Prosecutor’s Response;”

TAKING NOTE of the Decision rendered by this Trial Chamber on 7 February 2000 on the Defence’s Application of Extreme Urgence for Disclosure of Evidence filed by the Accused on 9 November 1999, where the Trial Chamber specifies the different time frames for disclosure of supporting material based on Rule 66;

NOTING that on 3 March 2000, the Accused filed the ‘Very Urgent Defence Motion for Order of Compliance by the Prosecutor with Order of the Tribunal Dated 7 February 2000,’ the Hearing of which was on 30 March 2000.

NOTING that Prosecutor has complied with the disclosure required under Rule 66;

CONSIDERING the provisions of the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), in particular Rules 66 and 72;

HAVING HEARD the parties on the motions on 1 June 2000;

WHEREAS on 1 June 2000 the Trial Chamber rendered an oral decision on this case on the Preliminary Motion and the Motion Seeking Stay of Proceedings, and the parties were notified that the written decision would be filed at a later stage.



THE SUBMISSIONS OF THE PARTIES

The Defense on the Preliminary Motion

1. The Defense raises several issues to substantiate allegations that the Trial Chamber lacks jurisdiction. In the light of the serious violations of the rights of the Accused, given the conduct and *mala fides* of the Prosecutor, the Accused has suffered serious prejudice to the extent that no fair trial can take place and therefore, to try him would be so unfair as to amount to an abuse of process. The Defense Counsel in support of this motion made, *inter alia* the following submissions:

Abuse of process

2. In support of its Preliminary Motion the Defence uses Affidavits filed in April 2000 as Annexes 5 and 6 to the Defense Motion. The Preliminary Motion alleges, *inter alia*:
3. That pursuant to Rule 47(H)(ii), the Indictment against the Accused was confirmed on 15 July 1996 and an Order pursuant to Rule 40*bis* addressed to the Government of Kenya to search for, arrest and transfer the Accused to the Tribunal was also signed on 16 December 1998.
4. On 9 February 1999, the Accused was arrested in Nairobi, Kenya.
5. The Prosecutor conducted interrogation of the Accused, without recordings being made and in the absence of a lawyer, in breach of the provisions of Article 19(1) and (2) and Article 20(3) and (4)(g) of the Statute, and Rules 42(A) (i) and (iii): 42(B) and 43 (i), (ii), (iii), (iv) and (v), *mutatis mutandis*, Rule 44 *bis* (D), 45 (under Rule 45 *bis*), with no provision having been made for any such interrogation under Rules 55 or 57.
6. The Prosecutor, during the course of interrogation, attempted to compel the Accused to admit guilt to all the charges alleged against him in the Indictment. The Prosecutor, in order to encourage a guilty plea, made mention of certain promises and inducements, including:
 - (a) that some of the charges proffered against the Accused would be removed.
 - (b) that if the Accused accepted the demands, the Prosecutor would arrange for the family of the Accused to be transferred, without delay, receiving financial assistance for at least six months, whilst awaiting intervention of UNHCR.

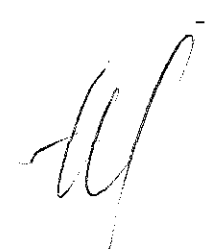


- (c) that if the Accused refused to co-operate, the Prosecutor could proceed to amend the Indictment and include, *inter alia*, the additional charge of rape even though she knew that the Accused had not raped anyone and that there was no credible evidence to prove such a charge.
7. The Defence emphasizes that in order to deter a potential abuse, there must be strict adherence to the Rules considering the vulnerability of the Accused.
 8. On 18 February 1999, the duty counsel of the Accused informed the Prosecutor that the Accused was innocent of the charges being brought against him and that he could not plead guilty to false charges and was ready to prove his innocence.
 9. The Defence reminds the Tribunal that to date the Prosecutor has neither sworn an affidavit, nor has she filed one to rebut all of the matters, which the Accused has deposed to. The evidence as given by the Accused stands unchallenged and should be taken as true, in the absence of any rebutting evidence.
 10. The Accused awaited disclosure under Rules 66(A) and 68 comprising of the exculpatory evidence, supplementary materials and the full witness statements, redacted or otherwise, especially the extracts of witness statements, which are to be provided within thirty days of the initial appearance of the Accused. The Defence has written to the Prosecutor several times seeking a definitive answer on this point.
 11. On 13 March 2000, seven weeks later, disclosure was made of supporting material comprising of witness statements. At the end of April 2000 the Prosecutor disclosed some exculpatory evidence, which it had denied possessing, up to then.
 12. The Defence submits that, this Preliminary Motion has been filed within thirty days of receipt from the Prosecutor of what is, in reality, the supporting material envisaged by the Defence pursuant to Rule 66A(i).
 13. The Defence submits that the Prosecutor's case, which charges the Accused of committing crimes under Article 2, 3 and 4 of the Statute is not grounded in evidence, because:
 14. The Prosecutor relies on the statements of a witness who has already been discredited in two separate trials: *Prosecutor v Alfred Musema*, ICTR – 1996-13-T, as Witness “Z” (Judgement of 27 January 2000) and in the case of *Prosecutor v Clement Kayishema and Obed Ruzindana*, ICTR-95-1-T, as Witness “NN” (Judgement of 21 May 1999). The Defence submits that to put forward the testimony of this witness, is incontrovertible proof of the overwhelming abuse of process and *mala fides* of the Prosecutor towards this Accused.



15. Defence further submits that in putting forward sixteen witness testimonies, of whom not one witness makes allegations of having seen the Accused killing anyone manifests, *inter alia*, to an abuse of process. This is contrary to Rule 95, which states that, no evidence shall be admissible if its admission is antithetical to and would seriously damage the integrity of these proceedings.
16. The Defence further submits that the charge of conspiracy brought against the Accused in the existing Indictment is false and without foundation. The evidence to ground these allegations having emerged since Operation NAKI in July 1997.
17. The Prosecutor impedes the Trial Chamber in carrying out its obligation to the Accused in ensuring his right to a fair and expeditious trial as set out in Article 19(1) of the Statute. The Prosecutor's Motion and Brief for Leave to File an Amended Indictment is specifically referred to.
18. The Prosecutor's Application to Amend the existing Indictment against the Accused three years and nine months after he was indicted will delay his trial and constitutes an abuse of process.
19. The Defence grounds its arguments on the abuse of process against the Accused by making reference to, *inter alia*, the case of *Regina v Horseferry Road Magistrates Court ex parte Bennett*, IAC, 42.95 [1994], ILR, House of Lords, 380 (1993). The House of Lords stated, *inter alia*, that one would hope the number of reported cases in which a Court has to exercise jurisdiction to prevent abuse of process are comparatively rare, usually confined to cases in which the conduct of the Prosecution has been such as to prevent a fair trial of the Accused.
20. Further reference is made to *Jean-Bosco Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, page 42, Decision of 11 march 1999, where it was stated that, 'To proceed with a trial against the Accused would amount to a further act of injustice in forcing him to undergo a lengthy and costly trial, only to have him raise once again these issues currently before this chamber.'
21. The Accused requests the Trial Chamber that given all the circumstances outlined herein, to take this Motion under Rule 72 as it existed before its amendment in February 2000.
22. The Defence therefore prays that the Trial Chamber stay these proceedings with prejudice to the Prosecutor, order immediate unconditional release of the Accused, and compensate the Accused

The Defence on the Motion Seeking Stay of Proceedings



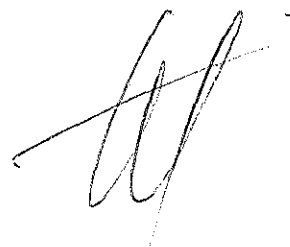
23. The Defense submits that because of lack of jurisdiction any further proceedings stay until the Trial Chamber has deliberated on this Preliminary Motion.

The Prosecutor on the Preliminary Motion

24. In response, the Prosecutor submits, as follows;

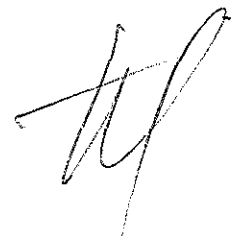
Abuse of Process

25. That the Defence does not appreciate the distinction between 'supporting material' pursuant to Rule 66(A)(i) and 'witness statements' pursuant to Rule 66(A)(ii).
26. That this Trial Chamber accepted in its Decision rendered on 7 February 2000 that all of the supporting material was sent at the latest on 11 June 1999, which the Accused still ignores completely and seeks to have another determination of the issue.
27. That the Accused had '60 days', following disclosure of all the material envisaged by Rule 66(A)(i) by the Prosecutor since June 11 1999 within which to bring a preliminary motion. The Accused is eight months out of time in bringing this so-called 'Urgent Motion' and the Defence has not requested an extension of the deadline for good cause.
28. That in response to the misapprehension shown by the Accused that the Prosecutor has exculpatory evidence, the Prosecutor responds again, as she has maintained before this Trial Chamber in a hearing of 7 December 1999, that she does not have any material she considers exculpatory.
29. That the Accused misstates Articles 2, 3, and 4 by not stating them fully. The Defence complains about the adequacy of evidence, which in essence, is an issue for trial and not for a preliminary motion. The Prosecutor refers to the case of *Prosecutor v Jérôme Bicomumpaka*, ICTR-99-50-I, Decision of Trial Chamber II given on 8 May 2000.
30. The Prosecutor submits that the Defence ignores the substantial learning on genocide and related crimes contained in the Decisions of this Tribunal. The case of *Prosecutor v Jean Paul Akayesu*, paragraph 112 to 129 and 492 – 562 and particularly at paragraphs 523 – 524, ICTR-96-4-T Judgement of 2 September 1998, is one such case, with respect to inferences to be drawn from multiplicity of facts.
31. The Prosecutor further submits that the Accused is charged with heinous crimes because there is evidence, which in accordance with the law, was and is sufficient to confirm the Indictment and to put the Accused on trial as was determined by the confirming Judge.



32. The Prosecutor, whereupon, made reference to the witness statements where in at least three of the witnesses referred to the Accused by name.
33. The Prosecutor therefore submits that the witness statements are not 'truncated' and are full statements in respect to the witness it is intends to call. The Defences' submissions in respect of these matters are false and mischievous.
34. As to the allegations by the Defence concerning the Prosecutor's Motion to Amend the indictment, the Prosecutor submits that filing a Motion to Amend an Indictment does not amount to an abuse of rights, which is a totally different issue and is not a matter of jurisdiction.
35. The Prosecutor submits that the Defence's Preliminary Motion may be addressed under Rule 72(H), which deals with objections based on jurisdiction. This rule exclusively challenges an Indictment on the ground that it does not relate to, *inter alia*, specific persons, territories, period and violations as provided for in the Statute. This Motion does not, therefore relevantly relate to this Rule. This Preliminary Motion is instead, an attempt to review the Decision of the confirming Judge, of 15 July 1996.
36. As to the issue of Affidavit, the Prosecutor submits that she received the sealed Affidavit of the Defence Council on the 30 May 2000 after the Court had ordered that it be disclosed. For that same reason, the Prosecutor submits accounts for the delay in delivering the Affidavit in response to the Defence Counsel's Affidavit.
37. The Prosecutor further submits on the understanding of certain of the facts in the Affidavit of the Accused that it was the Accused who initiated conversations with the Prosecutor because he wanted to ensure the safety of his wife and children. Furthermore, the Accused wanted to know what sort of a deal he could get if he did co-operate with the Prosecutor.
38. The Prosecutor also submits that the Accused further wanted to know if the Prosecutor would remove certain parts of the Indictment. It was therefore the accused bargaining with the Prosecutor to have certain charge taken out so that he could co-operate.
39. As to the issue of recording interrogations and conversations made with the Accused, the Prosecutor submits that it was the Accused himself, a journalist, who stipulated that he would not talk if there were to be any recording. The Accused had made reference to Jean Kambada whose co-operation was soon broadcast amongst the detainees and who was considered to be a 'cockroach' by the other detainees.

The Prosecutor's response on the Motion Seeking Stay of Proceedings



40. The Prosecutor relies on its Motion titled 'Supplementary Prosecutor's Response to, *inter alia*, Urgent Defence Motion Seeking Stay Of Proceedings' filed on 30 May 2000. The Prosecutor submits, *inter alia*, the following:
41. That this Urgent Motion Seeking Stay of Proceedings is premised on the Defence complaints concerning disclosure of witness statements that has motivated every Defense Motion that has been filed and argued before this court. The Defense has been in possession of the supporting materials since the time of his arrest. Copies of the full witness statements were delivered to him by the Registry on 11 June 1999. The first Defense preliminary motion is this preliminary motion before us, which is a full nine months out of time as prescribed under Rule 72.
42. The Prosecutor therefore requests that the Defense application for stay be denied and that this Trial Chamber sanction the Defense by withholding compensation for the Defense Motion Seeking Stay of Proceedings.


AFTER HAVING DELIBERATED

Extent of the Motion

43. Although the Defence filed its Preliminary Motion making objections based on lack of jurisdiction and defects in the form of the indictment, at the hearing of 1 June 2000, the Defence indicated that it will only dwell into the issue of Lack of Jurisdiction.

Timeliness of the Preliminary Motion

44. The Defence filed its Preliminary Motion on 11 April 2000 under Rule 72. The Trial Chamber notes that the Defence has not sought relief under Rule 72(F) for the extension of the time limit as prescribed in Rule 72(A). Instead, the Defence maintains that this Preliminary Motion is filed within thirty days of receipt from the Prosecutor of the supporting materials envisaged under Rule 66(A)(i). In the brief supporting this Motion, the Defense maintains that the Prosecutor continues to breach its obligations in failing to disclose 'supporting materials' and that the applicable 'supporting materials' for disclosure within thirty days were the full witness statements, redacted or otherwise.
45. Pursuant to Rule 72(A) as amended on 22 February 2000, all preliminary motions must be filed within thirty days following disclosure by the Prosecutor to the Defence of all materials envisaged by Rule 66(A)(i). Rule 72(F) further provides that failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights unless the Trial Chamber grants relief from the waiver upon showing good cause.



46. Thus the question of whether the Defence has filed the Preliminary Motion in a timely manner, depends on the date when copies of the supporting material that accompanied the indictment at its confirmation are disclosed to the Defence.
47. The Trial Chamber deems it necessary at this juncture, to point out the important distinction between the different specified time frames for the disclosure of various documents pursuant to Rule 66 by referring to its decision of 7 February 2000.
48. In the 7 February 2000 Decision, the Trial Chamber distinguished between:
- (a) *The Disclosure of Supporting Material pursuant to Rule 66(A)(i)*:
The Prosecutor should have disclosed to the Defence, copies of the Supporting material, which accompanied the Indictment when confirmation was sought within 30 days of the initial appearance of the Accused and not 57 days later (i.e. 11 June 1999.)
 - (b) *The Disclosure of Witness Statements pursuant to Rule 66(A)(ii)*:
Although the trial date is not set yet, the Prosecutor is required to make a concerted effort to continue and complete the Prosecutor's disclosure obligations at the earliest opportunity.
49. Rule 66(A)(i) states that the Prosecutor shall disclose to the Defence within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecutor from the accused. The Trial Chamber emphasises the importance of the link between the disclosure of supporting materials as envisaged by Rule 66(A)(i), and the specified time limit for the filing of a preliminary motion as prescribed in Rule 72(A).
50. This Chamber addressed the same issue in *Prosecutor v. Sylvain Nsabimana and Alphonsbe Nteziryayo*, ICTR-97-29-I, pg. 4, paras. 4-5, (10-9-1999) where in, the Tribunal held that the period for filing a preliminary motion begins to run once the Prosecutor has disclosed the supporting material pursuant to Rule 66(A)(i). In the same decision, the Trial Chamber noted that the Prosecution must disclose supporting material and prior statements of the accused within thirty days of the initial appearance.
51. Similarly, in *Prosecutor v. Ferdinand Nahimana*, Case No. ICTR-96-11-I, pg. 3, para. 4, (8-31-1999) in which the Trial Chamber ruled that Rule 72(A) specifies the time limit to file all preliminary motions following disclosure by the Prosecutor. The materials that are subject to disclosure, as envisaged in Rule 66(A)(i) of the Rules are copies of the supporting material that accompanied the indictment at its confirmation, as well as prior statements obtained by the Prosecutor from the Accused.

52. In the instant case, the Trial Chamber acknowledges that the issue of disclosure has been raised repeatedly by the Defence.
53. As indicated in the above decision dated 7 February 2000, the Accused made his initial appearance on 15 April 1999. It is undisputed that on or about 11 June 1999, the Defence received a second set of supporting materials identical to the one disclosed to the Accused on the day of his arrest on 9 February 1999 (see Decision On the Defence Motion For Disclosure of Evidence, pg. 1, para. 1; see also Defence Application of Extreme Urgence For Disclosure of Evidence, filed 9 November 1999). Hence, the Trial Chamber found that the Prosecutor has complied with the mandatory obligation stated in Rule 66(A)(i) as of 11 June 1999.
54. Thus, the date when the Prosecutor communicated the supporting materials to the Defence serves as the triggering factor for the running of the time limit to file the preliminary motion within thirty days of the disclosure date as specified in Rule 72(A). Therefore the Preliminary Motion which was filed on 11 April 2000 is submitted after the time limit expired.
55. The Defense requests that the Trial Chamber apply 'old' Rule 72, which is as it stood before its amendment in February 2000, but it fails to show any prejudice for the accused if the amended rule is applied. Furthermore, even if this Trial Chamber was to consider the Defence's request to apply the previous Rule 72 prior to its amendment, (which allowed sixty days following disclosure by the Prosecutor to the Defence to file any preliminary motions), the prescribed time limit for filing preliminary motions would have long been expired.
56. Therefore because the Accused has not adhered to the provisions of Rule 72 and no relief was sought for a waiver of this time limit pursuant to Rule 72(F), the Trial Chamber rules that the Defence's preliminary motion is inadmissible.
57. Furthermore, in view of the aforementioned Decision and the subsequent hearing on 30 March 2000, when the Trial Chamber again noted that the Prosecutor has complied with the disclosure requirements, the issue of disclosures has previously been ruled on and decided upon.
58. Thus, in accordance with the principle of *res judicata*, the Trial Chamber holds that the issue of disclosure shall not be reopened or re-challenged by the parties. In addition, mindful of Rule 73(E), the Trial Chamber reminds, *in limine*, counsel for the Defence, the obligation not to make frivolous or unwarranted motions.
59. In any case, it is evident from the submissions by the Defence, the issue raised was not one of jurisdiction rather it was an attempt to review the decision of the confirming Judge, which is inadmissible under Rule 72.



60. The Defence also raised and linked the issue of jurisdiction to the question of abuse of process. As already explained, the Preliminary Motion is out of time under Rule 72. The Trial Chamber has considered the issue of abuse of process and it holds that it is unfounded.
61. The Trial Chamber accepts that the parties met noting the fact that there have been plea agreements leading to pleas of guilty in some proceedings before the Tribunal. It further notes, that the alleged events are said to have happened during the first days the Accused came into contact with representatives of the Prosecutor's office in February 1999. Yet the Accused raised them for the first time in April 2000, upon filing this Preliminary Motion to the Tribunal. In these circumstances, therefore, the Trial Chamber is led to believe that the allegations by the Accused are unfounded.

Stay of Proceedings

62. The Defence's second Motion asking for stay is thus moot and denied.

FOR THE FOREGOING REASONS,

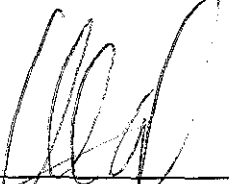
THE TRIAL CHAMBER,

DISMISSES the Defence's Preliminary Motion, because it is out of time, and;

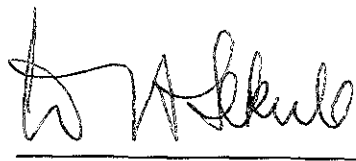
DISMISSES the Defence request for seeking stay of proceedings pending final decision on the Defence's Preliminary Motion filed on 9 April 2000 as inadmissible because it is moot.

Decision Rendered on 1 June 2000

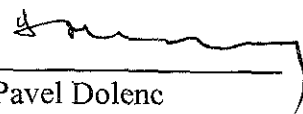
Signed in Arusha on 21 June 2000



Laitty Kama,
Presiding Judge



William H. Sekule
Judge



Pavel Dolenc
Judge

(Seal of the Tribunal)