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ICTR-98-41-I

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International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

Original: ENGLISH

Before: Judge Lloyd George Williams, Presiding  
Judge Yakov Ostrovsky  
Judge Pavel Dolenc

Registrar: Dr. Agwu U. Okali

Date: 20 October 2000

JUDICIAL RECORDS/ARCHIVES  
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THE PROSECUTOR  
v.  
THÉONESTE BAGOSORA

THE PROSECUTOR  
v.  
GRATIEN KABILIGI and  
ALOYS NTABAKUZE

THE PROSECUTOR  
v.  
ANATOLE NSENGIYUMVA

Case No. ICTR-98-41-I

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**DECISION ON NTABAKUZE'S PRELIMINARY MOTION AND  
MOTION FOR THE EXECUTION OF THE DECISIONS RENDERED  
ON 5 OCTOBER 1998 AND 8 OCTOBER 1999**

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Office of the Prosecutor:

Chile Eboe Osuji  
Frédéric Ossogo

Defence Counsel for Ntabakuze:

Clemente Monterosso

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1. **THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (Tribunal),

**SITTING** as Trial Chamber III (Chamber) composed of Judges Lloyd George Williams, presiding, Yakov Ostrovsky and Pavel Dolenc;

**BEING SEISED** of Aloys Ntabakuze's "*Requête en exception préjudicielles et en exécution de la décision du 5 octobre 1998 et du 7 octobre 1999*", filed on 6 June 2000 (Motion);

**CONSIDERING** the Prosecutor's response to the Motion, filed on 22 July 2000;

**RECALLING** the Chamber's Decision of 18 May 2000 on Ntabakuze's Preliminary Motion Seeking to Obtain from the New Indictment Clarification Crucial in the Exercise of the Rights of the Accused to Raise Preliminary Motions (Decision);

**NOW CONSIDERS** the matter solely on the basis of the briefs of the parties.

**DEFENCE SUBMISSIONS**

2. The Defence submits that the Motion is based on Rule 72 of the Rules of Procedure and Evidence (the Rules) as it stood as of 2 October 1999, when the Prosecutor disclosed to the Defence the materials covered by Rule 66A(i).

3. The Defence contends that it never waived its rights to file preliminary motions. The Defence was served with the supporting materials of the new indictment on 2 October 1999. Noting the confusion as to the relationship between such supporting materials and the new and old charges brought into the indictment, the Defence on 18 October 1999, filed a "Preliminary Motion to Obtain from the New Indictment Clarification Crucial in the Exercise of the Rights of the Accused to Raise Preliminary Motions". In that motion, the Defence requested the Chamber to order the Prosecutor to highlight the new charges brought into the new indictment and to suspend the sixty-day time limit for filing preliminary motions until the Prosecutor provided the clarifications sought.

4. The Defence submits that the Decision was vitiated by factual and legal errors. A single Judge should not have rendered the Decision, pursuant to Rule 73, given the fact that the Defence brought the motion under Rule 50, which refers to Rule 72.

5. The Defence argues that the Chamber erroneously considered that the Defence waived its rights to file preliminary motions by filing a motion after the sixty-day time limit, whereas the computation of the sixty day time-limit should begin, not from the day of the Chamber's decision granting the Prosecutor's request for leave to amend the indictment, but from the date of disclosure of the supporting materials.

6. The Defence therefore prays the Chamber to review the Decision and to extend the time within which to file preliminary motions, so as to enable it to challenge the indictment, which is vague, imprecise, and contains many shortcomings.

7. The Defence prays that the Chamber find the Motion admissible.

8. On the merits, the Defence submits that the indictment contains numerous superfluous facts, making it more confusing. Some facts have nothing to do with the Accused and do not support any of the charges. Those facts should be stricken from the indictment.

9 The Defence cites numerous paragraphs of the indictment that lack precision and require additional information under Rule 47(C).

10 The Defence argues that the fact that the indictment charges several offences on the basis of the same facts violates Rule 47(C). The Defence prays that the Chamber order the Prosecutor to retain only one offence for each transaction.

11. The Defence recalls that the former Trial Chamber II, in its decision rendered on 5 October 1998, ordered the Prosecutor to specify the contents of the paragraph 2.12 of the indictment confirmed on 15 October 1997. Trial Chamber III handed down on 8 October 1999 a similar decision ordering the same specification. *See Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, ICTR-97-30-I, at para. 65 (Decision on the Prosecutor's Motion to Amend the Indictment) (8 October 1999). The Prosecutor never complied with those decisions. The Defence prays that the Chamber order compliance with said decisions, given the fact that paragraph 5.8 of the new indictment refers to the same facts as the paragraph 2.12 of the former indictment.

12. The Defence prays that the Chamber order the severance of the conspiracy charge. The Defence contends that the law on the evidence related to the offence of conspiracy is not the same as those for other offences and that the rights of the Accused would be jeopardised if all the offences are based on the same facts as would appear to be the case.

**SUBMISSIONS OF THE PROSECUTOR**

13. The Prosecutor submits that the Motion is inadmissible under Rule 72(F), which the Defence relies upon as the legal basis for filing the Motion. When there is an amendment of the indictment with new charges, an accused must file preliminary motions within sixty days pursuant to Rule 50, which refers to Rule 72. The sixty-day time limit begins on the date of the initial appearance, under Rule 50(B) and (C), and pursuant to previous decisions of the Chamber. In addition, the Prosecutor submits that even under the Defence's interpretation of the Rules, the Motion would still be out of time because more than sixty days elapsed between the alleged date of the beginning of the computation and the date of filing.

14. The Prosecutor disagrees with the contention that the new charges of the amended indictment lack clarity. She recalls that the Defence filed, in October 1999 three motions challenging the amended indictment in each of which it clearly referred to the five new charges. The Defence then was able to challenge the amended indictment.

15. As to the alleged non-compliance with a Chamber's order to give more particulars, in its decision rendered on 8 October 1999, the Prosecutor states that there is no such order in that decision. The Prosecutor submits in addition, that the Defence request for more particulars is time barred pursuant to Rule 72(A).

16. Regarding severing the conspiracy charge, the Prosecutor submits that such an objection is inadmissible and time barred under the sixty-day time limit of Rule 72(B)(iii),

which expired a long time ago. This objection also lacks merit. The Defence alleges a risk of jeopardising the rights of the Accused, but fails to prove the requirements of Rule 49.

### **DELIBERATIONS**

17 The Defence submits that the Motion is filed under Rule 72. Rule 72(B) empowers the Defence to bring preliminary motions only on specific enumerated subjects. However, most issues raised by the Defence in its Motion are not on the subjects provided in Rule 72.

18 The Defence contends that the Chamber cannot deny the Accused his right to file preliminary motions. There is no question of denying such a right. However this right should be exercised in conformity with the requirements of the Rules. If a party files a preliminary motion under Rule 72, this Rule should be referred to. The motion should be on a subject provided for in this Rule and brought within the prescribed time limits.

#### *The Review of the Decision*

19. The Chamber first turns to the request for a review of the Decision of 18 May 2000. The Defence contends that a single Judge pursuant to Rule 73 rendered this decision whereas the Motion of 18 October 1999 was filed under Rule 50(C), which refers to Rule 72. The single Judge therefore, from the point of view of the Defence, was without jurisdiction to rule on the motion. The Chamber is here faced with a misrepresentation of the Rules. There is no legal basis for the Defence to file a preliminary motion under Rule 50(C). This Rule provides only in what circumstances a period of time for filing preliminary motions could be extended and what are the time limits of this extension. Apart from the reference in the heading of "Preliminary Motion", there was nothing in the Motion of 18 October 1999 which could lead to the conclusion that this Motion was filed under Rule 72. This Rule was not even mentioned in the Motion. The Defence raised in this Motion only three issues: to underline the new portions of the amended indictment, to suspend the established period of time for filing preliminary motions, to recognize that Rule 50(B) was violated because the Accused was caused to plead not only on the new counts but on all counts brought against him. It is sufficient to compare these three issues with the subjects on which the preliminary motions could be brought in order to see that not a single of these issues could be filed before the Chamber as a preliminary motion under Rule 72. Therefore the Chamber had all the reasons to consider the Motion of 18 October 1999 as filed under Rule 73 and it is not acceptable that the Defence now refers to Rule 72. If such reference were made in the Motion, it could have been automatically denied as inadmissible because such a preliminary motion would not comply with the requirements of Rule 72.

20. In any event, pursuant to Article 25 of the Statute and Rule 120, the review applies only to final judgements, and provided that "a new fact which was not known at the time of the proceedings and which could have been a decisive factor in reaching the decision" is discovered. Moreover, the Appeal Chamber in its decision of 31 March 2000 (I.C.T.R 97-19-AR72 *Prosecutor Versus Jean Bosco Barayagwiza*) extended the notion of final judgement to any decision the consequence of which is to end the proceedings. Here, the Decision challenged is not a final judgement nor did the Decision end the proceedings. Further, the Defence did not identify a new fact that was not known at the time of the proceedings. For these reasons also, the request for review must fail.

*Extension of Time Limits*

21. The Defence raises again the issue of time limits for filing preliminary motions despite the fact that this issue was already considered by the Chamber as a result of the Defence Motion of 18 October 1999. The main point of that motion was that the Defence has been unable to determine from the amended indictment the new charges against the Accused. Because of that, the Defence requested the Chamber to suspend the period of time for the filing of preliminary motions in respect of the new charges until it receives the clarification sought in its motion.

22. The Chamber denied in its Decision of 18 May 2000 that such clarification was necessary. The Chamber found that the Accused was aware of the new charges against him from the moment of his further appearance and plea on 13 August 1999. It is obvious that the Accused and his Counsel were able to distinguish the new charges from those made in the original indictment.

23. The Chamber added that each new count in the new amended indictment contains a specific reference to the concise statement of facts supporting the charges. The Accused and his Counsel thus have had open to them the opportunity to study the matter in detail and to file preliminary motions in respects of the new charges within the prescribed time limits. Indeed they have done so in filing on 13 and 14 October 1999 two preliminary motions challenging the jurisdiction of the Tribunal with regard to the amended indictment (Preliminary Motion to Declare the Indictment filed 13 August 1999 *Void Ab Initio* & Motion based on Lack of Jurisdiction). Those two Motions reflected at that time the Defence option to challenge the indictment. Further, although the Decision of 18 May 2000 denied the Defence request for clarification, the Defence has been able to set out in the present Motion all the alleged defects in the form of the indictment. Therefore the Defence could have done so at the outset.

24. In the Decision of 18 May 2000, the Chamber recalled that Rule 72(F) prescribes that failure to comply with the time limit for filing of preliminary motions constitutes a waiver of the right to bring such motions. Under this Rule, the Chamber may grant relief from the waiver upon the showing of good cause. It should be emphasized that the Defence not only failed to show good cause in the Motion of 18 October 1999, but that it did not even attempt to do so.

25. The Defence has its own, erroneous approach to calculating the time limits in which the Accused is entitled to file preliminary motions in respect of the new charges. The Defence is seeking to base its position on Rule 66(A)(i), claiming that the time limit should be computed from the date of receiving from the Prosecutor supporting materials. Pursuant to that Rule, 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. It is obvious that this Rule deals with the disclosure of materials by the Prosecutor after the initial appearance when there was not only the indictment but also supporting materials which, under Rule 47(B) should be prepared by the Prosecutor together with the indictment and forwarded to the reviewing Judge who is confirming the indictment.

26. In this case, the situation is different. The amended indictment includes new charges and a further appearance of the Accused before the Chamber has been held to enable him to

enter a plea on the new charges. In this particular case, Rule 50(C) grants the Accused a supplementary period of time to file preliminary motions on the subjects specified in Rule 72. It is natural that this period of time should be calculated from the moment when the Accused became aware of the new charges. This is why the Chamber in its Decision of 18 May 2000 stated that Rule 50(C) allowed the Accused sixty days from his further appearance for the filing of preliminary motions pursuant to Rule 72 in respect of the new charges.

27. The Defence contention that the above-mentioned period of time should run from the date of the disclosure of supporting materials is without merit. There is no provision in the Rules which imposes on the Prosecutor the obligation to disclose new supporting materials when the amended indictment includes new charges. In this particular case, the Prosecutor supplied the Defence with some additional material to support the entire new indictment and not only the new charges as the Defence claims. However, this fact does not create law and does not mean that the above-mentioned period of time should be computed from the date of the disclosure of this material. Such an interpretation of the Rules is untenable.

#### *Defects in the form of the Indictment and Severance of crimes*

28. These two issues pertain to Rule 72 and are subject to time limits. At the date of the filing of the Motion (6 June 2000), Rule 72(A) stood as follows: "Preliminary motions by either party shall be brought within *thirty days* following the disclosure by Prosecutor to the Defence of all the materials envisaged by Rule 66(A)(i)" (italics added). Rule 72(F) prescribes that failure to comply with the time limits for the filing of preliminary motions constitutes a waiver of the right to bring such motions. Under this Rule, the Chamber may grant relief from the waiver upon the showing of a good cause. In this case, however, the Accused failed to show good cause for his failure to comply with the prescribed time limits. Consequently, the Chamber will not give any further consideration as to the alleged defects in the form of the indictment and to the request to sever of the charge of conspiracy.

#### *Execution of the Decisions Rendered on 5 October 1998 and 8 October 1999*

29. The Chamber, in its Decision of 8 October 1999, held as follows: "The Trial Chamber however finds that the granting of the Motion and the proposed amended indictment now supersede the order of 5 October 1998. This is without prejudice to any possible defence motion on alleged defects in the form of the indictment." *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, ICTR-97-30-I, at para. 65 (Decision on the Prosecutor's Motion to Amend the Indictment) (8 October 1999).

30. It is clear that the Decision of 8 October 1999 did not sustain the previous order of 5 October 1998 since the latter became moot when leave to amend the indictment was granted. The Defence, therefore, misrepresents the contents of the Decision in this respect. However, the Decision did not exclude the Defence from objecting to the amended indictment provided that the Defence made such an objection in accordance with the Rules. Here the Defence filed the Motion out of time and that being so, the Motion is inadmissible in this respect.

#### *Frivolous Motion*

31. The Defence has filed other motions challenging the validity of the said indictment previously; which motions the Chamber already has dealt with and handed down decisions (Decision of 13 April 2000 on the Defence Motions Objecting To A Lack of Jurisdiction and

Seeking to Declare The indictment *Void Ab Initio*). It, therefore, appears that the present Motion is not in good faith.

32. Rule 73(E) provides that the Chamber may impose sanctions for the filing of motions that are frivolous or an abuse of process, including non-payment of fees associated with a motion and costs. The Chamber finds the Motion to be frivolous and an abuse of process; consequently, directs the Registrar not to pay the fees and costs associated with the filing of this Motion.


*Dealing with the Motion on the Briefs*


33. The Chamber finds it proper to render a decision solely on the briefs of the parties without a hearing; a glance at the Motion shows that it was not filed under Rule 72 in good faith and its only purpose could have been to hinder the proceedings.

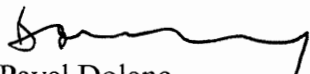
34. For these reasons, the Chamber:

- (a) **DISMISSES** the Motion, and;
- (b) **DIRECTS** the Registrar not to pay the fees and costs associated with the filing of this Motion.

Arusha, 20 October 2000.

  
 Lloyd George Williams  
 Judge, Presiding

  
 Yakov Ostrovsky  
 Judge

  
 Pavel Dolenc  
 Judge

Seal of the Tribunal