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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

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

Registrar: Agwu U. Okali

Date: 1 November 2000

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THE PROSECUTOR
v.
Pauline NYIRAMASUHUKO
and
Arsène Shalom NTAHOBALI
Case No. ICTR-97-21-T

DECISION ON ARSÈNE SHALOM NTAHOBALI'S
PRELIMINARY MOTION OBJECTING TO DEFECTS IN THE FORM
AND SUBSTANCE OF THE INDICTMENT

The Office of the Prosecutor:

Japhet Mono
Ibukunolu Alao Babajide
Andra Mobberley

Counsel for Ntahobali:

René Saint-Léger

International Criminal Tribunal for Rwanda Tribunal pénal international pour le Rwanda	
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NAME / NOM: <i>Dr. MINDUA... K. M. Antoine</i>	
SIGNATURE: <i>[Signature]</i>	DATE: <i>01.11.2000</i>

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01.11.2000.

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

SITTING as Trial Chamber II (The "Chamber"), composed of Judges Laïty Kama, presiding, William H. Sekule, and Pavel Dolenc as assigned by the President of the Tribunal on 5 June 2000 for purposes of hearing the motions;

BEING SEISED of Ntahobali's "Amended Preliminary Motion Objecting to Defects in the Form and Substance of the Indictment, Rule 72(B)(ii) of the Rules of Procedure and Evidence," (the "Motion") filed on 22 May 2000;

CONSIDERING the "Prosecutor's Response to Defense Preliminary Motion Objecting to Defects in the Form of the Indictment, Rule 72(B)(ii) of the Rules of Procedure and Evidence" (the "Prosecutor's Response") filed on 19 June 2000. At paragraph 11 of her response, the Prosecutor states that she will rely on her response filed on the 9 May 2000, for the Defense objections to defects in the form of the indictment;

NOTING that on 22 May 1997, an indictment confirmed against Arsène Shalom Ntahobali (the "Accused") jointly with Pauline Nyiramasuhuko (the "Co-Accused") charges them of Genocide, Crimes Against Humanity, and Serious Violations of Article 3 Common to the Geneva Convention (the "Initial Indictment;")

NOTING that on 10 August 1999, the former Trial Chamber I, then seized of the case, granted amendments to the confirmed indictment as regards the addition of command responsibility pursuant to Article 6(3) of the Statute and the new charges against the Accused notably for conspiracy to commit genocide, the crimes against humanity of extermination, persecution, rape and other inhumane acts (the "Amended Indictment");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), particularly Rule 72;

HAVING HEARD the Parties on the Motion held on 10 July 2000;

SUBMISSIONS OF THE DEFENCE

Initial Clarifications

1. During the hearing of 10 July 2000, the Defense applied for the withdrawal of its two Motions filed on 28 February 2000 and 3 March 2000, and the arguments on the "Substantive Defects in the Indictment" in part "B" of the Motion, stating that it would argue on the basis of the Motion with regard to defects in the form of the Amended Indictment only.

Alleged Violations of Rule 47(C)

2. The Defense submits that Chapters I, II, III and V be deleted in their entirety as they only dwell on historical context, territorial, temporal and material jurisdiction, power structure and preparation for the crimes.

3. The Defense further submits that paragraphs 6.1, 6.2, 6.29, 6.32, 6.33, and 6.38 to 6.46 do not relate to the Accused and should be deleted from the Amended Indictment. The Defense submits that the withdrawal or deletion of the above-mentioned chapters and paragraphs will make the Amended Indictment meet the requirements of Rule 47(C).

On Responsibility

4. Defense alleges that paragraphs 6.49 to 6.56 under the heading of "Responsibility" rely on witness statements aimed at determining criminal responsibility of the Accused in respect of the charges brought against him and should, therefore, be deleted.

On the Insufficiency of the Evidence

5. The Defense submits that there is no supporting material for the Amended Indictment to buttress the charge of conspiracy as alleged in paragraph 5.1. This paragraph should be withdrawn from the Amended Indictment.

6. Paragraphs 4.4, 6.27, 6.29, 6.30, 6.31, 6.34 to 6.36, 6.39, 6.49 to 6.56 are based on statements of witnesses disclosed to the Accused in support of the Initial Indictment. The Defense submits that, new charges preferred against the Accused in the Amended Indictment are supported not by new evidence but by the same statements, referred to in the above paragraphs. The Defense submits that these paragraphs should, consequently, be deleted.

7. As to the allegations of the Accused command responsibility pursuant to Article 6(3) of the Statute in each count, the Defense submits that neither the Amended Indictment nor the supporting material show whether the Accused was a political, local or administrative authority, or that the Accused led militiamen at all. The Defense requests that the Amended Indictment differentiate the responsibility of the Accused pursuant to Article 6(1) from responsibility pursuant to Article 6(3).

General or Vague Allegations

8. If the Chamber deems that paragraph 5.1 should remain in the Amended Indictment, it should order the Prosecutor to provide the Defense with clarifications.

9. At the hearing 10 July 2000 the Defense made a request for the identities of the "unknown persons" in paragraph 6.27, "soldiers and militiamen" in paragraph 6.30 and "soldiers" in paragraph 6.34, which the Accused is alleged to have worked with.

10. The Defense points out that all the counts begin with the phrase, "By the acts or omissions of the Accused in paragraphs 5.1 to 6.56 and more specifically in the paragraphs referred to below." The Defense submits that this wording is vague and should be deleted since case law handed down by the Tribunal already exists finding this wording to be vague.

11. The Defense submits that in instances where it has been wrongly provided that the Accused was born in 1970 and that he was born in Butare Prefecture in the records of the Prosecutor and records produced by the Registry, this should be corrected to reflect the truth.

On Alternative Counts

12. In *Prosecutor v. Kanyabashi*, ICTR-96-15-I, at para. 5.13, Decision on Defense Preliminary Motion for Defects in the Form of the Indictment, 31 May 2000, the Trial Chamber decided that the counts of genocide and complicity in genocide go together and should be charged in the alternative. The Defense submits that this should be the same in the case of the Accused rather than how he is charged.

Defense Prayers

13. The Defense prays that:

- (a) Chapters I, II, III and V and the paragraphs, which do not concern the Accused at all, be deleted from the Amended indictment.
- (b) The charge of conspiracy is deleted from the Amended Indictment or, if the Chamber decides it should remain, the Prosecutor should provide the necessary clarifications to the Defense.
- (c) All charges against the Accused pursuant to Article 6(3) of the Statute should be deleted from the Amended indictment, or if the Chamber decides they should remain then the Prosecutor should provide additional information to show which conduct of the Accused constitutes responsibility under 6(3) of the Statute.
- (d) The Prosecutor provides additional evidence to support all new charges brought against the Accused in the Amended Indictment.
- (e) The charge of genocide and complicity in genocide should be in the alternative.
- (f) The introductory wording preceding each count, "By the acts or omissions of the Accused in paragraphs 5.1 to 6.56 and more specifically in the paragraphs referred to below" should be deleted.
- (g) The correct date and place of birth of the Accused should be inserted in the documents of the Prosecutor and the Registry.

SUBMISSIONS OF THE PROSECUTOR

14. The Prosecutor submits that the Motion attacks the "style" rather than the "form" of the Amended Indictment. The Prosecutor asserts that its form is "perfect" as it gives the gist of the charges against the Accused making it possible for him to understand the nature of the charges against him pursuant to Rule 47(C).

15. As to the Defense allegation that some of the paragraphs do not concern the Accused, the Prosecutor argues that these form the basis upon which she charges the Co-Accused.

16. The Prosecutor requests the Chamber to dismiss all the Defense submissions requesting the withdrawal of the charge of conspiracy until the commencement of trial, when the challenge on the credibility, quality and quantity of the evidence can be an issue.

17. The Prosecutor submits that the Amended Indictment has sufficient information and, together with the supporting material enables the Accused to recognize circumstances and actions attributed to him.

18. As to the Defense request for further particulars from the Prosecutor regarding the names of co-conspirators and subordinates, the Prosecutor submits that the Defense should make this request directly to the Prosecutor, although she represents that she does not have further particulars. If the names of co-conspirators and subordinates become known, they would be the subject of the Tribunal's inquiry and may be among the Accused.

19. As to the request of the Defense that the wording, "By the acts or omissions of the Accused in paragraphs 5.1 to 6.56 and more specifically in the paragraphs referred to below" preceding every count, and following the decision in *Kanyabashi, supra*, the Prosecutor orally submits that the Tribunal has the discretion to vary its decision to suit the ends of justice.

20. The Prosecutor prays that the Chamber dismiss the Motion in its entirety.

DELIBERATIONS

Initial Clarifications

21. The Chamber takes note of and grants the Defense request for the withdrawal of its Motions filed on 28 February and 3 March 2000 respectively. The Chamber further notes the Defense withdrawal of its submissions made in paragraphs 81 to 124, which is section "B" of the Motion on substantive defects in the Indictment. Accordingly, the Chamber only considers the Motion with regard to defects in the form found in paragraphs 1 to 80 and the conclusions of the said Motion.

22. As to the Prosecutor's submissions that the objections of the Defense are on style rather than on defects in the form of the Amended Indictment, the Chamber notes that there is no definition of the form of an indictment. The case law of the Tribunal, however, shows that form of the indictment is interpreted to give an accused sufficient, accurate and specific information of the crimes raised against an accused, which enables an accused to recognize the circumstances and the actions attributed to him and to understand how and when, under the particular circumstances, such actions constitute one or more crimes covered by the Tribunal's jurisdiction. In *Prosecutor v. Ntagerura*, ICTR-96-10, Decision on the Preliminary Motion filed by the Defense based on Defects in the Form of the Indictment, 28 November 1997, the Trial Chamber decided that objections against vagueness, insufficient indication of time, lack of specifications of the charges, constitute objections on form of the indictment under Rule 72(A)(ii). The Chamber, therefore, regards the respective objections as objections to defects in the form, not on the style, of the Amended Indictment. Consequently, the Chamber considers the Motion admissible pursuant to Rule 72(A)(ii).

Alleged Violations of Rule 47(C)

23. The Defense argues that certain chapters be deleted as they dwell only on historical context, territorial, temporal and material jurisdiction, power structure and preparation, all of which do not relate to the Accused. The Defense further argues that the Prosecutor is using the Amended Indictment to present her own theory on the case, by incorporating therein such facts as do not constitute the crimes for which the Accused is charged and which cannot be qualified as crimes under Articles 2, 3 and 4 of the Statute, and therefore contravene Rule 47(C). The Chamber is of the opinion that these Defense allegations are not correct. In interpreting Rule 47(C) in *Prosecutor v. Nsengiyumva*, ICTR-96-12-I, at para. 24, Decision on the Defense Motion Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, 13 April 2000, Trial Chamber III held that:

“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 indictment allegations that are not strictly related to the elements of the crimes themselves. Here, it is important to distinguish between the word “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 Defense submission that the indictment’s concise statement of facts is limited strictly to 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.”

24. The Chamber further recalls its Decision in *Prosecutor v. Niyitegeka*, ICTR-96-14-T, at para. 33(2)(c), Decision on Prosecutor’s Request for Leave to file an Amended Indictment, 21 June 2000. The Chamber observed therein that a detailed proposed Amended Indictment that includes historical background of the offences, and other useful information in connection to the crimes charged could provide a greater degree of specificity and clarity to the allegations, against an accused. The Chamber, in line with the jurisprudence in the above two decisions, rules that Chapters I, II, III, and V do not violate the provisions of Rule 47(C) and, accordingly they may remain in the Amended Indictment.

25. The Chamber considers the Defense allegations that certain paragraphs do not relate to the Accused and his role in the events alleged therein. However, the Chamber holds that these allegations are not correct and it makes reference to the Decision in *Prosecutor v. Nsengiyumva*, ICTR-96-12-I at paras. 1 - 4, Decision on Defense Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, 12 May 2000. This Decision essentially stated that it is not reasonable to expect the Prosecutor to mention the Accused in every paragraph in the Amended Indictment. The Amended Indictment must be considered in its totality because it would be incorrect to make conclusions as to non-compliance with Rule 47(C) upon a selective reading of only certain of its paragraphs. The Chamber agrees with this holding and, accordingly, it decides that paragraphs 6.1, 6.2, 6.29, 6.32, 6.33 and 6.38 to 6.46 may remain in the Amended Indictment.

As Regards Responsibility

26. The Defense argues that the Amended Indictment makes conclusions on the responsibility of the Accused for the alleged crimes under paragraphs 6.49 to 6.56. These paragraphs should be deleted because they rely on statements given by witnesses aimed at ascertaining criminal responsibility of the Accused in respect of the charges brought against him. The Defense further contends that the determination of criminal responsibility lies in the exclusive jurisdiction of the Judges who will preside at the trial. The Chamber finds that these paragraphs allege criminal responsibility. Such paragraphs are incumbent in an indictment and they do not establish criminal responsibility of the Accused, which is clearly an issue for final judgement. As such, the Chamber finds that these paragraphs do not violate the Statute or the Rules and, accordingly, they may remain in the Amended Indictment.

As Regards the Insufficiency of the Evidence

27. With regard to the allegations of the Defense on the insufficiency of evidence to buttress the charge of conspiracy and the allegations of command responsibility pursuant to Article 6(3) of the Statute, the Chamber reminds the Defense that a reviewing Judge confirmed the Initial Indictment and that a Trial Chamber granted the addition of new charges when the Prosecutor sought leave to amend the Initial Indictment. The Chamber, therefore, considers the Defense request for withdrawal or amendment of this charge and these allegations as amounting to a request to re-examine or review the act of confirmation and the decision granting the Prosecutor's request to amend the Initial Indictment. Such a request lacks a legal basis and does not fall within the scope of a preliminary motion objecting to the form of the indictment or any other preliminary motion under Rule 72. Accordingly, the Chamber denies the Defense request to withdraw the charge of conspiracy and the Accused responsibility pursuant to Article 6(3) of the Statute.

28. Nevertheless, the Chamber agrees with the Defense request that the Amended Indictment identify which alleged acts of the Accused engage his individual criminal responsibility under Article 6(1), from those acts which engage his individual criminal responsibility under Article 6(3) of the statute for each count.

General or Vague Allegations

29. With regard to the Defense alternative request for the names of the co-conspirators in paragraph 5.1, the Chamber is of the opinion that the said paragraph, as it stands, adequately sets out sufficient particulars to enable the Accused to understand the conspiracy charge against him.

30. As to the Defense argument that paragraph 6.27, 6.30 and 6.34 allege that the Accused worked with "unknown persons" in paragraph 6.27, "soldiers and militiamen" in paragraph 6.30 and "soldiers" in paragraph 6.34 to commit acts alleged therein, the Chamber considers that the Defense request for the identities of these people could be valid. The Chamber, therefore, holds that the Amended Indictment set out the identity of at least some of the persons with whom the Accused is alleged to have worked with, if known.

31. As to the Defense further request for particularity as to time, place and the Accused participation in the preparation, organization of the plan, and his participation in the training and distribution of weapons and drawing up of the lists of persons to be eliminated, the Chamber notes that the magnitude, time, territorial dimensions, nature and the characteristics of the alleged crimes hardly enable the Prosecutor to provide in the Amended Indictment all the particulars of the given crime and, therefore, considers that this particularity will be argued at trial.

32. As regards the Defense request for the removal of the introductory phrase preceding each count, the Chamber, in line with its Decision in *Kanyabashi, supra*, at paras. 5.17 and 5.18 decides that the introductory phrase, "By the acts or omissions of the Accused in paragraphs 5.1 to 6.56 and more specifically in the paragraphs referred to below" preceding each count, does not specify nor does it limit the reading of the counts, but rather it expands the Amended Indictment without concretely identifying precise allegations against the Accused. The Chamber holds, therefore, that the introductory phrase must be deleted from each count and that each count must consequently only mention the specific paragraphs of the Amended Indictment.

33. As to the Defense allegations that information about the Accused date and place of birth are wrongly stated in the documents of the Prosecutor and the Registry, and its request for their correction, the Chamber considers that these allegations are not matters to be decided upon pursuant to a preliminary motion. The Chamber, nevertheless, directs the Parties to agree on the correct information. Should the Parties fail to agree, this information shall be resolved at trial.

As Regards Alternative Counts

34. The Chamber agrees with the submissions of the Defense that the Amended Indictment should charge the Accused with genocide and complicity in genocide in the alternative, rather than as the present Amended Indictment charges him, with genocide in count 2 and complicity in genocide in count 3. In line with its decision in *Prosecutor v. Niyitegeka*, ICTR-96-14-I, at para. 46(a)(i), Decision on Prosecutor's Request for Leave to File an Amended Indictment, 21 June 2000, the Chamber, orders that the Amended Indictment charge genocide and complicity in genocide as alternative counts.


35. **FOR THE FOREGOING REASONS, THE TRIBUNAL:**

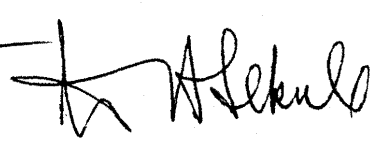
(a) **GRANTS**, in part, the Motion as follows;

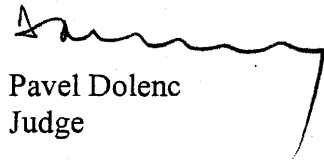
- (i) **ORDERS** the Prosecutor to distinguish clearly the acts for which the Accused incurs individual criminal responsibility under Article 6(1) of the Statute from those for which he incurs individual criminal responsibility under Article 6(3) of the Statute;
- (ii) **ORDERS** the Prosecutor to provide the identity of at least some of the "unknown persons" in paragraph 6.27, "soldiers and militiamen" in paragraph 6.30 and "soldiers" in paragraph 6.34 in the Amended Indictment, if known;
- (iii) **ORDERS** the Prosecutor to delete the introductory formulation to each count, "By the acts or omissions of the Accused in paragraphs 5.1 to 6.56 and more specifically in the paragraphs referred to below"
- (iv) **ORDERS** the Prosecutor to charge as alternate counts the counts of genocide and complicity in genocide;
- (v) **DIRECTS** the Prosecutor to file with the Registry within thirty days from the date of this Decision, the English and French versions of the Amended Indictment as modified pursuant to this decision, and;

(b) **DENIES** the Motion in all other respects.

Arusha 1 November 2000.


 Laity Kama
 Judge, Presiding


 William H. Sekule
 Judge


 Pavel Dolenc
 Judge

Seal of the Tribunal

