

ICTR-97-21-T
2/11/2000
(134440 — 134430)

134440

mtg



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

JUDICIAL RECORDS/ARCHIVES
RECEIVED
ICTR

2000 NOV -21 P 4: 59

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

**DECISION ON NYIRAMASUHUKO'S
PRELIMINARY MOTION BASED ON DEFECTS IN THE FORM
AND THE SUBSTANCE OF THE INDICTMENT**

The Office of the Prosecutor:

Japhet Mono
Ibukunolu Alao Babajide
Andra Mobberley

Counsel for Nyiramasuhuko:

Nicole Bergevin
Guy Poupart

02. 11. 2000

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

SITTING as Trial Chamber II (Chamber), composed of Judges Laïty Kama, presiding, William H. Sekule, and Pavel Dolenc, whom on 5 June 2000, Judge Navanethem Pillay, President of the Tribunal, assigned to sit in place of Judge Mehmet Güney in this matter;

BEING SEISED of Nyiramasuhuko's "Preliminary Motion Based on Defects in the Form of the Substance of the Indictment, Rules 72(B)(ii) and/or Rule 73 of the Rules of Procedure and Evidence" (Motion) filed on 29 October 1999;

CONSIDERING the "Prosecutor's Response to the Preliminary Motion Based on Defects in the Form and the Substance of the Indictment" (Response) filed on 3 February 2000;

BEING SEISED of Nyiramasuhuko's "Amended Preliminary Motion Based on Defects in the Form and Substance of the Indictment, Rule 72(B)(ii) of the Rules of Procedure and Evidence" (Second Motion) filed on 17 April 2000;

CONSIDERING the "Prosecutor's Response to Accused's [Nyiramasuhuko's] Amended Preliminary Motion on Jurisdiction, Rules 72(B)(I) [*sic*] 50 and 47 G [*sic*] of the Rules of Procedure and Evidence" (Second Response) filed on 31 May 2000;

HAVING HEARD the parties at a hearing on the Motion and Second Motion on 7 June 2000;

NOW CONSIDERS the matter.

SUBMISSIONS OF THE DEFENCE

Legal Bases for the Motion and Second Motion

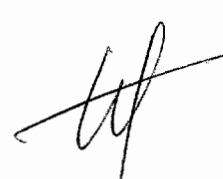
2. The Defence submits that the legal bases for the Motion are Rules 72(B)(ii) and/or Rule 73. The Defence, in a cover letter dated 17 April 2000 attached to the Second Motion, submits that the legal bases for the Second Motion are Rule 72(B)(ii) and/or Rule 73.

3. The Defence, in the same cover letter, notes that the Second Motion differs from the Motion in the amendments to paragraphs 39, 44, 62, 68, 88, 89, 121, and 124, and the first two new prayers.

4. On 7 June 2000, at the hearing, Defence Counsel for Nyiramasuhuko effectively represented to the Chamber that the substance of her Motion was the same as her Second Motion. *See* Transcript of 7 June 2000, at page 27.

Defects in the Form of the Indictment

5. Some paragraphs contained in the indictment are null due to non-compliance with Rule 47(C). The indictment incorporates facts that do not constitute crimes of which Nyiramasuhuko is charged, nor can they be classified as crimes under Articles 2, 3 and 4 of the Statute.



6. For instance, Chapter I of the indictment, entitled "Historical Context", shows no nexus between the facts of the case and the crimes (the criminal acts) with which the suspect is charged. It is an arbitrary selection of events in Rwanda. It is fraught with sweeping references and fails to specify the names directly relevant to the charges brought against the Accused. Consequently, said chapter should be deleted in its entirety.

7. Chapter 2's reference to the Tribunal's jurisdiction in this context is absolutely immaterial.

8. Chapter 3 does not contain such facts as can constitute criminal acts. Like the two preceding chapters, this chapter should also be deleted from the indictment.

9. In Chapter 5, paragraph 5.1 is general and vague. The Defence also challenges as vague paragraphs 5.2, 5.3, 5.4 to 5.7, 5.8, 5.9, 5.10, 5.11, 5.12, 5.13, 5.14, 5.15, and 5.16.

10. In Chapter 6, paragraph 6.1 to 6.6 makes no allegation of a nexus between such acts and the offences as charged against the Accused under the Statute. Paragraphs 6.7 and 6.8 make no reference to the Accused and should be deleted. Paragraphs 6.9, 6.10, 6.12, 6.18, 6.23 to 6.24, 6.26, 6.41, 6.43 to 6.46, and 6.48 do not involve the Accused. Paragraphs 6.49 to 6.56 constitute findings of the guilt.

Request for Additional Information

11. The Defence requests additional information on certain paragraphs included in the indictment

12. In paragraphs 5.1, 5.3, 5.11, 5.14, 6.25, 6.30, and 6.38, the Defence seeks the identity of the persons concerned so that the Accused may know exactly who was involved, including in the alleged conspiracy.

13. The Defence requests the exact date in paragraphs 6.27 and 6.38.

14. The Defence requests that the Prosecutor disclose the supporting materials filed in support of paragraph 4.1 concerning identity.

"Substantive" Defects in the Indictment

15. The Defence challenges the indictment itself based on several legal grounds.

16. The new charges were not confirmed pursuant to Rule 47(E); thus, the defence can object to substantive defects.

17. In *Prosecutor v. Nahimana*, ICTR-96-11-T, at para. 6 (Decision on the Preliminary Objection Filed by the Defence Based on Defects in the Form of the Indictment) (24 November 1997), the Trial Chamber held: "Only in special circumstances can a preliminary motion raising objections against the form of the confirmation of an indictment be applied as an indirect means to obtain a review by a Trial Chamber of a confirming decision." The Defence submits that such a lack of confirmation constitutes a "special circumstance" which allows for a review of the substantive defects.



18. Failure to review an indictment to determine whether a prima facie case exists for each of the counts runs afoul of the basic principle of presumption of innocence. The Defence also cites *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I (Decision on the Prosecutor's Motion to Amend the Indictment) (Separate and Concurring Opinion of Judge Dolenc) (8 October 1999).

The Conspiracy Count

19. The charge of conspiracy to commit genocide is null for a lack of a prima facie case. To support the count of conspiracy, the Prosecutor must establish a prima facie case to the effect that the Applicant and the other named accused conspired together to commit the crime of genocide. The Defence submits that there is no prima facie evidence of conspiracy to commit genocide.

The New Counts Are Null Because They Are Based on False Allegations

20. The Defence submits that all the new counts should be nullified because the Prosecutor based her written request for leave to amend the indictment and her oral submissions thereon on false allegations, namely that the new charges were supported by new evidence.

21. Witnesses ZC and ZB hardly provided any fresh evidence. Though the Defence concedes that "investigations allegedly carried out after 29 May 1997 had unearthed three fresh items of evidence." Motion, at para. 121 (emphasis in original).

Nullity of Counts of Individual Responsibility under Article 6(3)

22. There is no evidence either in the indictment or in the supporting material to sustain the charge that the Accused was individually responsible for crimes pursuant to Article 6(3) of the Statute.

23. Counts 10 and 11 on Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II thereto, lack of evidence. The Defence submits that there is not one shred of evidence establishing a link between her and the Rwandan Armed Forces and no supporting material to sustain any such allegation. Thus, Counts 10 and 11 should be set aside.

Defence Prayers

24. The Defence prays that the Chamber: (a) set aside all new charges in the absence of fresh evidence after 29 May 1997; (b) set aside all charges brought under Article 6(3) of the Statute for lack of evidence; (c) set aside counts 10 and 11 for lack of evidence; (d) set aside the charge of conspiracy to commit genocide for lack of evidence.

25. In the alternative, the Defence prays that the Chamber: (a) direct the Prosecutor to provide further clarifications required with respect to the challenged paragraphs, and; (b) allow the Accused to reserve the right to make submissions on paragraph 6.12.



SUBMISSIONS OF THE PROSECUTOR

The Indictment Complies with Rule 47

26. The Prosecutor submits that Rule 47(B) clearly provides for the exercise of the Prosecutor's discretion in the preparation and forwarding of an indictment to the Registrar.

27. On 29 May 1997, the confirming judge, Judge Ostrovsky, satisfied himself that a prima facie case had been established against the Accused.

28. Under Rule 50(A), the Prosecutor applied for leave to amend the indictment against the accused. The Trial Chamber granted the proposed amendment. The Prosecutor contends that the granting of the amendments would not have occurred if the requirements and intent of Rule 47(C) were not satisfied.

29. The Prosecutor submits that Chapters One, Two and Three of the indictment constitute part of the factual background upon which the indictment is predicated. The "Historical Context", the "Territorial, Temporal and Material Jurisdiction," and the "Power Structure" were all accepted and taken as presenting part of a concise background to the events referred to in the indictment. The Prosecutor relies upon the judgement in *Prosecutor v. Akayesu*, ICTR-96-4-T (Judgement) (2 September 1998). These chapters do not constitute a defect and should not constitute grounds for the dismissal of the indictment.

30. The Prosecutor contends that it is premature at this stage to call on the Chamber to direct such extensive amendment to the indictment without going into the merits of the case.

Request for Additional Information

31. The Prosecutor submits that the Defence should first address a request for particulars to the Prosecutor who may make further disclosure under Rule 66.

32. The Prosecutor contends that the indictment contains sufficient particulars to enable the Accused to understand the nature of the charges against him. The Prosecutor has surmised all the acts, omissions and conduct of the Accused in drafting the indictment, within the purview of the materials in its custody.

33. The provision of any additional information infringes the decision of the Trial Chamber granting protection of the identities of Prosecution witnesses. The Prosecutor contends that any further information will be made available during the course of trial.

Amendment of the Indictment

34. Further, after the August 1999 hearing of the application for amendment of the indictment, the Chamber decided that: "the victims' and witnesses' protection [are] to be of utmost importance, and cannot entirely be subordinated to the rights of the accused for disclosure". *Prosecutor v. Nyiramasuhuko & Ntahobali*, ICTR-97-21-I, at para. 19 (Decision on the Prosecutor's Request for Leave to Amend the Indictment) (10 August 1999).

35. The Trial Chamber deliberated on principles of fairness and granted the motion to amend the indictment, finding sufficient legal and factual grounds.

Res Judicata

36. The Defence challenge to the indictment is similar to the objections it raised during the hearing of the application to amend the indictment. Raising these issues again offends the principle of *res judicata* as contained in the decision of the Trial Chamber in *Prosecutor v. Nahimana*, ICTR-96-11-T (Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment) (30 August 1999).

Review of the Indictment

37. The non-confirmation of the amended indictment does not constitute a special circumstance warranting a Trial Chamber to review the confirmation of the indictment. The Prosecutor contends that once the Trial Chamber finds legal and factual grounds for the amended indictment, it cannot be dismissed on the basis of a preliminary motion.

The Conspiracy Count

38. The Prosecutor urges the Trial Chamber to hold that the Defence challenge to the conspiracy count is premature, inaccurate, and misleading. The Prosecutor contends that the Trial Chamber can best determine the merit of the conspiracy count at trial.

39. The Defence's extensive requests in effect seek that the Chamber conduct a "trial within a trial" by determining fundamental issues which can only properly be adjudicated in a full trial. Such unnecessary duplication offends the principle of judicial economy.

Sufficiency of the Evidence of Individual Responsibility

40. The Prosecutor relies on *Prosecutor v. Nahimana*, ICTR-96-11-T (Decision on the Preliminary Motion Filed by the Defence on Defects in the Form of the Indictment) (30 August 1999), where the Trial Chamber ruled:

The Trial Chamber finds that the allegation in Paragraph 3.20 of the present indictment enables the accused to understand the nature and cause of the charges against him. In any event, the onus is on the Prosecutor to prove at the Trial of the accused the alleged superior-subordinate relationship and the identities of the alleged subordinates.

Applying such reasoning here, the submission of the Defence is untenable.

New Charges Are Supported by New Evidence

41. Prosecution submits that a factual and legal basis have been shown to justify the amendment of the indictment.

Nexus

42. The Prosecutor contends that criminal responsibility is a matter for the determination of the Chamber, as is the question of weight to be attached to evidence. These are issues to be determined at the trial, not before. At the International Criminal Tribunal for the former Yugoslavia, in *Prosecutor v. Delalic et al*, IT-96-21-T (Decision on the Motion by the

Accused Zejnil Delalic Based on Defects in the Form of the Indictment) (2 October 1996), the Trial Chamber held: “[d]isputed matters of fact must be decided at trial, after a full opportunity for the presentation of the evidence”.

Application of Rule 5

43. The Defence has failed to establish in its objections that any principles of fairness have been violated. The Prosecutor contends that “the cause of justice will be better served if the case proceeds to its logical conclusion.”

Prosecutor's Prayer

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

DELIBERATIONS

Admissibility and Timeliness of the Motion and Second Motion

45. The Chamber first turns to the issue of whether the Motion and the Second Motion are admissible or inadmissible, as being time barred under Rule 72. At the time of the filing of the Motion, Rule 72(A) allowed sixty days to file preliminary motions “following the disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66(A)(i) and in any case before the hearing on the merits.”

46. Here, the parties do not dispute that the Prosecutor dispatched the supporting materials for the Amended Indictment to Defence Counsel on 24 or 25 August 1999, and that Defence Counsel received them on 28 August 1999. *See* Prosecutor’s Notice of Compliance with Rule 66(a) [*sic*]; Motion, at para. 14; Second Motion, at para. 14; Transcript of 7 June 2000, at page 27. The sixty days after receipt of the supporting materials by Defence Counsel elapsed on 27 October 1999. Thus, 27 October 1999 was the deadline for bringing preliminary motions under Rule 72.

47. Defence Counsel dated the Motion itself “27 October 1999” (*see* Motion, at page 18) and represents that she filed the Motion on 27 October 1999. *See* Transcript of 7 June 2000, at page 27. There, however, is no other evidence to support her contention regarding the filing date. To the contrary, the date stamp of the Registry on the Motion itself clearly reads 29 October 1999, two days after the deadline. Even more persuasive as to the late filing is the back cover page of the Motion itself, as filed by Defence Counsel (and enumerated by the Registry as page 1719 *bis*), that reads “Arusha, le 28 octobre 1999”. The Motion, even if filed 28 October 1999, would be one day after the deadline.

48. Thus, Defence Counsel effectively filed the Motion on 29 October 1999, sixty-two days after receipt of the supporting materials, and two days after the time limit of Rule 72(A) elapsed. Thus, the Motion is time barred and, as such, inadmissible under Rule 72(A).

49. Rule 72(F), however, allows a Trial Chamber to grant relief and allow preliminary motions after the time bar, upon a “showing [of] good cause”. Here, however, the Defence did not argue or show good cause. The Defence merely insisted the Motion was timely.



50. Nevertheless, this Chamber, in *Prosecutor v. Nzirorera*, ICTR-98-44-T, at para. 14 (Decision on the Defence Motion in Opposition to Joinder and Motion for Severance and Separate Trial Filed by Accused Joseph Nzirorera) (12 July 2000), observed:

In light of the specific circumstances of this case, the Trial Chamber finds . . . that it is in the interests of justice to grant relief for the waiver of this time limit.

The Trial Chamber thus *proprio motu* waives the prescribed time limit stipulated in Rule 72(A) and considers the Defence Motion.

51. Here, the Defence filed the Motion merely two days late. The Chamber also notes that the Prosecutor here did not object to the timeliness of the Motion. The Chamber observes that Article 19(1) of the Statute requires a Trial Chamber to ensure that the proceedings are fair. The Chamber, in the particular circumstances of this case and in this situation, finds that it is fair and in the interests of justice to grant relief to the waiver of this time limit for the Motion. The Chamber, acting under Rule 72(F), *proprio motu* waives the time limit of sixty days in the then Rule 72(A) and admits the Motion.

52. At the time of the filing of the Second Motion, Rule 72(A) allowed thirty days to file preliminary motions. The Defence filed the Second Motion on 17 April 2000, approximately 233 days after receipt of the supporting materials, and 203 days after the time limit of Rule 72(A) elapsed. Thus, the Second Motion is time barred and, as such, inadmissible. The Chamber grants no relief to the waiver of the time limit of Rule 72(A) for the Second Motion.

Defects in the Form of the Indictment

53. Rule 47(C) governs the form of an indictment. In *Prosecutor v. Nsengiyumva*, ICTR-96-12-I, at para. 24 (Decision on the Defence Motion Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment) (13 April 2000) (emphasis in original), Trial Chamber III held:

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.



54. Here, the historical context section of the Amended Indictment relates to the Prosecutor's theory of the case, and its inclusion does not violate Rule 47(C). Likewise, the Defence objection to other allegations that exceed the mere charges themselves or don't mention the Accused is without merit.

55. The Chamber finds without merit the submission of the Prosecutor that the Defence must first address a request for particulars to the Prosecutor who may make further disclosure under Rule 66. The Statute and Rules nowhere impose such a requisite first step to attempt to cure an alleged defect in the form of the indictment. In any case, the Defence is free to make such a request.

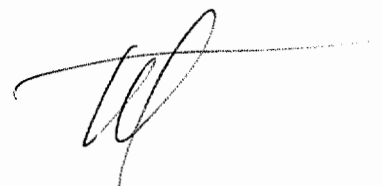
56. The Chamber also finds without merit the submission of the Prosecutor that the principle of *res judicata* bars the Defence challenge to the form of the indictment. The decision in *Nahimana*, on which the Prosecutor relies, is factually distinct from that at bench. In *Nahimana*, the Trial Chamber already had decided a particular defence objection to a defect in the form of the indictment before the defence raised the same objection at the hearing of the motion to amend. Here, there is no prior decision on the precise objections that the Defence raises, and, thus, the principle of *res judicata* does not apply.

57. The Defence requests additional information on the identity of persons and dates alleged in the Amended Indictment. The Prosecutor does not appear to expressly object to the Chamber ordering her to provide further particulars, nor does she state clearly that such information is not known or available to her.

58. Providing such further particulars as to identity may allow the Defence to better prepare its case and narrow the issues for trial. In *Prosecutor v. Kabiligi & Ntabakuze*, ICTR-97-34-I, at para. 27 (Decision on Kabiligi's Motion to Quash or Amend the Indictment) (6 June 2000), Trial Chamber III held that the Prosecutor must "specify the identity of other participants, if known." Trial Chamber III did not quash the indictment, as the defence there sought, but rather ordered the Prosecutor to "provide the information to the Accused and his Counsel in the form of particulars, to the extent that such information is available to her." *Id.* at paras. 29-30.

59. As to the Defense request for the Prosecutor to specify particular dates, 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 particular dates of the given crimes. The Chamber considers that the Prosecutor may endeavor to prove the specific dates at trial, in conformity with the evidence tendered. *See also Prosecutor v. Nyiramasuhuko & Ntahobali*, ICTR-97-21-T, at para. 31 (Decision on Arsène Shalom Ntahobali's Preliminary Motion Objecting to Defects in the Form and Substance of the Indictment) (27 October 2000).

60. Thus, the Chamber finds that the Prosecutor should modify the Amended Indictment to identify the persons alleged in paragraphs 6.25, 6.30, and 6.38 of the Amended Indictment, if known, but to the limited extent that such particulars should not supercede any decision protecting the identity of witnesses or victims. Such identification will enhance judicial economy at trial.



Validity of the Charges in the Amended Indictment

61. The Chamber finds without merit the Defence objections to the new charges in the Amended Indictment, including the conspiracy count, based on a lack of confirmation or lack of a prima facie case. The amendment of an indictment under Rule 50 does not invoke a new prima facie or confirmation test. The Tribunal granted the amendment of the indictment, including the conspiracy count, pursuant to the Statute and Rules.

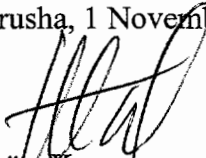
62. The Defence challenges several counts based on a lack of evidence. The Chamber notes that the test of the evidence remains an issue for trial. The Chamber finds that these objections to the counts of the Amended Indictment must fail.

63. The Chamber notes that Judge Dolenc attaches a declaration to this Decision.


64. For the above reasons, the Chamber:

- (a) **GRANTS** the Motion, in part, as follows:
 - (i) **ORDERS** the Prosecutor to modify the Amended Indictment by identifying those persons not named in paragraphs 6.25, 6.30, and 6.38 of the Amended Indictment, if known, as set out above in paragraph 60 of this Decision;
 - (ii) **ORDERS** the Prosecutor to file the Amended Indictment, as modified in compliance with this Decision, in both English and French within thirty (30) days of this Decision;
- (b) **DENIES** the Motion in all other respects, and;
- (c) **DISMISSES** the Second Motion.

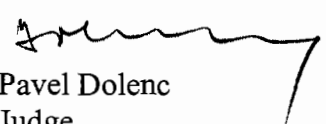
Arusha, 1 November 2000.



Laiti Kama
Judge, Presiding



William H. Sekule
Judge



Pavel Dolenc
Judge

Seal of the Tribunal

DECLARATION OF JUDGE PAVEL DOLENC

1. I concur with all of the Chamber's findings on the merits, except those in paragraphs 50 and 51 of the Decision. In my opinion, a Trial Chamber may not *proprio motu* extend the time limit provided for in Rule 72(A). Further, the length of the delay and silence of the Prosecutor with regard to the time bar of the Motion do not constitute good cause to justify granting relief from the waiver under Rule 72(F).
2. Therefore, I submit this declaration because I would dismiss that part of Nyiramasuhuko's Motion, which objects to alleged defects in the form of the Amended Indictment, as inadmissible because the Defence filed it out of time.

Arusha, 1 November 2000.


Pavel Dolenc
Judge

Seal of the Tribunal

