

ICTR-97-21-T
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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: 14 February 2001

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THE PROSECUTOR

v.

Pauline NYIRAMASUHUKO et al

8/8

Case No. ICTR-97-21-T

**DECISION ON PAULINE NYIRAMASUHUKO'S MOTION SEEKING REVIEW
AND ON PROSECUTOR'S MOTION FOR CLARIFICATION AND
HARMONIZATION OF COURT ORDERS**

The Office of the Prosecutor:

Japhet Mono
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Manuel Bouwknecht

Counsel for Nyiramasuhuko:

Nicole Bergevin
Guy Poupart

14.02.2001

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 8 December 2000 for purposes of hearing the motions;

BEING SEIZED of the “Extremely Urgent Co-joined Motion by the Prosecutor for Extension of Time to Comply and Harmonization of Court Orders Made under Rule 73 of the Rules” (“the Prosecutor’s Motion”) filed on 24 November 2000;

BEING SEIZED of the “Motion by Pauline Nyiramasuhuko for Review of the Decision on the Preliminary Motion for Defects in the Form and Substance of the Indictment,” attached to which is one copy of the audio tape of the evidential interview of the Accused, conducted in French and held at Arusha on 20 July 1997, one copy of the transcript of that interview as well as a copy of the transcripts of the hearing held on 7 June 2000 on the Motions on Defects in the Form filed on 29 October 1999 and 17 April 2000 (“Nyiramasuhuko’s Motion for Review”) filed on 28 November 2000;

CONSIDERING the “Prosecutor’s Response to Pauline Nyiramasuhuko’s Motion Seeking Review of the Decision on the Defects in the Form and Substance of the Indictment,” (the “Prosecutor’s Response”) filed on 28 December 2000;

NOTING that, on 1 November 2000, the Chamber delivered two Decisions entitled, “Decision on Arsène Shalom Ntahobali’s Preliminary Motion Objecting to Defects in the Form and Substance of the Indictment” (the “Decision on Ntahobali’s Motion”) and “Decision on Nyiramasuhuko’s Motion Based on Defects in the Form and the Substance of the Indictment,” (the “Decision on Nyiramasuhuko’s Motion”), both of which Decisions shall be referred herein as the “Decisions of 1 November 2000.” In the said two Decisions, the Chamber granted in part the Defense Preliminary Motions ordering the Prosecutor to modify the joint Amended Indictment on certain aspects within 30 days of the said two Decisions;

NOTING FURTHER the Chamber’s Decision entitled; “Intermediate Decision on Prosecutor’s Motion for the Extension of Time to Comply with Court Orders in the two Decisions Based on Defects in the Form and Substance of the Indictment for Both Accused rendered on 1 November 2000,” delivered on 13 December 2000, wherein it granted; “[...] the Prosecutor’s request for extension of time pending the Decision on the clarifications and harmonisation sought in the Motion, which may also stipulate when the modified Amended Indictment must be filed, mindful that were it to be so ordered, then the extension of time shall include this period as well;”

CONSIDERING that on 10 August 1999, the former Trial Chamber I granted amendments to the 22 May 1997 Indictment confirmed jointly against Arsène Shalom Ntahobali and Pauline Nyiramasuhuko (the “Accused”), adding new charges. (the “joint Indictment”)

CONSIDERING the Statute of the Tribunal (the “Statute”) and the Rules of Procedure and Evidence (the “Rules”), particularly Rule 73 of the Rules;

CONSIDERING that the Chamber will decide the Motions solely on the briefs, pursuant to Rule 73 of the Rules;



SUBMISSIONS OF THE PARTIES

The Prosecutor's Motion

1. In the Motion, the Prosecutor *inter alia* seeks clarification and harmonization, particularly as she faces unsurpassable inconsistencies regarding the joint Indictment. The Decision on Ntahobali's Motion orders the Prosecutor to *inter alia* amend paragraphs 6.27, to charge Ntahobali with alternative counts of Genocide and Complicity in Genocide and to delete the introductory formulation to each count, while the Decision on Nyiramasuhuko's Motion has no such orders.

2. The Prosecutor, therefore, requests an order for the harmonization and clarifications on the Decisions of 1 November 2000 and extension of time within which to file the joint Indictment, modified as ordered.

Nyiramasuhuko's Motion for Review

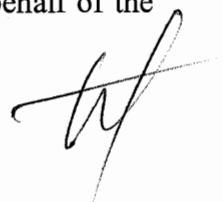
3. In the Motion, the Defense, on behalf of the Accused, requests the Chamber to rule as admissible Nyiramasuhuko's "Amended Preliminary Motion Based on Defects in the Form and the Substance of the Indictment" filed on 17 April 2000 (the "Motion of 17 April 2000"). The Defense submits that the Motion of 17 April 2000, which was found inadmissible as it was filed out of time in the Decision on Nyiramasuhuko's Motion, is timely because the said Motion was in fact a resubmission of the Motion she filed on 29 October 1999 (the "Motion of 29 October 1999") with some modifications. The Defense contends that this resubmission cannot result in a new computation of the time limit.

4. Furthermore, the Defense argues that, because the Defense received the Accused prior statement to the Prosecutor, as prescribed under Rule 66(A)(i), on 25 May 2000, therefore the deadline for filing Preliminary Motions as provided under Rule 72(A) would have been 25 June 2000. The Defense, therefore, argues that the Motion of 17 April was, in fact, filed within the prescribed time limit under Rule 72(A).

5. The Defense further contends that there be a review of the requests for clarifications, that did not appear in Nyiramasuhuko's Motion of 29 October 1999, which were raised orally at the hearing on 7 June 2000. In particular, the Defense requests the following clarifications:

- (a) Those arguments regarding defects in the substance of the indictment be withdrawn;
- (b) Clarifications concerning paragraphs 5.1, 5.3, 6.13, 6.14, 6.27, 6.30, 6.32, 6.38, 6.39 and 6.47;
- (c) Clarifications concerning Counts 9 on Crimes Against Humanity and Counts 10 and 11 on War Crimes;
- (d) Distinctions be made between the charges brought against the Accused under Article 6(1) and those brought under Article 6(3) of the Statute;
- (e) The names of the Accused's subordinates be mentioned.

6. The Defense, finally, requests that since the Accused is jointly indicted with the Accused Ntahobali, and in order to maintain consistency and fairness, the amendments ordered in the Decision on Ntahobali's Motion should be similarly ordered on behalf of the Accused Nyiramasuhuko.



Prosecutor's Response

7. In her response to the Motion for Review, the Prosecutor states that she is in agreement, in principle, with the Defense prayer, which she understands to amount to a request for an order by the Chamber that the amendments ordered in the Decision on Ntahobali's Motion should also be ordered in the Decision on Nyiramasuhuko's Motion.

8. The Prosecutor, on the other hand, objects to the other prayers of the Defense concerning; (a) the request for the admissibility of the Motion of 17 April 2000; (b) the request for withdrawal of the section dealing with the defects in the substance; and (c) the request for consideration of the oral submissions for clarifications made at the hearing of 7 June 2000.

9. The Prosecutor argues that, as to the request for the admission of the Motion of 17 April 2000, she aligns herself with the Chamber and argues that it is time barred. Similarly, the Prosecutor submits that the instant Motion lacks merit as it raises issues already settled and is, therefore, barred by the rule of *Res Judicata*. Furthermore, the Prosecutor points out that preliminary motions, such as the instant motion, cannot be reviewed under rule 73.

10. The Prosecutor, therefore, requests that the Chamber dismiss the Motion.

DELIBERATIONS

Initial Clarifications

11. The Chamber shall consider first Nyiramasuhuko's Motion for Review and then consider the Prosecutor's Motion.

Nyiramasuhuko's Motion

12. In the instant Motion, the Defense requests the Chamber to review the Decision on Nyiramasuhuko's Motion and consider the Motion filed on 17 April 2000 as being a modified version of the Motion of 29 October 1999, which the Chamber admitted. The Defense, therefore, argues that since the Motion filed on 29 October 2000 was admitted and the Motion of 17 April 2000 was a modification, then it should not have been considered as time barred.

13. The Chamber reminds the Defense that, in fact, the Motion of 29 October 1999 was filed 2 days after the prescribed time limits laid out in Rule 72(A) and the Chamber, *proprio motu* waived the prescribed time limits, in the interests of justice, and considered the said Motion.

14. In essence, although the Defense, at the hearing of 7 June 2000, argued the Motion of 17 April 2000 in substitute to the Motion of 29 October 1999, stating that it was not time barred because the Defense stated orally that the Prosecutor finalized disclosures on 25 May 2000, the Chamber, as laid out in its Decision on Nyiramasuhuko's Motion, at para. 46, was not convinced that the Motion of 17 April 2000 did warrant a waiver of the time limits prescribed in Rule 72(A). Therefore, the Chamber notes that in the instant Motion the Defense is requesting a review of the Decision on Nyiramasuhuko's Motion.



15. As regards the review of the Decision on Nyiramasuhuko's Motion, which the Defense brings pursuant to Rule 73, the Chamber refers to its findings in *Prosecutor v. Nsabimana*, Case No. ICTR-97-29A-T, (20 November 2000) (Decision on the Defense Motion for the Review of the Decision of 9 May 2000 and for the Scheduling of a Status Conference). In the said Decision, at para. 11, the Chamber considered that, "[...]a Decision on a Preliminary Motion," such as the instant Motion, "[...]may not be reviewed." The said Decision further made reference to the Appeals Chamber Decision in *Barayagwiza* rendered on 31 March 2000, which stated that, "[...] only a final judgment may be reviewed pursuant to Article 25 of the Statute and to Rule 120...a final judgment in the sense of the above-mentioned articles is one which terminates the proceedings." The Chamber, therefore, in line with its jurisprudence in the *Nsabimana Decision supra* finds that the Defense request for review is without merit.

16. Nevertheless, as regards the Defense request that the amendments ordered in the Decision on Ntahobali's Motion should also be ordered on behalf of the Accused Nyiramasuhuko because she is jointly indicted with the Accused Ntahobali, the Chamber agrees with the Prosecutor and considers the said request as one for the harmonization of the Decisions of 1 November 2000 rather than one for the review of the Decision on Nyiramasuhuko's Motion as characterized in the instant Motion.

The Prosecutor's Motion

17. As regards the Prosecutor's Motion and the requests for clarifications and harmonization, the Chamber notes that the orders made in the Decision on Ntahobali's Motion have an equal impact upon the Accused Nyiramasuhuko, particularly as she is jointly indicted with Arsène Shalom Ntahobali. The Chamber, therefore, directs the Prosecutor to modify the joint Indictment so that the orders made in the Decision on Ntahobali's Motion, which concern and have a similar impact upon the Accused Nyiramasuhuko are similarly ordered on behalf of the Accused, to maintain consistency and fairness.

FOR THE FOREGOING REASONS, THE TRIBUNAL:

DIRECTS the Prosecutor to modify the Amended Indictment so that the orders made in the Decision on Ntahobali's Motion are similarly ordered on behalf of the Accused as follows:

- (a) That the Prosecutor provide the identity of at least some of the "unknown persons" in para. 6.27, "soldiers and militiamen" in para. 6.30 and "soldiers" in para. 6.34, if known;
- (b) That the Prosecutor clearly distinguish the acts for which the Accused incurs individual criminal responsibility under Article 6(1) from those for which she incurs individual criminal responsibility under Article 6(3) of the Statute
- (c) That the Indictment charge as alternate counts the counts of Genocide and Complicity in Genocide;
- (d) That the Prosecutor 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."

DENIES the Prosecutor's Motion in all other respects.

DENIES the Motion for Review.

ORDERS the Prosecutor to modify the joint Indictment as prescribed in the Decision on Ntahobali's Motion and the Decision on Nyiramasuhuko's Motion and this Decision and file it with the Registry in French and in English by Wednesday 28 February 2001 at close of business.

Judge Pavel Dolenc appends a Partly Separate Dissenting Opinion to this Decision.

Arusha, 14 February 2001.

Laïty Kama
Judge, Presiding



William H. Sekule
Judge



Seal of the Tribunal

PARTLY SEPARATE DISSENTING OPINION OF JUDGE PAVEL DOLENC

1. I agree with the Decision to deny Nyiramasuhuko's motion regarding the request for review and also with reasoning for this decision as set forth in paragraph 15 of the Decision.

Regretfully, I cannot agree with the majority to grant Prosecutor's and Nyiramasuhuko's application for "harmonisation" of the orders in Ntahobali's and Nyiramasuhuko's Decisions of 1st November 2000.

2. The Decision directs transposition of the orders from Ntahobali's decision into Nyiramasuhuko's case following the majority's finding that orders made in Ntahobali's decision have an equal impact upon Nyiramasuhuko since both are jointly indicted (see paragraph 17 of the Decision). Thus, the majority established that implementation of the orders in Ntahobali's decision will inevitably impact upon Nyiramasuhuko's charges, provided that they are common to both of the accused. This finding applies for orders under subparagraphs 35(a)(ii)(iii) and (iv) in Ntahobali's Decision with, to amend paragraphs 6.27, 6.30 and 6.34 of the indictment, to delete the introductory formulation to each count (even to count 4 which charges only Nyiramasuhuko) and to charge genocide and complicity in genocide as alternate counts. However, the finding in the same time denies the Prosecutor's and Nyiramasuhuko's argument that "harmonisation" of the orders in Decisions of 1st November 2000 is necessary because compliance with the orders in Ntahobali's decision would cause inconsistencies in the joint indictment. Therefore, it proves that those additional orders under (a), (c) and (d) of the Decision are redundant. In addition the same amendments of paragraph 6.30 are already ordered also in Nyiramasuhuko's Decision, while paragraph 6.34 which amendment is also ordered, does not touch Nyiramasuhuko at all.



3. Compliance with the order in Ntahobali's Decision to distinguish between acts which incurs responsibility under Article 6(1) from those under Article 6(3) of the Statute would cause an inconsistency in the joint indictment. This inconsistency would derive from the fact that Nyiramasuhuko did not object this particular defect in the form of the joint indictment whilst Ntahobali did. However, any defect in the form of an indictment can be removed only according to the provisions of Rule 72. Nyiramasuhuko failed to object this particular defect of the form in the joint indictment. Her failure cannot be cured in the manner as she requested in the instant case. In my opinion, a final decision of the Tribunal should be complied with unless the execution becomes in conflict with a law, or futile, or impossible, or imposes extreme difficulties which cannot be justified with the purposes of a decision. None of these reasons exists in the present case.

4. For the reasons explained above, in my opinion, the correct decision should be that both motions of the Prosecutor and Nyiramasuhuko should be denied entirely. Someone might wonder that my dissenting opinion is senseless because the additional orders in the majority's Decision will not cause significant change of the Decisions of 1st November 2000. My intention, however, is to draw attention on an encroachment in final decisions without legal basis and beyond necessity. Such acts undermine the principle of legality which should be observed to the broadest extend. Additional decisions might be inconsistent with the previous ones. Finally, the Decision opens possibility for another step to delay the proceedings in joint cases under the pretext of need to harmonise charges.

Arusha, 14 February 2001



Pavel Dolenc
Judge