

ICTR-2001-69-1

517/2001

(86-83)

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UNITED NATIONS  NATIONS UNIES

International Criminal Tribunal for Rwanda

TRIAL CHAMBER III

OR: ENG

Before: Judge Pavel Dolenc

Registrar: Adama Dieng

Date: July 5 2001

THE PROSECUTOR

v.

Hormisdas NSENGIMANA

Case No. ICTR-2001-69-I

JUDICIAL RECORDS ARCHIVES
RECEIVED
ICTR

Adama Dieng

2001 JUL -5 P 7:30

CONFIRMATION OF THE INDICTMENT

The Office of the Prosecutor:

Silvana Arbia

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

Sitting as Judge Pavel Dolenc, designated by the President of the Tribunal pursuant to Rule 28 of the Tribunal's Rules of Procedure and Evidence (Rules);

HAVING RECEIVED an indictment (the indictment) against Hormisdas Nsengimana (the accused) dated 8 June 2001 and filed with the Registry on 21 June 2001 for review and confirmation pursuant to Articles 17(4) and 18(1) of the Statute of the Tribunal (Statute) and Rules 47(a)(b) and (e);

HAVING RECEIVED the supporting materials comprised of twenty witness statements without biographical details, proposed pseudonyms, and excerpts of expert and legal documents supporting respective parts of the indictment;

HAVING HEARD the Prosecutor during an *Ex parte* hearing on 5 July 2001 pursuant to Rule 47(D);

HAVING REVIEWED the indictment and accompanying materials;

NOW CONSIDERS THE MATTER AND FINDS:

2. Pursuant to Articles 17(4) and 18(1) of the Statute and Rule 47(A)–(F), the Prosecutor shall, if satisfied that the investigation reveals sufficient evidence to provide reasonable grounds for believing that the accused has committed a crime within the jurisdiction of the Tribunal, file an indictment together with supporting materials. The indictment shall set forth the particulars of the accused and a concise statement of facts of the crimes within jurisdiction of the Tribunal with which the accused is charged. The reviewing judge shall confirm the indictment if satisfied that the Prosecutor has established a *prima facie* case. If not so satisfied, the reviewing judge shall dismiss all or some counts, adjourn the review and request the Prosecutor to present additional supporting material or modify the indictment or take any other appropriate measures.
3. An indictment must allege all of the material facts that constitute the elements of a given crime. An indictment must contain sufficient particulars to identify, without ambiguity, in time and location, the acts or omissions of the accused which constitute the crime. The indictment must also demonstrate a causal link between the alleged conduct and criminal consequences. An indictment should allege grounds for individual responsibility of the accused as principal perpetrator, or as an accomplice or as a superior with command responsibility for acts of his subordinates. Supporting material is not permitted to fill in any gaps in the material facts pleaded in the indictment. Rather, supporting material is used to ensure that there is sufficient evidence to support the material facts as they are set out in the indictment. The joint operation of Article 18 and Rule 47 is that the reviewing judge must be satisfied that the material facts pleaded in the indictment establish a *prima facie* case and that there

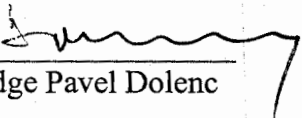
is evidence available which supports these material facts. (*Decision of the ICTY on Review of Indictment against Slobodan Milosevic et al.*)

4. In the present case, the indictment charges Hormisdas Nsengimana with genocide or alternatively with complicity in genocide, with conspiracy to commit genocide and with two crimes against humanity committed by murder and extermination. For each of these alleged crimes, except for conspiracy to commit genocide, the accused is charged alternatively as a principal perpetrator pursuant to Article 6(1) and as a superior for acts of his subordinates pursuant to Article 6(3).
5. The Tribunal finds that the indictment sets forth the name and attainable particulars of the accused, a concise statement of the facts of the case and of the crimes of genocide, conspiracy to commit genocide and two crimes against humanity as a principal perpetrator. Supporting materials give sufficient grounds to establish a *prima facie* case in respect of these alleged crimes.
6. However, with respect to the alternative charges for complicity in genocide and for superior responsibility, the Tribunal finds that the Prosecutor has not provided sufficient particulars or supporting evidence to establish a *prima facie* case. In particular there is insufficient evidence to raise the superior-subordinate relationship under which the accused could be held criminally responsible under international law for the acts of others.
7. The Rules contain no specific provisions for alternative charges. Therefore, the Tribunal must apply the test as set out in Rule 47 which requires that an indictment shall set forth a concise statement of facts "of the crime with which the suspect is charged." This statement of facts is required in order to raise a *prima facie* case for any allegations of alternative crimes or alternative modes of responsibility. The simple recitation of a legal text of alternative mode of responsibility or of the legal elements of alternative crimes is insufficient. This is particularly important when the alleged alternatives do not correspond to the allegations as set forth in the general statement of facts or where the alternatives contradict or mutually exclude each other. Alternative charges are appropriate where conflicting evidence shows that a crime could have occurred in essentially different ways or where conflicting evidence demonstrates different modes of responsibility for the crime.
8. The concise statement of facts and respective alternative counts for superior responsibility of the accused in the present case do not demonstrate a superior-subordinate relationship between the accused and a group of named employees of the Christ-Roi college, some students and unnamed *interhamwe*. These "subordinates" allegedly acted under the Accused's authority (see for example paragraphs 11 and 17), but the indictment does not present either a legal or a factual basis for such an allegation.
9. The indictment does allege that the accused failed to discourage or prevent one employee, Pheneas, from screaming at the students dormitory that "you are sleeping

while the father of the nation has been killed by the Tutsi.” The indictment alleges that “as a direct consequence of these statements, the Hutu students (about 700) launched an attack against the Tutsi students (about 100), who fled the college.” (paragraph 11) However, the acts of Pheneas do not constitute an act of genocide or of complicity in genocide as alleged in the indictment. The accused cannot be criminally liable for genocide when the act of the alleged “subordinate” is not, in itself, genocidal.

10. In order to establish *prima facie* case in respect of the charges of superior responsibility, the Prosecutor will need to amend the concise statement of facts in the Indictment accordingly.
11. In Counts 1 and 2 the accused is alternatively charged with genocide and with complicity in genocide. The Indictment alleges that the accused was an accomplice to the killing or causing of serious bodily or mental harm with intent to destroy the Tutsi as a racial or ethnic group. The count of complicity in genocide is founded on the same facts as are used to support the accused’s responsibility as a principal perpetrator of genocide in Count 1. The indictment merely recites Article 6(1) of the Statute, which enumerates all possible modes of involvement in a crime as an actual perpetrator or as an accomplice. In this respect the indictment is contradictory since the identical conduct of the accused cannot constitute his responsibility as principal perpetrator and as accomplice. In order to establish a *prima facie* case for complicity in genocide, the Prosecutor must amend the indictment by clearly indicating the concise facts that would support this crime.
12. Consequently, for the above reasons, the Tribunal:
 1. **CONFIRMS** counts 1, 3, 4 and 5 of the indictment with regard to the responsibility pursuant Article 6(1) of the Statute only;
 2. **DISMISSES** count 2 and all charges of superior responsibility pursuant to Article 6(3) of the Statute, without prejudice.

Arusha, 5 July 2001



Judge Pavel Dolenc

Seal of the Tribunal