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UNITED NATIONS
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**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

TRIAL CHAMBER III

Original: English

Before: Judge Lloyd George Williams, Presiding
Judge Pavel Dolenc
Judge Andréia Vaz

Registrar: Mr Adama Dieng

Date: 23 May 2002

**THE PROSECUTOR
v.
THÉONESTE BAGOSORA
GRATIEN KABILIGI
ALOYS NTABAKUZE and
ANATOLE NSENGIYUMVA**

2002 MAY 23 P 4:31
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JUDICIAL RECORDS
FOLIO 1076

Case No. ICTR-98-41-T

**DECISION ON DEFENCE MOTIONS OF NSENGIYUMVA, KABILIGI, AND
NTABAKUZE CHALLENGING THE PROSECUTOR'S PRE-TRIAL
BRIEF AND ON THE PROSECUTOR'S COUNTER-MOTION**

The Office of the Prosecutor:

Mr Chile Eboe-Osuji
Mr Drew White
Ms Christine Graham

Defence Counsel:

Mr Raphaël Constant
Mr Jean Yaovi Degli
Mr Clemente Monterosso
Mr André Tremblay
Mr Kennedy Ogetto
Mr Gershom Otachi Bw'omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”), sitting as Trial Chamber III composed of Judge Lloyd G. Williams Q.C., presiding, Judge Pavel Dolenc and Judge Andréia Vaz (the “Chamber”);

BEING SEISED of Anatole Nsengiyumva’s “Preliminary Objection to Prosecutor’s Pre-trial Brief and Annexes, and Motion to Reject the Brief and Annexes” filed 2 April 2002 (“Nsengiyumva’s Motion”);

BEING SEISED of the “Prosecution Response to [Nsengiyumva’s Motion] and Prosecution Counter-Motion for an Order of the Court Compelling the Defendants to File a Statement of Admitted Facts and Law and a Pre-trial Brief Addressing the Factual and Legal Issues Pursuant to Rule 73Bis(F)” (the “Prosecutor’s Response” and the “Counter-motion”), both contained in the same document filed 12 April 2002;

BEING SEISED of Nsengiyumva’s “Defence Response to the Prosecution Counter-Motion” filed 22 April 2002;

BEING SEISED of the “Requête de la Défense de Aloys Ntabakuze en vue de faire rejeter le mémoire préalable du Procureur daté du 21 janvier 2002, parce que non conforme a la loi et à l’acte d’accusation”, filed 3 May 2002;

BEING SEISED of the “Requête de la Défense de Gratien Kabiligi aux fins de rejet du mémoire préalable du Procureur en date du 21 Janvier 2002”, filed 6 May 2002;

NOW DECIDES the Motion and Counter-Motion on the basis of the briefs pursuant to Rule 73(A) of the Rules of Procedure and Evidence (the “Rules”);

SUBMISSIONS OF THE DEFENCE:

1. In their separate motions (collectively the “Defence Motions”) Counsel for Anatole Nsengiyumva, Aloys Ntabakuze and Gratien Kabiligi request that the Prosecutor’s pre-trial brief and its annexes be rejected and that the Prosecution be ordered to file new pre-trial documents corresponding to the law and to the Indictments.
2. The Defence allege that the Prosecutor’s Pre-trial Brief and Annexes include accusations of war crimes and anticipate calling witnesses to support the allegations of war crimes. The Defence argues that this is not in conformity with the Statute of the Tribunal (the “Statute”) and Rules because the Statute does not recognize jurisdiction over war crimes and because the Indictments against the Accused do not include allegations of war crimes. In addition, summaries of several witness statements indicate that they will testify on facts beyond the frame of the Indictments, which the Defence submits is not permissible without prior amendment of the indictment. In particular, Counsel for Ntabakuze and Kabiligi allege that the pre-trial documents suggest that the two Accused are charged with direct and public incitement to commit genocide, when no such allegations exist in the Indictment.
3. Further, the Defence criticize that the Pre-trial Brief and its Annexes do not indicate the points in the indictment on which each witness will testify.
4. The Defence further submit that separate pre-trial documents should be filed for each of the three indictments.

5. In its response to the Counter-motion, the Defence for Nsengiyumva submits that there is no link between the Counter-motion and Nsengiyumva's Motion, that the Counter-motion is time-barred since an order to file pre-trial documents pursuant Rule 73 *bis* (F) may be rendered only during the pre-trial conference and, moreover, that there is no legal basis for compelling the Defence to admit facts. The Defence for Nsengiyumva suggests that the Prosecutor should be sanctioned for filing a frivolous Counter-motion.

SUBMISSIONS OF THE PROSECUTOR:

6. In its response to Nsengiyumva's Motion, the Prosecution proposes that the Motion should be denied. The Prosecutor submits that violations of the Geneva Conventions and of Additional Protocol II form part of customary international law applicable to internal conflicts, which are commonly referred to as "war crimes".
7. The Prosecutor responds that the Defence allegation that the pre-trial documents introduce new facts beyond the scope of the Indictment is vague. Pre-trial documents only give particulars of the charges set forth in an indictment and provide a brief outline of the evidence. Therefore, pre-trial briefs cannot contain new charges.
8. In the view of the Prosecutor, each witness statement summary clearly indicates, according to Rule 73 *bis* (B)(IV)(c), to which accused and to which count it refers.
9. In its Counter-motion, the Prosecutor applies for an order compelling the Accused to file a statement of admitted facts and law and a pre-trial brief pursuant to Rule 73 *bis* (F).

DELIBERATIONS:

10. On 29 June 2000 the Chamber granted the Prosecutor's motion and ordered a joint trial of Bagosora, Kabiligi, Ntabakuze and Nsengiyumva. Counsel for three of the Accused filed separate motions relating to the same issue, namely, challenging the Prosecutor's pre-trial documents. The grounds of all three motions are virtually identical. Moreover, the remedy sought is the same in all three motions. The Chamber therefore finds that it is in the interests of justice and of judicial economy to deal with the motions in a single decision.
11. More than one accused may be jointly charged or jointly tried pursuant to Rules 48 or 48*bis* respectively. According to the principle of *beneficium cohaesionis*, if one co-accused files a motion, then the remedy shall be extended, where equal reasons apply, to other co-accused who did not file any motion. The aim of this rule of criminal procedure in civil law jurisdictions is obvious: to avoid inconsistencies in the procedural position of co-accused during the same trial. When appropriate a trial chamber shall *proprio motu*, pursuant to Rule 54, order the extension of a remedy to other co-accused who did not join the motion requesting the given relief. In this matter the Accused Bagosora did not file a motion. Nevertheless, the remedy granted to the three Co-Accused who filed motions, shall also apply to Bagosora.
12. The Motions rightly state that pursuant to Rule 73*bis*(B)(iv)(c) the Prosecution should indicate the points of the indictment on which each witness will testify. This rule implements the right of the Accused to be informed in detail of the nature and cause of the charges against him, which is guaranteed in Article 20(4)(a) of the Statute. However, the summary of witness statements indicates only the names of the Accused and the crime on which each witness will testify. The Chamber agrees with the Defence that the reference in the Rule to "the points of the

indictment” does not mean “the counts of the indictment”, which only recite or rephrase the legal text of the Statute relating to the crimes within the jurisdiction of the Tribunal and to the mode of criminal responsibility of the accused. Witnesses do not testify on such abstract legal matters, but rather to the factual circumstances underlying such charges as alleged in the indictment’s concise statement of facts of the crimes and of the case filed in accordance with Article 17(4) of the Statute and Rule 47(C). Furthermore, citing only to the counts of the indictments, which relate to a number of events, does not properly inform the Accused of the anticipated evidence relating to specific allegations. Consequently, the Chamber is of the view that the Prosecution should indicate to which events, circumstances, or paragraphs in the concise statement of facts in the Indictments each of the witnesses will testify.

13. The Chamber notes that Kabiligi and Ntabakuze are not charged with the crime of direct and public incitement to commit genocide as indicated in the pre-trial documents. Therefore, in amending the pre-trial documents as provided above, the Prosecutor will also correct this deficiency.
14. The Chamber finds that the other submissions of the Defence are without merit. Violations of the Geneva Conventions are commonly regarded and termed as “war crimes”, regardless of whether they refer to Additional Protocol I or II or whether they are committed in international or non-international armed conflict.¹ The narrow notion of war as armed conflict between military forces of two hostile states has been developed and broadened so that it also includes civil wars and all kinds of armed conflicts, but for the exceptions provided in Protocol II. The Chamber therefore considers references to “war crimes” in the pre-trial documents to be references to the crimes stipulated in Article 4 of the Statute.
15. The indication in the summary of witness statements that some witnesses might testify on events or circumstances outside the scope of the indictment is not grounds to reject the pre-trial documents. It is for the Chamber to decide during the trial whether such testimony is relevant to the issues at trial. It is also clear that pre-trial documents cannot add new charges beyond those included in the indictments or serve to unilaterally amend the indictments.
16. The Chamber does not agree that the Prosecution should file three separate pre-trial documents relating to each of the three Indictments. As long as the pre-trial documents sufficiently indicate which parts relate to each of the accused, there is no need for separate sets of documents. The requested order would run contrary to the principle of judicial economy and would not serve the interests of justice, which were the grounds, in part, for joinder of the Indictments.
17. The Prosecution’s Counter-motion to compel the defendants to file a statement and pre-trial brief pursuant to Rule 73bis(F) is equally misplaced. Pursuant to Rule 73 bis (A) and (F) the Chamber may order the Defence at the Pre-Trial Conference to file requested documents not later than seven days prior to the date set for trial. The Counter-motion was filed after the Pre-Trial Conference took place and after the trial had already commenced. Therefore, the request of the Prosecutor is out of time and cannot be considered.
18. The Chamber finds that all three Defence motions, while raising some reasonable matters, also raise issues that lack any merit. The Prosecutor’s Counter-motion similarly lacks seriousness. The Chamber finds that such motions and counter-motions unnecessarily waste the resources of the Tribunal and deems them as frivolous. The Chamber therefore formally warns all the parties


¹ Rome Statute of International Criminal Court, U.N. Doc. A/CONF.183/9, Article 8 (2)(c) and (e) defines war crimes as grave breaches of the Geneva conventions including common article 3 and other serious violations of the laws and customs applicable in armed conflicts not of an international character.

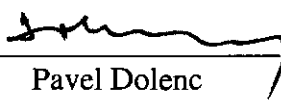
to refrain from filing needless and unmeritorious motions and, in addition, sanctions the Defence Counsel by reducing their fees and costs.


19. For the reasons above the Trial Chamber:

- (a) **GRANTS**, in part, the Motions by the three Defence, and *proprio motu*, orders the Prosecutor to indicate within fifteen days after receipt of this decision, the points in the concise statement of facts in each of the three Indictments relating to all four Accused to which each witness will testify;
- (b) **DENIES** the Defence Motions in all other respects;
- (c) **DENIES** the Prosecutor's Counter-motion in its entirety;
- (d) **DENIES** the Defence Application to sanction the Prosecutor;
- (e) **DIRECTS** the Registry, pursuant to Rule 73(E), to pay to the Defence of Nsengiyumva, Ntabakuze and Kabiligi only half of the fees and costs associated with the preparation and filing of their motions.

Arusha, 23 May 2002.


Lloyd G. Williams, Q.C.
Presiding Judge


Pavel Dolenc
Judge


Andréia Vaz
Judge

[Seal of the Tribunal]