International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
Arusha International Conference Centre
P.O.Box 6016, Arusha, Tanzania - B.P. 6016, Arusha, Tanzanie
UNITED NATIONS
NATIONS UNIES
Tel: 255 27 2504207-11 2504367-72 or 1 212 963 2850 Fax: 255 27 2504000/2504373 or 1 212 963 2848/49

TRIAL CHAMBER I

ENGLISH

Original: FRENCH

Before: Judge Navanethem Pillay, presiding
Judge Erik Møse
Judge Andrésia Vaz

Registry: Adama Dieng

Decision rendered on: 30 May 2002

THE PROSECUTOR

v.

EMMANUEL NDINDABAHIZI

Case No. ICTR-2001-71-I

DECISION

(DEFENCE MOTIONS ON DEFECTS IN THE FORM OF THE INDICTMENT)

Office of the Prosecutor:

Kenneth C. Fleming
Melinda Y. Pollard

Counsel for the Defence

Pascal Besnier

The International Criminal Tribunal for Rwanda (the "Tribunal")

Sitting as Trial Chamber I composed of Judges Navanethem Pillay, presiding, Judge Erik Møse and Judge Andrésia Vaz,

Being seized of:

(i) Motion by the Defence titled, "*Preliminary Motions*" filed on 19 November 2001 ("the Motion") on defects in the form of the Indictment pursuant to Rule 72 (B) (ii) of the Rules of Procedure and Evidence (the "Rules");

(ii) Prosecutor's Response filed on 8 February 2002 (the "Response"); and

(iii) A *Corrigendum* to the Response, filed on 12 March 2002;

Considering that:

(i) Ndindabahizi's Indictment was confirmed on 5 July 2001 by Judge Pavel Dolenc, who was satisfied that the supporting materials submitted by the Prosecution provided sufficient grounds for a *prima facie* case against him[1];

(ii) The said Decision, however, directed the Prosecutor to amend the counts on superior responsibility;

(iii) A fresh indictment, including the amended charges, was again confirmed on 3 October 2001;[2]

(iv) The Defence is well within the Sub-Rule 72 (A) time-limit for filing motions on defects in the Indictment thus amended;

Hereby considers the Motion on the basis of the briefs filed by the parties.

SUBMISSIONS

1. The Defence objects on the following grounds:

(i) Inadequacy or lack of supporting materials accompanying Count 5 (rape).

It argues that:

> *(…) the witness statements accompanying the request for confirmation of the indictment neither make any reference to the participation of the Accused in one or several rapes, nor do they allege that he ordered, instigated or*

[1] See *The Prosecutor v. Emmanuel Ndindabahiza*, Case No. ICTR-2001-71-I, Confirmation of the Indictment, 5 July 2001 ("Decision of 5 July 2001"), notably para. 5.

[2] See *Ibid.*, Decision on the *ex-parte* Application of the Prosecutor for Leave to Amend the Indictment Pursuant to Rule 50 and Review and Confirmation of Amended Indictment and Related Documents, 3 October 2001 ("Decision of 3 October 2001").

otherwise abetted (within the meaning of Article 6 (1)) the commission of the said crime;[3]

(ii) Inadequacy of the material submitted in support of all the counts in respect of the responsibility of the Accused as a superior, namely four of the five counts, including that of crime against humanity (rape – Count 5);

More specifically, the Defence contests the fact that the confirming judge had accepted the indictment in its amended version, in regard to the charge of superior responsibility, whereas he had criticised the material facts in support of the corresponding allegations. The Defence had inferred from this that the judge did not seem convinced of the existence of sufficient evidence to sustain a *prima facie* case against the Accused in respect of the said counts[4];

(iii) The fact that Count 5, as formulated, did not clearly establish whether the Accused bore, direct or indirect responsibility for rape (as a crime against humanity) within the meaning of Articles 6 (1) or 6 (3) of the Statute;

(iv) The concurrence of crimes alleged under superior responsibility (Article 6 (3) and under direct responsibility (Article 6 (1) of the Statute);

(v) The concurrence of crimes between genocide and crimes against humanity (extermination and murder).

2. The Trial Chamber is compelled on several grounds not to consider the first and second objections above (inadequacy and/or lack of supporting materials):

(i) Objections based on defects in the form of the indictment cannot dwell on substance and cannot, in particular, be used as a basis at this preliminary stage in the proceedings for arguments, on the guilt or innocence of the Accused or for lack of evidence in support of the allegations against him;[5]

(ii) Supporting materials are not an integral part of the indictment, since both differ in terms of content and purport.[6] In fact, in terms of Rule 72 (B) (ii) of the Rules, the Trial Chamber may only consider the Indictment; any other document being excluded;

(iii) The confirming judge considered the supporting materials. Trial Chambers do not have appellate jurisdiction over decisions rendered by a single judge or by a Trial Chamber;[7]

---

[3] Motion, para. 11.
[4] See Motion, paras. 21-27.
[5] See *The Prosecutor v. Edouard Karemera*, Case No. ICTR-98-44-T, Decision on the Defence Motion, pursuant to Rule 72 of Rules of Procedure and Evidence, Pertaining to, *inter alia*, Lack of Jurisdiction and Defects in the Form of the Indictment, 25 April 2001, paras. 11-13. See also *The Prosecutor v. Radoslav Brdjanin and Momir Talić,* Case No. IT-99-36, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, para. 15.
[6] *The Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, Decision (Defence Motion for Disclosure and Objections regarding the Legality of Procedures), 28 February 2002, para.7.
[7] Decision, *Karemera* of 20 February 2001(*cf.supra),* para. 13.

(iv) On the specific issue of the procedure for the confirmation of an indictment, the Trial Chamber adheres to the reasoning of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia ("ICTY") as regards keeping "the functions of the confirming judge and of the Trial Chamber apart…": "*[so as] to avoid any contamination spreading from the* ex parte *nature of the confirming procedure to the Trial Chamber".*[8]

3. As for the second objection (inadequacy or lack of supporting materials accompanying Count 5 (crime against humanity, rape), it is the understanding of the Trial Chamber that the Defence had deemed it necessary to focus its attention on the supporting materials so as to obtain clarification on rape charges. The Chamber will therefore consider said objection *in tandem* with the third objection, which is a complaint about the vagueness of the Indictment (1). The Trial Chamber will then consider the other complaints pertaining to the prohibited cumulative charging (2).

1. Vagueness of Count 5 of the amended Indictment (rape as a crime against humanity)

4. The Defence appears on the whole, to consider that the fifth Count of rape in the Indictment is too vague. It does not, however, spell out what information is lacking for the Accused to be adequately apprised of the charges against him. In the absence of further clarifications, this objection is overruled.

5. Furthermore, the Defence is of the view that Count 5, as formulated, fails to determine whether the Accused bears direct or indirect responsibility in the case of the rape charges. *Indeed, it further submits that in the material facts of the crime, the Prosecution fails to distinguish between those which relate to the provisions of Article 6 (1) of the Statute and those which come under Article 6 (3)."*[9] As a result, the Accused is not informed in detail of the nature or cause of the charge against him pursuant to Article 20 (4) of the Statute. The Defence accordingly prays the Chamber to drop all the charges pertaining to Count 5.

6. The Prosecution responded first:

(i) That the mode of participation is set out in the Decision confirming the Indictment; and

(ii) That the Defence had actually filed a motion seeking further information on the offences charged (commonly referred to in Common Law as *Request for bill of particulars).* According to the Prosecution, that request should have been first addressed directly to the Prosecutor. At any rate, the Prosecutor argues, that she cannot justify a request that the said Count be quashed.

7. With regard to the above, The Trial Chamber notes:

(i) In respect of the first submission, that the Indictment and no other document should inform the Accused adequately of the nature and cause of the charges against him; and

---

[8] ICTY, *The Prosecutor v. Brdjanin and Talić,* Case No. IT-99-36-PT), Decision on Motion to Dismiss Indictment, 5 October 1999, paras. 21 and 22.
[9] Motion, para. 10.

(ii) In respect of the second submission, that the Defence is not only merely seeking further details on the charges set out in the Indictment, but actually raising an objection in view of the vagueness of some of the charges. The Defence is so entitled, under Rule 72 (B) (ii) of the Rules and subject to the time-limit prescribed by Rule 72 (A), considering that it had not been afforded the opportunity to raise such objections at the *ex-parte* confirmation of the indictment, as provided in Rule 47 of the Rules.

8. Lastly, the Prosecutor submits that sufficient information is provided in the paragraphs of the Indictment pertaining to the Count.

9. The Trial Chamber has considered paragraphs 50 to 56 of the amended Indictment in order to ascertain whether there was sufficient clarity on the allegations of rape (considered as a crime against humanity).

10. The names of some of the rape victims and the places are alleged to have occurred are specified (names of four victims at Gitwa Hill are mentioned in paragraph 53 of the Indictment, and five names at Rwirambo Hill in paragraph 54 of the Indictment). However, the paragraphs in question make no reference to the name(s) of the perpetrator(s) of the rapes, same as in the other cases of rape mentioned in paragraph 52 of the Indictment which merely states that *"There were numerous incidents of rape and of indecent assault during the attacks at the Rwirambo, Gitwa, Karongi and Bisesero Hills"*.

11. Paragraph 55 of the amended Indictment for its part, states that Augustin Ndindabahizi is charged with the various incidents of rape for being *"present at the attacks at Rwirambo, Gitwa, Karongi, and Bisesero Hills, [for having] participated in them and had effective control over the perpetrators of them, [for having given] "instructions to others and led attacks by his words and his actions in circumstances in which he knew, or should have known, that some of those under his control would commit rape and indecent assault."*

12. The Trial chamber notes that the material allegations are not specific as to which incidents of rape the Prosecution holds the Accused responsible, as the case may be, under Article 6 (1) of the Statute, and which other rapes are charged under Article 6 (3) of the Statute. However, such lack of details is explained by the Prosecutor in paragraph 51 of the Indictment, namely that *"The identity of each victim (…) and the exact circumstances of each attack cannot be detailed exhaustively due to the overwhelming devastation (…) and the near-complete extermination of the intended victim-class…"*.

13. The Trial Chamber therefore notes at this juncture that the Prosecutor was unable to provide any more details beyond those appearing in the amended Indictment on the rape charges. To that extent, the Chamber does not view the Indictment as being defective in form.

2. Concurrence of crimes

14. The Defence argues that the Accused cannot be indicted for the same acts or group of acts:

(i) In the case of Counts 1, 3 and 5 in respect of command responsibility (Article 6 (3) of the Statute) and direct responsibility (Article 6 (1) of the Statute); and

(ii) In the case of genocide, crime against humanity (extermination) and crime against humanity (assassination).

15. The Prosecutor responded first that the *non bis in idem* principle is applicable only in regard to preventing the trial or conviction of a person on the basis of acts for which that person has already been tried in another proceeding. It cannot therefore be relied on as ground for objecting to the concurrence charging for the same act or the same transaction in the course of the same trial.

16. It is true that the *non bis in idem* principle is expressly referred to in Article 9 of the Statute only in its restricted context encapsulated in the words "already been tried", in reference solely to multiple trials. The same applies to the Statute of ICTY. Be that as it may, both Tribunals have applied the *non bis in idem* principle, even if implicitly, in case of cumulative charging.[10]

17. The Prosecutor further responded that the issue of concurrence of crimes is raised prematurely by the Defence and that the Trial Chamber is properly seized when the matter is considered on its merits.

18. The Trial Chamber notes that in the *Celebići* Judgement, ICTY Appeals Chamber held that, in general:

> *"Cumulative charging is allowed in light of the fact that, prior to the presentation of all the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and the ICTR."*[11]

19. In this regard, the Trial Chamber notes that in a separate and dissenting opinion Judges Mohamed Bennouna and David Hunt pertaining to the issue of cumulative charges, this principle lacks certain exceptions.[12]

20. The Trial Chamber considers, however, that in this instant case such issues should be referred to the judges to consider the merits.

21. The Trial Chamber observes that in light of the separate and dissenting opinion rendered by Judge Mohamed Bennouna and Judge David Hunt, there are exceptions to that principle.

---

[10] See, notably, (1) *The Prosecutor v. Jean-Paul Akayesu,*Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 462 (application of "*substantive* non bis in idem *principle in criminal law");* (2) ICTY Appeals Chamber, Judgement in "Celebići"; *The Prosecutor v. Zejnil Delalić et al.,* No. 96-21-A, 20 February 2001 ("*Celebići* Judgement"), notably in para. 412; (3) Appeals Chamber, *Alfred Musema v.The Prosecutor,* Case No. ICTR-96-13-A, Judgement, para. 346 *et seq*..

[11] *Celebici* Judgement, para. 400.

[12] *Celebići* Judgement, Chapter XVI, Separate and Dissenting Opinion of Judges Hunt and Mohamed Bennouna, p. 324, para. 12, footnote 14.

For these reasons,

The Chamber

Rejects the Motion.

Arusha, 30 May 2002

(Signed)	(Signed)	(Signed)
Erik Møse	Pillay Navanethem	Andrésia Vaz
Judge	Judge (presiding)	Judge

- - - - -

(Seal of the Tribunal)