



ICTR-2001-64-I
25-7-2002
C434-429
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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OR: ENG

TRIAL CHAMBER III

Before: Judge Lloyd George Williams Q.C., Presiding
Judge Yakov Ostrovsky
Judge Pavel Dolenc

Registrar: Mr Adama Dieng

Date: 25 July 2002

THE PROSECUTOR

v.

SYLVESTRE GACUMBITSI

Case No. ICTR-2001-64-I

JUDICIAL RECORDS SECTION
ICTR
2002 JUL 25 P 4:01
Adama Dieng

**DECISION ON DEFENCE MOTION TO AMEND INDICTMENT
AND TO DROP CERTAIN COUNTS**

The Office of the Prosecutor:
Mr Richard Karegyesa
Ms Holo Makwaia
Ms Andra Mobberley

Counsel for the Accused:
Mr Kouengoua

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (the “Tribunal”), sitting as Trial Chamber III, composed of Judges Lloyd George Williams Q.C., presiding, Yakov Ostrovsky and Pavel Dolenc (the “Chamber”);

BEING SEISED of the Defence “Motion to Amend Indictment and Drop Certain Counts” filed 26 Nov 2001 (the “Motion”);

CONSIDERING the “Prosecutor’s Response to the Defence Motion Seeking Amendment of the Indictment” filed 19 Dec 2001 (the “Prosecutor’s Response”);

CONSIDERING the Defence “Reply to the Prosecutor’s Response” filed 27 Dec 2001 (the “Defence’s Reply”);

HAVING HEARD the parties on 6 June 2002, now decides the Motion.

I. DEFENCE SUBMISSIONS

ON THE ADMISSIBILITY OF THE MOTION

1. The Defence of Gacumbitsi argues that the combined provisions of Rules 50, 72 and 73 of the Rules of Procedure and Evidence (the “Rules”) allow it to request that the Chamber order the Prosecutor to amend the Indictment. The Defence argues that although the Accused was served with documents on 25 June 2001, he was not assigned Counsel until 13 August 2001, and said Counsel reported to the Tribunal on 18 October 2001. At Annex “C” to the Defence Reply, the Defence attached a copy of a memorandum indicating that French translations of the witness statements of Witnesses TAH and TAO were filed on 15 November 2001. Defence Counsel did not receive these final five pages of disclosure material until 20 November 2001. Thus, if the time-limit set under Rule 72 (A) began to run on 20 November 2001, the Defence would have until 21 December 2001 to file its motion, and the Motion filed on 26 November 2001 is therefore within the time-limit.

ON THE MERITS

2. The Defence argues that the Indictment impermissibly charges the Accused of being both the principal perpetrator of and an accomplice to the same act. In support of this contention the Defence notes that no principal perpetrator is named for the acts to which Gacumbitsi is an alleged accomplice. Furthermore, the Defence considers that the fact that the Prosecutor charges complicity only as an alternative crime gives credence to their claim that the factual basis for either the count of genocide or the count of complicity to commit genocide is insufficient.

3. The Defence requests the Chamber to order a withdrawal of Count 5 because the Prosecutor does not allege that the Accused committed any acts that constitute rape according to the definition employed by the Defence. According to the Defence, the Prosecutor has only charged the Accused with rape as a principal perpetrator and not as an accomplice and has failed to allege any acts of rape committed by the Accused.

4. Addressing the dates given in the indictment, the Defence contends that the use of imprecise phrases such as “between...and...April 1994,” “on or around,” “On a date uncertain” and “During April, May and June 1994...” undermines the Defence’s ability to



create its case and prejudices the rights of the Accused. The Defence argues that lack of clarity in the indictment contravenes Article 20, para. 4 (a) of the Statute and Articles 10 and 11 of the Universal Declaration for Human Rights of 10 December 1948. The Defence further claims that the failure to link individual witnesses to each of the alleged acts with which the Accused is being charged does not afford the Defence "a position of equality before the law".

5. Thus, the Defence requests that the Chamber:

- (i) Order the Prosecution to drop either the count of genocide or the count of complicity in genocide;
- (ii) Order the Prosecution to drop the count of rape; and
- (iii) Order the ensuing amendment of the Indictment.

II. PROSECUTOR'S RESPONSE

ON THE ADMISSIBILITY OF THE MOTION

6. The Prosecutor submits that the issues raised by Defence's motion can only be interpreted as objections based on defects in the indictment as defined in 72 (B) (ii) and are governed by the time limits in 72 (A). Therefore the Defence reliance on Rule 73, as an alternative basis for bringing the Motion, is misconceived. Rule 73 is subject to Rule 72, which has primacy over the issues raised in the Motion.

7. The Prosecutor claims to have effected disclosure to the Accused on 25 June 2001. Thus, since the Defence filed its Motion on 26 of November 2001, the Defence has exceeded the time limit of thirty days set out in Rule 72 (A) and the Motion is time barred.

8. While the Prosecutor concedes that Lead Counsel for the Defence was served with materials on 25 October 2001, she contends that this does not amount to the good cause showing required for the Chamber to grant relief from the time limit pursuant to Rule 72 (F). The Prosecutor reasons that the two witness statements disclosed to Defence Counsel on the 15 November 2001 were not "new materials" because they were "simply translations" of materials previously disclosed to the Defence.

ON THE MERITS

9. The Prosecutor concedes that she relies on the same facts in support of both Count 1 and Count 2 of the Indictment, and agrees that an Accused cannot be both the principal perpetrator and an accomplice with regards to the same offence. However, the Prosecutor emphasizes that the Accused is charged with Genocide in Count 1 *or alternatively* with Complicity in Genocide in Count 2. Therefore, since the Accused could not be found guilty of both crimes, the Prosecutor argues that no legal or logical inconsistency arises. Both genocide and complicity to commit genocide can be charged in the alternative in respect of the same facts.

10. In response to the Defence's claim that the allegations do not suffice to support the charge of rape, the Prosecutor argues that at the preliminary motions stage it is premature to consider



the merits of the evidence and that such issues are properly considered only at trial. In the alternative, the Prosecutor submits that paragraphs 37 - 40 contain clear allegations as to the role of the Accused in the rapes that allegedly took place in Kibungo prefecture in the stated period. Furthermore, the Prosecution notes that under the rubric of Article 6 (1) and 6 (3) of the Statute, sexual penetration by the Accused is not required for him to incur individual criminal responsibility for rape as a crime against humanity stipulated in Article 3 (g).

11. The Prosecutor states that, to the extent possible, the Indictment sufficiently particularizes the material facts underpinning the crimes with which the Accused is charged. Lack of specificity on some dates is explained by the large-scale nature of the crimes over a period of time. Moreover, the Prosecutor argues that the Accused would suffer no prejudice in preparing his defence if the Indictment is read together with the pre-trial disclosure of Prosecution evidence.

12. The Prosecutor confirms that the periods set out in the Indictment are the "best distillation" of the timing of events available to the Prosecutor and indicates that more specific dates would be merely speculative. The Prosecutor concludes that the Defence's allegations concerning the vagueness of the indictment are unfounded, and the Accused's rights under Article 20 (4) (a) of the Statute are in no way prejudiced.

III. DELIBERATIONS

ON THE ADMISSIBILITY OF THE MOTION

13. The Defence invokes Rules 50, 72 and 73 as the legal basis of its Motion. The Chamber, however, finds that this Motion is properly considered as a preliminary motion pursuant to Rule 72. Rule 72 specifically provides a framework for preliminary motions, which cannot be circumvented by reliance on the general provisions of Rule 73. Rule 50 is inapplicable, as it concerns the voluntary amendment of the Indictment by the Prosecutor.

14. Rule 72 (B) (ii) indicates that "[o]bjections based on defects in the form of the indictment" constitute preliminary motions governed by Rule 72. Rule 72 (A) dictates that such motions "shall be brought within thirty days following disclosure by the Prosecutor to the Defence of all the material envisaged by Rule 66 (A) (i)." The Chamber emphasizes that the 30-day time limit under Rule 72 (A) begins to run following the disclosure of *all* the material envisaged by Rule 66 (A) (i).

15. Pursuant to Article 31 of the Statute and sub-Rules 3 (A) and (E), the working languages of the Tribunal are English and French. Rule 45 (A) requires that all counsel assigned to the Accused by the Registry must speak one or both working languages of the Tribunal. The Chamber considers that the Accused's right, guaranteed by Article 20 (4) to effective legal assistance requires that the Defence counsel receive important documents in the working language of the Tribunal that he understands. Moreover, pursuant to Article 20 (4) (a) and (f), the Accused has the additional right to be informed promptly and in detail of the nature and cause of the charges against him in a language which he understands and to be assisted by an interpreter if he does not speak one of the working languages of the Tribunal. Therefore, the limitation period in Rule 72 (A) cannot begin to run until the Accused and his counsel are in possession of all the documents to which they are entitled.



16. As indicated in Annexe "C" to the Defence Reply, translations of two witness statements, TAH and TAO, were not filed until 15 November 2001. Upon verification with the Registry, the Chamber finds that disclosure to the Defence was not effected until 20 November 2001. Thus, the thirty-day time limit expired on 20 December 2001, and the Motion filed by Defence on 26 November 2001 is not time barred. In light of this conclusion, the Chamber finds it unnecessary to address the Defence contention that the French text of Rule 72 (A)¹ extends the time limit beyond the 30-day period prescribed in the English version.

ON THE MERITS

17. Article 20 (4) (a) of the Statute guarantees the Accused's fundamental right "[t]o be informed promptly and *in detail* in a language which he or she understands of the nature and cause of the charge against him or her." Article 17 (4) of the Statute demands that the Indictment contain "a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute." According to Rule 47 (C), "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged." The Chamber underscores the central role of the indictment, and in particular of the concise statement of facts, in providing the Accused with fair notice of the allegations against him. The Indictment is the foundation of the trial against the Accused; it serves to outline the Prosecutor's case and to shape the Defence response, and will eventually form the basis of the Chamber's evaluation of the evidence and judgment.

A. Complicity to Commit Genocide Charged in the Alternative

18. In the Indictment, the Prosecutor relies on the same concise statement of facts to support both the charge of genocide and the alternate charge of complicity in genocide. The Defence requests that the Prosecutor be ordered to drop one of the alternate charges because a single person cannot be both the principal and the accomplice. The Chamber finds that, in certain circumstances, an accused may be charged alternatively with genocide and complicity in genocide.² Therefore this objection must be dismissed.

B. Rape

19. The Chamber finds that the Defence's objections to Count 5 of the Indictment, Rape as a Crime Against Humanity, are unfounded. The Chamber notes that the Accused is charged with rape pursuant to Article 6 (1) as a principal perpetrator, as an accomplice, and as an instigator, and pursuant to Article 6 (3) as a superior with responsibility for the acts and omissions of his subordinates including soldiers, gendarmes, communal police, Interahamwe, civilian militia or civilians under his authority. Paragraphs 38 and 39 allege specific actions of the Accused describing his role in the rape of Tutsi women. Paragraph 39 alleges that the Accused instigated and ordered others to commit rape. Finally, paragraph 40 clearly sets out alleged facts that form the basis of the Prosecutor's theory of superior responsibility for rape. To the extent that the Motion challenges the substance of this count of the Indictment, the Chamber recalls that this count in the Indictment has already been confirmed in accordance

¹ The French version of Rule 72 (A) reads: << Les exceptions préjudicielles de l'une ou l'autre des parties doivent être soulevées dans les trente jours suivant la communication par le Procureur à la défense de toutes les pièces prévues à l'Article 66 A) i), *et en tout cas avant l'audience au fond.*>> (Emphasis added)

² *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment, A. Ch., 6 November 2001, para. 369; *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgment, T. Ch. (ICTY), 14 Jan. 2000, para. 727.

with Rule 47 and Article 18 of the Statute, the reviewing Judge having been satisfied that “a *prima facie* case has been established by the Prosecutor.”

C. Imprecise Dates


20. The Defence argued that the dates provided in the Indictment are imprecise, and thereby violate the rights of the Accused. The Prosecutor explains that the dates are already pleaded in the most specific terms available to the Prosecution.

21. In relation to the dates in the Indictment, the Chamber observes that the dates of alleged crimes should be pleaded with as much precision as possible. However, the Prosecutor has unambiguously asserted that the dates given in the Indictment are the best distillation of the Prosecutor’s information at this time, and that more precision would require speculation.³ Moreover, the Defence, who is in receipt of all of the supporting material to the Indictment, has not pointed to any specific example of the Prosecutor failing to plead information in her possession.


22. Since the Prosecutor does not possess any more precise information, the Chamber cannot order the Prosecutor to amend the Indictment. The Chamber, furthermore, does not consider this to be a situation where it would be unfair to the Accused for the trial to proceed on the Indictment as currently drafted. The dates that the Defence has complained of are sufficiently precise to indicate the material aspects of the Prosecutor’s case against the Accused. In the opinion of the Chamber, the Indictment sets out the material facts of the Prosecution case with enough detail to inform the Accused of the charges against him so that he may prepare his defence.

23. For these reasons, the Motion is DENIED.

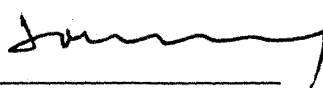
Arusha, 25 July 2002.



Lloyd George Williams, Q.C.
Judge, Presiding



Yakov Ostrovsky
Judge



Pavel Dolenc
Judge

(Seal of the Tribunal)

³ 6 June 2002, Tr. p. 26:19-27:4.