



UNITED NATIONS  
NATIONS UNIES

ICTR-2001-73-PT  
30-9-2005  
(3564-3557)  
International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Dennis C. M. Byron, Presiding  
Karin Hökberg  
Gberdao Gustave Kam

**Registrar:** Adama Dieng

**Date:** 30 September 2005

**THE PROSECUTOR**

v.

**Protais ZIGIRANYIRAZO**

*Case No. ICTR-2001-73-PT*

**DECISION ON DEFENCE URGENT MOTION TO EXCLUDE  
SOME PARTS OF THE PROSECUTION PRE-TRIAL BRIEF**

*Rule 73bis of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**

Wallace Kapaya  
Gina Butler  
Iskandar Ismail  
Jane Mukangira

**Defence Counsel:**

John Philpot  
Peter Zaduk

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** ("Tribunal"),

**SITTING** as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökberg, and Gberdao Gustave Kam ("Chamber");

**BEING SEIZED** of the Defence "Requête urgente pour exclure des éléments de preuve allégués dans le Mémoire préalable au procès du Procureur" filed on 10 August 2005 ("Motion");

**CONSIDERING** the Prosecution's Response filed on 15 August 2005; the Defence Reply filed on 17 August 2005; and the Prosecution's Rejoinder filed on 23 August 2005;

**RECALLING** the Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, delivered on 15 July 2004 ("Decision of 15 July 2004"); and the Decision on the Prosecution Conditional Motion for Leave to Amend the Indictment and on the Defence Counter-Motion Objecting to the Form of the Recast Indictment, filed on 2 March 2005 ("Decision of 2 March 2005");

**NOTING** the Amended Indictment filed by the Prosecution on 8 March 2005 ("Third Amended Indictment"), and the Prosecution's pre-trial brief filed on 22 July 2005;

**CONSIDERING** the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") particularly Rule 73*bis* of the Rules;

**NOW DECIDES** the Motion on the basis of the written briefs of the parties pursuant to Rule 73(A) of the Rules.

### DISCUSSIONS

#### A. Introduction

1. In their submissions, the parties raised the distinction between charges and facts in the Indictment. The Chamber recalls the Appeals Chamber Decision in *Muvunyi* case<sup>1</sup> where it was stated:

19. There is a clear distinction between counts or charges made in an indictment and the material facts that underpin that charge or count. The count or charge is the legal characterisation of the material facts which support that count or charge. In pleading an indictment, the Prosecution is required to specify the alleged legal prohibition infringed (the count or charge) and the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition (material facts). The distinction between the two is one that is quite easily drawn.

20. However, what made that distinction a little more difficult to draw in this case is that the Prosecution has identified numerous material facts as underpinning charges of genocide (Count 1) or alternatively complicity in genocide (Count 2) incurring individual criminal responsibility pursuant to Article 6(1) and superior responsibility pursuant to Article 6(3) of the indictment. Additionally, it has identified much more specific material

<sup>1</sup> *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 (AC), 12 May 2005, especially paras. 19-20 quoted above.

facts as underpinning charges of direct and public incitement to commit genocide (Count 3) incurring individual criminal responsibility pursuant to Article 6(1) of the Statute and rape as a crime against humanity (Count 4) incurring superior responsibility pursuant to Article 6(3) and other inhumane acts as a crime against humanity (Count 5) incurring superior responsibility pursuant to Article 6(3) of the indictment. Because the Prosecution chose to plead numerous material facts as supporting the charge of genocide, many of those material facts themselves actually support other counts or charges that have not been separately charged by the Prosecution. Thus, while the Prosecution sought to amend the indictment by the inclusion of further material facts without amending the counts or charges alleged against the Accused, some of those material facts could readily be characterised as new charges. (Emphasis added).

2. The Chamber also recalls that the Indictment is the primary accusatory instrument. Any other accusatory instrument cannot add charges or material facts amounting to charges that were not pleaded in the Indictment. Pursuant to Rule 73bis(B)(i) and (F), the pre-trial brief addresses the “factual and legal issues” by developing the Prosecution strategy at trial. The pre-trial brief is therefore relevant to the case only as far as it develops such strategy in accordance with the Indictment. The relief sought in the Motion – an exclusion of parts of the pre-trial brief – is therefore unnecessary. However, in the interests of the overall expeditiousness of the trial, the Chamber now prefers to decide whether the alleged new facts and charges were or not pleaded in the Indictment. Whenever those facts and charges are not pleaded in the Indictment, they are irrelevant to the case even if the Prosecution keeps them in the pre-trial brief.

3. In the Defence’s submissions, it is alleged that there are five new charges: a joint criminal enterprise, a conspiracy and an incitement at Nyundo and three different instances of murder. It is also alleged that there are seven new facts, two having already been challenged as new charges: the MRND and the establishment of *Interahamwe*, the Arusha Agreement, the “Hutu Power”, the Bugesera Campaign, the murder of three Belgian teachers and three Tutsi priests, the events at Kiyovu roadblocks, and the conspiracy at Nyundo. The Chamber will consider those allegations one by one, without distinguishing between the two categories when the same element has been raised under both.

#### B. Joint Criminal Enterprise (Paragraph 24 of the pre-trial brief)

4. The Defence submits that Paragraph 24 of the pre-trial brief, dealing with the individual criminal responsibility of the Accused on the basis of a joint criminal enterprise, constitutes a new charge against the Accused. The Defence also submits that, contrary to the statement in the Response, Paragraph 24 of the pre-trial brief is not related to the other allegations of joint criminal enterprise referred to in Paragraphs 16 and 50<sup>2</sup> of the Third Amended Indictment which, according to the Defence, only deal with joint criminal enterprise on a local and not on a national scale. In that regard, the Defence asserts that the disclosure of evidence by the Prosecution is insufficient to correctly inform the Accused on the charge of joint criminal enterprise at a national level. The Defence finally challenges the

<sup>2</sup> Paragraphs 27 and 41 of the Third Amended Indictment are not enumerated but have corresponding wording.

Prosecution's submission that the participation in a joint criminal enterprise would only constitute a clarification or an elaboration of the charge of conspiracy to commit genocide.

5. The Chamber recalls that the issue of joint criminal enterprise was settled in its previous decisions. On 15 October 2003, the Chamber ordered the Prosecution to distinguish "for each Count the alleged acts of the Accused that give rise to individual responsibility under Article 6(1) of the Statute" (para. 26). On 15 July 2004, the Chamber ordered that, "with respect to Counts II, III, IV and V, the Prosecutor should either indicate the nature and the purpose of the joint criminal enterprise in which the Accused allegedly participated, its period of existence, its other participants, the implication of the Accused in it and any facts and circumstances from which the Prosecution infers the existence of and the Accused's participation in the alleged joint criminal enterprise or strike the words "or in concert with others in pursuit of a common purpose" [...]"<sup>3</sup> On 2 March 2005, the Chamber finally stated that "the Prosecutor has complied in all other respects with the Decision of 15 July 2004, requiring him to state the different forms of participation in the crimes alleged, and in particular with regard to the pleading of personal responsibility and the nature and purpose of the joint criminal enterprise alleged."<sup>4</sup> The pre-trial brief provides additional particulars to the pleading of a joint criminal enterprise with regard to the participants. It is regrettable that those particulars were not provided early and in the Indictment, but they do not constitute a new charge. When assessing the evidence adduced on trial, the Chamber will take into account the time of their disclosure, guaranteeing the rights of the Accused. The further challenges of this pleading are irrelevant in the Chamber's view, and the pre-trial brief does not add any charge to the Third Amended Indictment. The Defence contention therefore stands to be dismissed.

C. Conspiracy and Incitement at Nyundo (Paragraphs 33-35 of the pre-trial brief)<sup>5</sup>

6. These paragraphs refer to a meeting held in April 1994 in the football field in Nyundo, between the Accused, Bikindi, Munyagishari and Kabiligi, the *conseiller* of Muhire Secteur, in which they participated in a meeting to plan to kill Tutsi in the area. The Defence holds that the charges referred to in Paragraphs 33, 34 and 35 of the pre-trial brief constitute a new allegation of conspiracy and incitement to commit genocide against the Tutsi. The Defence further holds that these charges are not in the Third Amended Indictment and are not related to any other allegations in the Indictment. The Defence finally holds that it has not conducted any investigations on these allegations since they were unknown to the Accused, while as it is stated in the pre-trial brief there is still some vagueness about the date.

7. The Chamber takes note of the Prosecution's assertion that Paragraphs 34 and 35 are related to Paragraphs 5 and 6 of the Indictment, and Paragraph 33 associated with Paragraph 24 of the pre-trial brief is related to Paragraphs 3, 5, 6 and 8 of the Indictment. Having reviewed the relevant paragraphs in the Third Amended Indictment the Chamber considers that the particulars provided in the pre-trial brief are new facts related to the allegations already in the Indictment, and do not amount to new charges. The Chamber takes note of the Prosecution's statement that Nyundo is in Gisenyi *Préfecture*. The Chamber also

<sup>3</sup> See: Decision of 15 July 2004, (para. 47 (v)).

<sup>4</sup> See: Decision of 2 March 2005, (para. 21).

<sup>5</sup> The events occurring in Nyundo have been challenged by the Defence as new charges and new facts.

takes note of the Defence statement that they did not conduct any investigation on the matter, and considers that this is an issue to be raised on trial showing good cause for any remedy. The Defence challenge in this respect therefore cannot now succeed.

D. Allegations of murder of Venantie's family (Paragraphs 57-58 of the pre-trial brief), of Judge Nzamuye (Paragraph 61 of the pre-trial brief), of three Belgians and three Tutsi priests (Paragraphs 29 and 62 of the pre-trial brief).

8. With regard to the facts in Paragraphs 57-58 and 61 of the pre-trial brief, relating to the killing of Venantie's family (in Nyundo) and of Judge Nzamuye (in Giciye town), through means of instigation by the Accused, the Defence submits that these are new facts. The Defence also asserts that Paragraphs 29 and 62 of the pre-trial brief on the murder of three Belgian teachers and three Tutsi priests constitute new facts which amount to new charges of murder not mentioned in the Third Amended Indictment. Those facts, in the Defence's view, also substantiate the count of conspiracy between Agathe Kanziga and the Accused. They were not disclosed until the filing of the pre-trial brief, while on 15 July 2004 the Chamber in vain ordered the Prosecution to either strike the reference to her as one of those who worked out the list of people to be killed. The Defence further asserts that the witness summaries provided by the Prosecution do not contain any reference to these facts.

9. The Prosecution replies that the Defence is attempting to re-litigate the issue whether a factual basis for an allegation of conspiracy between the Accused and Agathe Kanziga is pleaded in the Indictment. The Prosecution states that the issue was settled when, after the Decision of 2 March 2005, the Prosecution implemented the Order to support the charge.

10. On Paragraphs 57 and 58 of the pre-trial brief, the Prosecution stresses that these facts supplement the existing charges of genocide (Count II), or in the alternative, of complicity in genocide (Count III) and of murder (Count V), highlighting that Witness ATN's statement contains these allegations and was disclosed to the Accused. On Paragraph 61, the Prosecution relies on the same argument, those killings being part of the attacks described in Paragraph 42 of the Indictment. Finally, on Paragraphs 29 and 62 of the pre-trial brief, he submits that they contain additional facts that clarify, particularize or elaborate Paragraph 5 of the Indictment related to conspiracy to commit genocide (Count I), genocide (Count II), or in the alternative, complicity in genocide (Count II), and murder (Count V).

11. Furthermore, the Prosecution submits that the killings alleged in Paragraphs 29, 57, 61 and 62 of the pre-trial brief help in the demonstration of a pattern of killing as that alleged in Paragraphs 25-26 and 48-49 of the Indictment and are therefore admissible in the interests of justice. The Prosecution refers to Rule 93(A) and (B) of the Rules as the legal basis for the admission of evidence relating to the said killings.

12. Following those arguments, the Defence asserts that the declaration of only one witness is not sufficient to provide information to the Accused on the facts alleged in Paragraphs 57 and 58 of the pre-trial brief. Regarding the killing of Judge Nzamuye, the Defence underlines that none of the witnesses mentioned by the Prosecution to support such an allegation – namely APJ, BIV, SGO, SGP – has affirmed that the Accused ordered that killing. The Defence submits that the Accused would suffer an important prejudice if he would have to prepare to defend himself on such a completely new charge.

13. The Chamber holds the view that none of those specific murders were explicitly pleaded in the Indictment. The Chamber accepts that some were in the disclosure made to the Defence. But as the Chamber has stated above, the process of curing an Indictment does take place only when the material fact was already in the Indictment in a certain manner, not when it was not included at all. The Chamber notes that the Prosecution has acknowledged that "some facts expand the scope of the allegations against the Accused" affirming that the Accused does not suffer any prejudice because those materials were disclosed in a timely, clear and consistent fashion. The Chamber also notes the Prosecution's assertion that the rights of the victims should be taken into account, but wishes to recall that those rights are to be balanced with the rights of the Accused to a fair trial as stated in Article 20(4) of the Statute.

14. The Chamber finds that the alleged murders constitute new and precise material facts which should have been pleaded in the Indictment at least in such a way that they could be discerned by the attentive reader. That is not the case here. Failure to have done so cannot in the present case be cured by the disclosure even if it was made in a timely, clear and consistent manner. These facts are then irrelevant to existing charges.<sup>6</sup> Having found this, the Chamber sees no reason to accept the Defence challenge.

15. The Chamber recalls that the Accused was indicted, arrested and transferred to the Tribunal Detention Centre in 2001. Since then the Prosecution has been granted leave to amend the Indictment twice: the first time upon its request, the second time following the Chamber's finding that an allegation included in the Amended Indictment was a material fact which should be included. In the Decision of 2 March 2005 (paras. 13-16) the Chamber was of the view that leave to amend the Indictment in order to include the Rurunga Hill attacks should be granted because there was no prejudice to the Accused. At this stage, however, the Chamber considers that a further leave to amend the Indictment and to include new charges would affect the rights of the Accused.

E. MRND and Establishment of *Interahamwe* (Paragraph 9 of the pre-trial brief), Arusha Accords (Paragraph 10 of the pre-trial brief), "Hutu Power" (Paragraph 11 of the pre-trial brief) and Bugesera Campaign (Paragraph 12 of the pre-trial brief)

16. The Defence submits that the issue of the establishment of the *Interahamwe* and of the programme of civil defence, in which the *Interahamwe* would have been subsequently incorporated, was not included in the Indictment. The Defence contends that the question of the conduct of the MRND vis-à-vis the civil defence programme, is an allegation having a national dimension, being also related to the "great debates" currently in course in other Trials. On "Hutu Power" and the description of the awareness campaign conducted by the Accused as a member of the Akazu in the Bushiru region (Gisenyi and Ruhengeri), the Defence submits that these are new facts with respect to the Indictment. As for the Arusha Accords, the Defence submits that they were not part of the Prosecution case. Finally, as for the Bugesera Campaign, in which members of the Akazu in Kibaya, Gisenyi and the country's highest civilian and military authorities would have nationwide incited towards

<sup>6</sup> The Prosecutor cannot therefore lead evidence to prove those facts.

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*Decision on Defence Urgent Motion to Reinstate Some Parts of the Prosecution Pre-Trial Brief*

30 September 2005

ethnic hatred and violence, the Defence submits that the Accused has no information and would not be able to prepare his defence on such an issue.

17. These newly raised issues would necessitate a postponement of the trial and the Defence would need an expert in order to approach some of them. The same considerations apply with regard to the youth of ~~the Accused~~ in ~~the region~~ where ~~additional~~ information to be disclosed to the Defence. The Defence also considers that the term "Hutu Power" itself is not relevant to the indictment and that the question of the existence of "Hutu Power" in the Bushiru region prior to the implementation of the Arusha Accords is an allegation of such a great dimension that was never before raised in any indictment.

18. The Chamber holds the view that these facts are only relevant to the background and the context of the specific allegations brought against the Accused. Their being included in the pre-trial brief, even if they are not in the indictment, do not affect the right of the Accused. The Defence challenge in this respect therefore cannot succeed.

**F. Kiyovu Roadblocks (Paragraphs 43-45 of the pre-trial brief)**

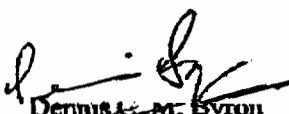
19. The Defence submits that the situation with regard to the allegations contained in Paragraphs 43, 44 and 45 of the pre-trial brief is similar to the one of the previous paragraphs already challenged in its motion. The Defence considers that there is no justification for such a late submission of new charges. The dates provided as well as the names of the subordinates of the Accused are vague.

20. The Chamber notes that in several paragraphs of the Third Amended Indictment the allegation with regard to Kiyovu Roadblocks appears, especially, Paragraphs 10, 17, 23 and 24. The pre-trial brief, in such circumstances, provides further particulars and completes the information given to the Accused. If such information is not sufficient for the Accused to prepare, he will have to make his arguments at a later stage when the Prosecution will have adduced the relevant evidence. The Defence challenge in this respect therefore cannot succeed.

**FOR THE ABOVE REASONS, THE CHAMBER**

- I. **REJECTS** the Motion in its entirety;
- II. **DECLARES** that the alleged murder of Venerable's Family, of Judge Nzamuye, of three Belgians and three Tutsi priests are not relevant to the case.

Arusha, 30 September 2005, done in English.

  
Dennis M. Byron  
Presiding Judge

  
Karin Holmberg  
Judge

  
Ghervan Gustave Kam  
Judge

[Seal of the Tribunal]

ethnic hatred and violence, the Defence submits that the Accused has no information and would not be able to prepare his defence on such an issue.

17. These newly raised issues would necessitate a postponement of the trial and the Defence would need an expert in order to approach some of them. The same considerations apply with regard to the youth of MRND in Gisenyi which would require additional information to be disclosed to the Defence. The Defence also considers that the term "Hutu Power" itself is not relevant to the Indictment and that the question of the existence of "Hutu Power" in the Bushiru region prior to the implementation of the Arusha Accords is an allegation of such a great dimension that was never before faced in any Indictment.

18. The Chamber holds the view that these facts are only relevant to the background and the context of the specific allegations brought against the Accused. Their being included in the pre-trial brief, even if they are not in the Indictment, do not affect the rights of the Accused. The Defence challenge in this respect therefore cannot succeed.

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20. The Chamber notes that in several paragraphs of the Third Amended Indictment the allegation with regard to Kiyovu Roadblocks appears, especially, Paragraphs 10, 17, 23 and 24. The pre-trial brief, in such circumstances, provides further particulars and completes the information given to the Accused. If such information is not sufficient for the Accused to prepare, he will have to make his arguments at a later stage when the Prosecution will have adduced the relevant evidence. The Defence challenge in this respect therefore cannot succeed.

**FOR THE ABOVE REASONS, THE CHAMBER**

**I. DENIES** the Motion in its entirety;

**II. DECLARES** that the alleged murder of Venantie's Family, of Judge Nzamuye, of three Belgians and three Tutsi priests are not relevant to the case.

Arusha, 30 September 2005, done in English.

Dennis C. M. Byron  
Presiding Judge

Karin Hökberg  
Judge

Gerdard Gustave Kam  
Judge

