

UNITED NATIONS



International Criminal Tribunal for the
Prosecution of Persons Responsible for
Genocide and Other Serious Violations of
International Humanitarian Law committed
in the territory of Rwanda and Rwandan
Citizens responsible for genocide and other
such violations committed in the territory of
neighbouring States, between 1 January 1994
and 31 December 1994

Case No. ICTR-96-15-I

ENGLISH

Original: FRENCH

TRIAL CHAMBER II

Before Judges: Laïty Kama, presiding
William H. Sekule
Mehmet Güney

Registry: Ms Aminatta N'Gum

Decision of: 31 May 2000

THE PROSECUTOR

vs.

JOSEPH KANYABASHI
Case No ICTR-96-15-I

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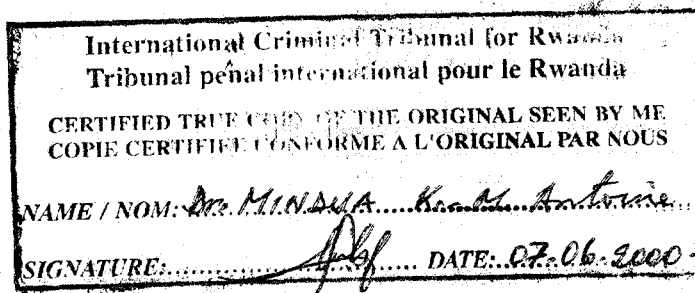
**DECISION ON DEFENCE PRELIMINARY MOTION FOR DEFECTS
IN THE FORM OF THE INDICTMENT
(Rule 72 (B)(ii) of the Rules of Procedure and Evidence)**

Office of the Prosecutor:

Mr. Japhet Mono
Ms Andra Mobberley
Mr. Ibukundu A. Babajide

Defence Counsel:

Mr. Michel Marchand
Mr. Michel Boyer



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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("The Tribunal")

SITTING as Trial Chamber II, composed of Judges Laïty Kama, presiding, William H. Sekule and Mehmet Güney;

CONSIDERING the initial indictment confirmed by Judge Yakov Ostrovsky on 15 June 1996 ;

CONSIDERING the indictment amended on 17 August 1999 ("the Indictment"), upon leave granted by this Chamber on 12 August 1999;

HAVING BEEN SEIZED of Defence preliminary motion for defects in the form of the indictment dated 9 October 1999;

CONSIDERING the Prosecutor's response to the said motion dated 14 February 2000;

HAVING HEARD the parties during the hearing held for this purpose on 29 February 2000.

Submissions by the parties:

The Defence

1. Under Rule 72 (B)(ii) of the Rules of Procedure and Evidence (the "Rules"), the Defence raises a number of defects in the form of the indictment, and submits essentially as follows:
 - 1.1. In addition to the relevant provisions, specifically, Articles 17 (4) and 20 (4)(a) of the Statute of the Tribunal (the "Statute"), and Rule 47 (C) of the Rules, an indictment must include some degree of specificity concerning temporal references, the charges, the distinction between the types of the Accused's individual responsibility, his conduct or the extent of his participation in the acts with which he is charged. In support of this submission, the Defence refers, particularly, to the decisions of 24 November 1997 and 17 November 1998 in the *Nahimana* case, and to the decision of 30 June 1998 in the *Ntakirutimana* case as well as the relevant case-law of the International Criminal Tribunal for the Former Yugoslavia.
 - 1.2. All nine counts of the Indictment begin with the following words:

By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below [...]

Now, the words "*and more specifically*" are imprecise and not at all restrictive. Therefore the charges must be set aside or, alternatively this formulation deleted.
 - 1.3. With the exception of Count 4, all the counts refer to the same paragraphs concerning the alleged facts. This identical formulation reads as follows:

"- pursuant to Article 6 (1), according to paragraphs: 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65

- pursuant to 6(3), according to paragraphs: 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65".

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According to the Defence, the effect of such practice certainly is to "*facilitate the work of the Prosecutor* [...]", but at the same time it prevents the Accused from knowing precisely what he is accused of individually or on account of the conduct of his subordinates. Consequently, these eight counts must be set aside.

- 1.4. Count 4 must also be set aside because it is vague and imprecise. The Defence submits that the Prosecutor failed to specify the time or to provide specific factual references as to the deeds or conduct of the Accused or his subordinates and as to Accused's exact role in the acts charged.
- 1.5. The paragraphs included in the formulation "5.1 to 6.65", but which are not specifically mentioned in the various counts namely 5.2 to 5.7, 5.9 to 5.11, 5.14 to 5.18, 6.1 to 6.21, 6.23 to 6.25, 6.27, 6.36, 6.39, 6.40, 6.47 to 6.56, must be deleted, firstly, on account of their vagueness and imprecision and, secondly, because they in no way cover the accused or his subordinates. Since joinder of Accused was granted in the absence of a joint indictment, all allegations unrelated to the Accused must be deleted from his Indictment;
- 1.6. Those paragraphs specifically referred to in the various counts namely 5.1, 5.8, 5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.57 to 6.65, should all be set aside, again, on account of their vagueness and imprecision and, more specifically, on account of one or more of the following reason:
 - (1) Absence of or imprecision in time references;
 - (2) Lack of specific factual reference as to the Accused's individual conduct with respect to the acts with which he is charged and as to role in the alleged crimes in relation to his hierarchical superiors, his co-conspirators, or his subordinates;
 - (3) Failure to disclose the identity of his co-conspirators.

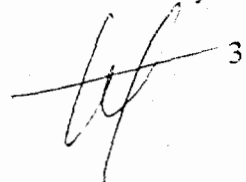
2. Consequently, in light of the foregoing the Defence prays:

- 2.1. That the indictment be set aside because it is vitiated by serious defects;
- 2.2. Alternatively, that should the Chamber decline to quash the indictment, the Prosecutor be ordered to effect the corrections requested by the Defence within 30 days.
- 2.3. That the Defence be allowed to reserve its right to raise objections to the indictment as amended following the decision of this present Chamber.

The Prosecutor

3. In response to the Defence, the Prosecutor mainly submits the following:

- 3.1. The style of the Indictment is within the sole prerogative of the Prosecutor, who has the power to adopt, under the guidance of the Trial Chamber, styles drawn from different jurisdictions throughout the world.
- 3.2. Regarding the nature and the scope of the facts indicated in the Indictment, it is necessary to



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make a distinction, between the minimum guarantees which the Accused is entitled to in the outline of the Indictment on the one hand, and, on the other hand, the right of the Accused to be provided subsequently with more detailed information so as to enable him prepare his defence. At this stage of the proceedings, the object of the Indictment is not to enable the Accused to prepare his defence, but rather to ensure that the Accused can read and fully understand the charges brought against him.

- 3.3. Regarding the wording "*and more specifically*", used in each of the counts, the Prosecutor submits that this formulation far from misleading the Defence, enables it to differentiate between the paragraphs which are purely of a narrative nature and those which describe specifically the acts alleged.
- 3.4. In response to the allegation by the Defence that counts 1 to 3 and 5 to 9 are cumulative since they all refer to the same factual paragraphs, the Prosecutor submits that the acts and omissions charged against the Accused all result from the same criminal transaction, in the instance, the genocide of 1994. The paragraphs cited all relate to each of the counts, but not necessarily in similar fashion to each of the factual ingredients of each count. In addition, the Prosecutor refers to the Decision of 24 November 1997 in the matter of *Nahimana* in which the Trial Chamber dismissed the allegation of cumulative charges made by the Defence, holding that the matter would only be relevant when determining the penalty.
- 3.5. Regarding temporal references, the Prosecutor submits that she focused on the sequence of events in which the Accused was allegedly involved, and that consequently, it is necessary to use *inclusive* rather than *exclusive* time frames.
- 3.6. Regarding the identity of the co-conspirators, Article 3 of the Statute does not require that the Prosecutor should name all the co-conspirators and the Prosecutor contends that with respect to the facts referred to in the first count of the Indictment on conspiracy to commit genocide, she followed the case-law established by the Decision of 24 November 1997 in *Nahimana* case, requesting the Prosecutor "*to identify some or all of the persons with whom the Accused, in the first count allegedly conspired to commit genocide*".
- 3.7. The submission by the Defence that the Indictment is vague as to the individual acts or the role of the Accused in the crimes alleged, or as to his acts or role as a subordinate, co-conspirator or hierarchical superior, is without merit. The specific factual information sought by the Defence is contained in the paragraphs referred to in each of the counts.
- 3.8. Moreover, the provisions of the Statute and the Rules provide that the clarifications sought by the Accused shall be specified during the disclosure process after his initial appearance.
- 3.9. Regarding the paragraphs which have not specifically been referred to in the counts, it appears from the structure of the Indictment that these mention the context within which the paragraphs which relate directly to the Accused should be situated, thus forming an integral part of the Prosecutor's argument.
- 3.10. Furthermore, in case of defects in the form of the indictment, the Rules do not provide that the Indictment be set aside. The practice is rather to direct, if necessary, the Prosecutor to cure if necessary, the defects in the form of the Indictment.



4. For all the foregoing reasons, the Prosecutor prays the Chamber to dismiss the Defence motion.

AFTER HAVING DELIBERATED,

Regarding the defects in the form of the Indictment:

- 5.1. WHEREAS an Indictment must be sufficiently clear to enable the Accused to fully understand the nature and cause of the charges brought against him;
- 5.2. WHEREAS the Trial Chamber reminds the Prosecutor that, pursuant to Article 20 (4) (a) of the Statute, an Indictment should present in a precise and detailed manner, the charges brought against the Accused;
- 5.3. WHEREAS the Accused may, pursuant to Rule 72 of the Rules, raise objections based on defects in the form of the indictment, which procedure enables him to obtain further information in order to fully understand the nature and cause of the charges brought against him;
- 5.4. WHEREAS, in the opinion of the Trial Chamber, contrary to the Prosecutor's submission, the clarification required in the Indictment therefore does not relate to style;

Regarding the fact that, with the exception of count 4, all counts refer to exactly the same paragraphs of the Indictment:

- 5.5. WHEREAS counts 1 to 3 and 5 to 9 refer without distinction to the same paragraphs of the Indictment, that is, paragraphs 5.1, 5.8.5.12, 5.13, 6.22, 6.26, 6.28 to 6.35, 6.37, 6.38, 6.41 to 6.46, 6.576 to 6.65;
- 5.6. WHEREAS the Trial Chamber notes that it is the usual practice before the Tribunal, which does not in anyway prejudice the Accused;
- 5.7. WHEREAS, furthermore, the Trial Chamber recalls that the issue of multiple charges can only be considered at trial and ruled on when judgement is passed, and not at this stage of the proceedings;

Regarding the fact that, according to the Indictment, the Accused incurs individual criminal responsibility, by reason of the same facts, pursuant to Article 6 (1) and Article 6 (3) of the Statute:

- 5.8. Whereas the Trial Chamber notes that with the exception of count 4, the wording of the charges states that the Accused incurs individual criminal responsibility based on the same facts, both under Article 6 (1) of the Statute and that of Article 6 (3) as hierarchical superior;
- 5.9. Whereas the Trial Chamber holds that such a practice makes it impossible for the Accused to understand the nature and the cause of the specific charges brought against him, since the same facts cannot simultaneously give rise to the two types of responsibility provided for under the Statute;
- 5.10. Whereas the Trial Chamber notes the case-law established by Trial Chamber I in its Decision

rendered on 17 November 1998, in the *Milutinovic* case, which directed the Prosecutor to amend the Indictment "*specifying [...] the alleged acts for which the Accused is held individually criminally responsible pursuant to Article 6 (1) of the Statute and the acts allegedly committed by the Accused's subordinates for which he is held individually criminally responsible pursuant to Article 6 (3) of the Statute*".

- 5.11 Whereas the Trial Chamber consequently holds that the Prosecutor must clearly distinguish between facts as a result of which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those giving rise to his responsibility under Article 6 (3);

Regarding the alternative nature of the charges of genocide and complicity in genocide :

- 5.12 Whereas the Trial Chamber notes that in its oral decision of 12 August 1999 granting leave to amend the indictment, it stated :

"that it follows from the Prosecutor's clarification during the hearing of the motion, that count 2 of the amended indictment of genocide and count 3 of the amended indictment of complicity in genocide are meant to be charged alternatively";

- 5.13 Whereas it is clear that the counts of genocide and complicity in genocide are alternative counts and that in the opinion of the Chamber the Indictment must clearly indicate that the said two counts are charged alternatively;

The paragraphs referred to in the counts which the Defence claims do not concern the Accused

- 5.14 WHEREAS the Trial Chamber notes that while certain paragraphs in the Indictment do not refer directly to the Accused, they nevertheless make for an understanding of the background to the acts with which the Accused is charged;
- 5.15 Whereas, the Trial Chamber holds that the Indictment must be read as a whole and that the paragraphs which do not refer specifically to acts with which the Accused is charged must be read in conjunction with those that concern him directly, and that consequently, it is not appropriate to delete them;
- 5.16 Whereas, in any case, the Trial Chamber reminds the Defence that the paragraphs which do not directly refer to the Accused are only of general import and, therefore, must not be construed as supporting the counts;

The general introductory formulation of each count:

- 5.17 WHEREAS, contrary to the Prosecutor's assertion, the Chamber finds that the general introductory formulation to each count, "*By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below*", does not specify nor does it limit the reading of the counts, but rather expands the Indictment without concretely identifying precise allegations against the Accused;
- 5.18 Therefore, the Trial Chamber holds that the said introductory formulation must be deleted from

each count and that each count must consequently only mention the specific paragraphs of the Indictment which directly concern the allegations against the Accused;

The vague and imprecise nature of the counts and the paragraphs to which they refer:

- 5.19 WHEREAS the Trial Chamber finds that the vague and imprecise nature of the counts, as alleged by the Defence, indeed stems from the lack of specificity of the paragraphs to which the said counts refer;
- 5.20 Whereas, with respect to the paragraphs which are not specifically referred to in the counts, the Chamber finds that it is not necessary to consider whether they are vague and imprecise, since as a result of the general introductory formulation to each count being deleted, such formulation will no longer be reflected in the charges against the Accused;
- 5.21 Whereas, therefore, after having carefully reviewed the paragraphs specifically referred to in the Indictment, the Chamber is of the opinion that the following paragraphs of the Indictment must be clarified:

(a) Paragraph 5.8:

The Prosecutor must align the wording of this paragraph of the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996, which is more precise;

(b) Paragraph 5.12:

The Prosecutor must specify whether the Accused is charged with having committed acts solely in Ngoma *commune* or also in Nyakizu *commune*, as indicated in paragraph 6.31;

(c) Paragraph 6.29:

It is necessary to specify the identity of the subordinates referred to in this paragraph;

(d) Paragraph 6.37:

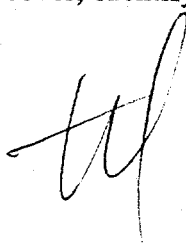
There appears to be a discrepancy between the English version and the French version with regard to the word "*éventuellement*", which appears in the last sentence of the paragraph. The Prosecutor should therefore harmonize the two versions;

(e) Paragraph 6.63:

The phrase "*During the events referred to in this indictment*" is not sufficiently precise; the Prosecutor must make reference to more specific dates;

(f) Paragraph 6.64:

This paragraph gives no indication as to the period during which the events referred to occurred; the Prosecutor must specify dates, and moreover, identify who the subordinates referred to in the paragraph are.



- 5.22 WHEREAS the Chamber finds that it is not necessary to respond to the Defence's objections relating to the other paragraphs, either because the paragraphs in the Indictment are sufficiently clear or because the factual precisions sought by the Defence bear on issues to be addressed during the trial on the merits, or also because the requested precisions sought can be inferred from the context of the paragraphs in question, bearing in mind the Chamber's opinion that the Indictment must be read as a whole.

Paragraph 6.66

- 5.23 WHEREAS, on this point, the Trial Chamber simply notes that said paragraph 6.66 is not referred to in any of the counts and does not rule on this matter.

FOR THE FOREGOING REASONS,

THE TRIBUNAL,

DISMISSES the Defence request to set aside the Indictment;

RULES that the Prosecutor must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6 (1) of the Statute from those for which he incurs criminal responsibility under Article 6 (3);

ORDERS that the Indictment must clearly indicate that the counts of genocide and conspiracy to commit genocide be clearly indicated in the Indictment;

RULES that the general introductory formulation to each count, "*By the acts or omissions described in paragraphs 5.1 to 6.65 and more specifically in the paragraphs referred to below*", must be deleted from each count and that each count must consequently only mention the specific paragraphs of the Indictment which directly concern the allegations against the Accused;

DIRECTS the Prosecutor to clarify paragraphs 5.8, 5.12, 6.29, 6.37, 6.63 and 6.64 of the Indictment as follows:

Paragraph 5.8:

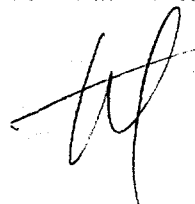
The Prosecutor must align the wording of this paragraph in the Indictment with that of paragraphs 7, 13 and 14 of the initial Indictment dated 15 June 1996;

Paragraph 5.12:

The Prosecutor must specify whether the Accused is charged with acts committed only in Ngoma *commune* or also in Nyakizu *commune*, as indicated in paragraph 6.31;

Paragraph 6.29:

The Prosecutor must specify the identity of the subordinates referred to;



(g) Paragraph 6.37:

The Prosecutor must harmonize the meaning of the word "*eventuellement*" which appears in the last sentence of the paragraph in the English and French versions of the indictment;

(h) Paragraph 6.63:

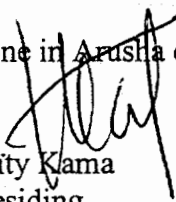
The Prosecutor must make reference to more specific dates;

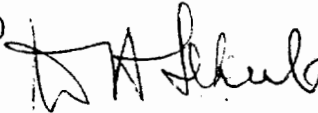
(i) Paragraph 6.64:

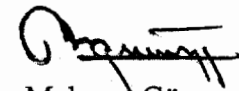
The Prosecutor must provide specific dates and identify who the subordinates referred to in this paragraph;

FURTHER DIRECTS the Prosecutor to file with the Registry within 30 days from the date of this Decision, the English and French versions of the Indictment amended pursuant to this Decision.

Done in Arusha on 31 May 2000


Laity Kama
Presiding


William H. Sekule
Judge


Mehmet Güney
Judge

(Seal of the Tribunal)

