

PART SEVEN: SENTENCING ISSUES:

I. PRELIMINARY REMARK

2597. We must make clear that we are discussing this issue in order to comply with the provision of Rule 86 of the Rules of Procedure and Evidence. The Ntabakuze Defence submitted that the Prosecution did not prove his case beyond reasonable doubt and that the Accused should be acquitted. As demonstrated above, the Ntabakuze Defence has even gone beyond of what it is normally required for the defence which is creating a reasonable doubt. But if, in the impossible, the Chamber founded him guilty of any of the charges against him, the Ntabakuze Defence prays the Chamber to take into account the following mitigating circumstances in imposing the sentence against him.

II. THE GOOD CHARACTER OF THE ACCUSED

2598. Several witnesses, most notably Colonel Dewez, Colonel Marchal, DM-25, DK-32 and DM-26 commented on the good character of the Accused, highlighting his helpfulness and heroism during the time they knew him in Rwanda.

Major Ntabakuze taught cohesion and love to his soldiers and preached by example. As testified to by Prosecution and Defence witnesses, there was no discrimination in the Para Commando Battalion. One of Para Commando soldier testified that Major Ntabakuze was nicknamed “love” by his soldiers. Major Ntabakuze managed to maintain discipline, cohesion and combat effectiveness within his unit until the defeat of the Rwandan Army. He was characterized by a spirit of self-sacrifice. He fought for the integrity of the national territory and for peace of its people without any distinction. He was opposed to the massacres. During his testimony before the Chamber, he expressed regret for not having been able to stop the massacres. He expressed his willingness to contribute to the reconstruction of the Rwandan society and to its reconciliation. (see Background).

It is submitted that, should the Trial Chamber convict the Accused of any of the charges against him, his good character should be considered in mitigation of his sentence.

III. PREJUDICE CAUSED BY PRE-TRIAL PROCEEDINGS²⁶²⁴

A. CONDITIONS OF ARREST AND DETENTION OF THE ACCUSED NTABAKUZE

2599. On 9 July 1997, the Prosecutor filed a request for transfer and provisional detention of Major Aloys Ntabakuze. An affidavit dated July 10, 1997 and signed by Alphonse Breau, Director of investigations in the Prosecutor's office, was attached to the Prosecutor's request. However, the request and the affidavit did not contain any precise allegations against Major Aloys Ntabakuze.
2600. On 16 July 1997, Judge Laïty Kama issued an order for transfer and provisional detention of Major Aloys Ntabakuze.
2601. Major Aloys Ntabakuze was arrested on 18 July 1997 in Nairobi, Kenya, without an indictment and transferred to the United Nations Detention Facility (UNDF) at Arusha that same day. It is submitted that the documents concerning his arrest and his provisional detention for three months with no indictment demonstrate that the Accused was the victim of a serious injustice. These documents show that the Prosecution had no allegations against the Accused Ntabakuze at the time of his arrest and that thereafter the Prosecutor had serious difficulties in establishing an indictment against him.
2602. On 12 August 1997, the Prosecutor filed a request for extension of the 30 day period of provisional detention of the then-suspect Major Aloys Ntabakuze. The Prosecutor attached an affidavit signed by Oyvind Olsen, in charge of investigations, to his request. However, the affidavit, like the Prosecutor's request itself, failed to indicate precise allegations against Major Aloys Ntabakuze.
2603. On 14 August 1997, Judge Laïty Kama issued a decision granting the Prosecutor's request for an extension of the 30 days of provisional detention of Major Aloys Ntabakuze.
2604. On 10 September 1997, the Prosecutor filed yet another request for an extension of another 30 days of provisional detention of the suspect Ntabakuze. The Prosecutor attached to his

²⁶²⁴ The details of all of the Proceedings related to this trial can be found in the Procedural History in annex

request another affidavit signed by Oyvind Olsen containing practically the same ambiguous elements as the last one dated 12 August 1997.

2605. On 16 September 1997, in an oral Decision without articulated reasons at that time, Judge Pillay granted the Prosecutor's request for another extension of a 30 day period of provisional detention of the suspect Ntabakuze. The reasons in support of that oral Decision were ultimately given in the written Decision issued on 5 November 1997.

2606. On the eve of the expiration of the last 30 day extension period, on 14 October 1997, the Prosecutor proffered, what it is submitted was, an ambiguous indictment against the Accused, thus maintaining his continued detention. A joint indictment with General Gratien Kabiligi was confirmed by Judge Aspegren on 15 October 1997, the last day of the extension period. Major Aloys Ntabakuze was served, at UNDF on 16 October 1997, with a joint indictment with Gratien Kabiligi along with a warrant of arrest and an order for continued detention signed by Judge Aspegren on 15 October 1997.²⁶²⁵

2607. On 24 October 1997, the Accused pleaded not guilty to all five counts:

- Genocide
- Complicity in genocide
- Crime against humanity/Murder
- Crime against humanity/Other Inhumane Acts
- Violation of Geneva Convention/Killing and causing violence.

2608. The Accused Major Aloys Ntabakuze challenged the legality of his arrest and of his provisional detention from 18 July to 15 October 1997 in his motion of 23 February 1998 which motion was rejected by the Trial Chamber II Decision of 25 September 1998.

²⁶²⁵ October 15, 1997 was the last day of the provisional detention of Ntabakuze pursuant to the Chamber decision of 16/09/1997. Ntabakuze signed a "Return of Service" upon receiving the indictment and the warrant of arrest from the Commanding officer of the UNDF on 16/10/1997 at around 01:00 a.m.

B. DEFENCE PRELIMINARY MOTIONS ON THE ORIGINAL INDICTMENT

2609. The Ntabakuze Defence filed a preliminary motion relating to defects in form and substance of indictment on 19 December 1997. By its Decision on 5 October 1998, Trial Chamber II ordered the Prosecution to provide precisions to two paragraphs of the indictment.
2610. On 23 February 1998, the Ntabakuze Defence filed a preliminary Motion for the annulment of the proceedings, for release and for return of the items and documents seized from the Accused Ntabakuze. On 25 September 1998, Trial Chamber II rejected the annulment of proceedings but ordered the Prosecution to return items seized from him to the Accused Ntabakuze.
2611. On 23 February 1998, Ntabakuze filed Defence motion requesting an order for separate trials which was rejected on 30 September 1998 by the Trial Chamber II.

C. AMENDMENT OF THE INDICTMENT

2612. On 13 July 1998, the Prosecutor filed a motion for leave to file an amended joint indictment against Major Ntabakuze with General Gratien Kabiligi. On 28 June 1999, the Prosecutor filed a motion for a stay of execution of the 5 October 1998 decision.
2613. On 13 August 1999, Trial Chamber II orally granted the Prosecutor's motion to amend the indictment, which now contained ten counts. At this time, the Prosecution had not yet executed the requirements of the Decision of 5 October 1998. In its written Decision of 8 October 1999 granting the requested amendment, the Trial Chamber declared the decision of 5 October 1998 to be moot.
2614. On 13 August 1999, despite Defence objection, the Accused Major Aloys Ntabakuze was compelled by Trial Chamber II to plead to all ten counts instead of only to the new counts, contrary to the provisions of Article 50 B) of the Rules of Procedure and Evidence. Ntabakuze pleaded not guilty to each one of the ten counts contained in the amended indictment:

- Count 1: Conspiracy to commit genocide
- Count 2: Genocide
- Count 3: Complicity in genocide
- Count 4: Crime against Humanity/Murder
- Count 5: Crime against Humanity/Extermination
- Count 6: Crime against Humanity/Rapes
- Count 7: Crime against Humanity/Persecution
- Count 8: Crime against Humanity/ Inhumane Acts
- Count 9: Violation of Geneva Convention/Killing and causing violence
- Count 10: Violation of Geneva Convention/Outrages upon personal dignity

After that plea, the case was reassigned to the Trial Chamber III.

D. JOINDER

2615. On 13 July 1998, the Prosecution filed a motion for joinder of the following cases: the case of Théoneste Bagosora (ICTR-96-7-T), the case of Gratien Kabiligi and Aloys Ntabakuze (ICTR-97-34-I and ICTR-97-30-I) and the case of Anatole Nsengiyumva (ICTR-96-12-T).

2616. After many Defence objections and decisions by the Trial Chamber II including the decision of 13 August 1999 granting the Prosecutor's motion to amend the indictment, the Trial Chamber III granted, on 29 June 2000, the Prosecution motion for joinder. The Ntabakuze case along with that of Kabiligi was joined to the cases against Colonel Théoneste Bagosora and Lieutenant Colonel Anatole Nsengiyumva, under Case No ICTR-98-41-T with three different indictments:

- The indictment against Bagosora
- The indictment against Nsengiyumva
- The joint indictment against Kabiligi and Ntabakuze

E. DEFENCE PRELIMINARY MOTIONS ON THE AMENDED INDICTMENT

2617. On 13 October 1999, the Ntabakuze Defence filed a motion based on lack of jurisdiction and seeking to declare the amended indictment *void ab initio*. On 13 April 2000, Trial Chamber

III rejected the Defence motion. On 19 April 2000, the Ntabakuze Defence filed a notice of appeal against the 13 April 2000 decision of the Trial Chamber III on the question of lack of jurisdiction (*ratione personae and ratione temporis*). On 13 November 2000, the Appeals Chamber rejected Ntabakuze appeal filed on 19 April 2000. However, concerning the temporal jurisdiction, the Appeals Chamber confirmed that crimes committed before 1 January 1994 cannot be attributed to an Accused and that any reference to the impugned paragraphs related to the allegations falling outside the temporal jurisdiction is made only for clarification.

2618. On 18 October 1999, the Ntabakuze Defence filed a motion for clarification on the new indictment in order to exercise his rights to file preliminary motions pursuant to Rule 72 of the Rules of Procedure and Evidence. On 18 May 2000, the Trial Chamber III rejected Ntabakuze Defence motion.

2619. On 1 June 2000, the Ntabakuze Defence filed a preliminary motion to challenge the vagueness of the new indictment. Notwithstanding that this new indictment was arguably more ambiguous than the first, Trial Chamber III rejected the Defence motion on 20 October 2000 with the reasoning that it was filed after time-limit. However, the Accused Ntabakuze had not waived his right to file preliminary motions to challenge the vagueness of the indictment and, it is submitted, had shown good cause. In point of fact, the Accused Ntabakuze had filed his motion of 1 June 2000 within two weeks of the Decision of 18 May 2000, which Decision he had been awaiting since 18 October 1999.²⁶²⁶ It is submitted that the Accused had no other option other than waiting for that Decision. Therefore, it is submitted that the Chamber should have granted relief from the waiver in favor of the Accused.²⁶²⁷ At that time, the Defence clearly objected to the vagueness of the indictment, which, it is submitted, violated Rule 47 C of the Rules of Procedure and Evidence (which vagueness the Defence has continuously raised as problematic throughout this trial). However, rather than instructing the Prosecution to remedy the defective indictment as objected to by the Defence or dismissing the indictment itself, the Trial Chamber simply rejected the Defence motion on a procedural ground.

²⁶²⁶ The Trial Chamber issued its written decision granting the amendment on 8 October 1999.

²⁶²⁷ Rule 72 (F) of the Rules of Procedure and Evidence adopted on 8 June 1998 and on 21 February 2000 provided that: *Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause.*

F. SCHEDULING ORDER AND PROSECUTION PRE-TRIAL BRIEF

2620. On 5 December 2001, Trial Chamber III issued a Decision and Scheduling Order on the Prosecution motion for harmonization and modification of protective measures for witnesses. In that Decision, the Chamber ordered the disclosure of the identity and unredacted statements of protected witnesses to be made 35 days before the anticipated testimony of the witness. On the same date the Chamber issued a Scheduling order and the trial was scheduled to begin on 2 April 2002. On 21 January 2002, the Prosecution filed its Pre-Trial Brief.
2621. The Ntabakuze Defence and his co-accused filed motions objecting to the lack of communication by the Prosecution of the totality of the witness statements and of other documents to be used by the Prosecution in apparent violation of Rules 19 and 20 of the Statute, Rule 66 of the Rules of Procedure and Evidence and the Trial Chamber decision of 5 December 2001.
2622. On 3 May 2002, the Ntabakuze Defence filed a motion challenging the Prosecution's Pretrial Brief as being not in conformity with the Rules, because, in the Prosecutor's Pre-Trial Brief, the Prosecutor had failed to indicate the points in the concise statement of the facts to which each witness would testify pursuant to Rule 73 bis B) iii) c) of the Rules of Procedure and Evidence. The Prosecution also had included allegations falling outside the scope of the indictment in the summary of facts on which each witness would testify.
2623. On 23 May 2002, Trial Chamber III granted the Ntabakuze Defence motion challenging the Prosecutor's Pre-Trial Brief.²⁶²⁸ In its decision, the Chamber ordered the Prosecutor to indicate the points in the concise statement of the facts to which each witness would testify. In paragraph 12, the Chamber held that:
12. The motions rightly state that pursuant to Rule 73 bis (B) (iv) (c) the Prosecutor 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 Statute. [...] The Chamber agrees with the Defence that the reference in the Rule to « the point of the indictment » does not mean « the counts of the indictment », which only recite or rephrase the legal text of

²⁶²⁸ The Decision was rendered on three different motions from three co-accused (Ntabakuze, Kabiligi and Nsengiyumva)

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 statement of the 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 counts of the indictment, which relate to a number of events, does not properly inform the Accused of the anticipated evidence relating to specific allegations. Consequently, it is the view that the Prosecutor should indicate to which events, circumstances, or paragraphs in the concise statement of the facts in the indictments each of the witnesses will testify.

In paragraph 15 of the Decision, the Chamber also held that:

It is clear that pre-trial documents cannot add new charges beyond those included in the indictments or serve to unilaterally amend the indictment.

2624. On 13 August 2002, the Ntabakuze Defence filed a motion for the execution by the Prosecutor of the Trial Chamber Decision of 23 May 2002, on the grounds that the Prosecutor had failed to fully execute the Chamber Decision ostensibly because of time limitations. Moreover, not only did the Prosecutor fail to strike out the allegations outside the scope of the indictment but he added new witnesses to be called to testify against the Accused to the previous witness list, without seeking prior leave from the Trial Chamber.
2625. On 4 November 2002, by a majority decision, the Ntabakuze Defence motion was rejected. The majority decision held that the Decision of 23 May 2002 did not impose a methodology to be followed by the Prosecution in applying Rule 73 bis B) iii) c) of the Rules of Procedure and Evidence. However, Judge Dolenc's dissenting opinion supported the position of the Defence, holding that the Chamber Decision of 23 May 2002 was very clear and should have been executed to the letter. Honorable Judge Dolenc also held that the majority decision failed to take into account the principle of "*reformatio peius*" which proscribes decisions that would put the applicant in a more unfavorable situation than he was before his motion.²⁶²⁹

CONCLUSION

2626. From the beginning of the proceedings, the Prosecutor violated the rights of the Accused. Major Aloys Ntabakuze was arrested without an indictment and was maintained provisionally in detention for three months without an indictment. Ntabakuze was never

²⁶²⁹ The Trial Chamber III Decision in Military I case on 4 November 2002, Dissenting opinion by Judge Dolenc, paras 13 and 17

charged with a valid indictment in violation of Rule 47 (C) of the Rules. Moreover, rather than proving the allegations actually contained in the indictment, the Prosecutor, in violation of Rule 20(4)(a) of the Statute, presented evidence relating almost entirely to totally new allegations, falling completely outside the scope of the indictment.

2627. At the date of filing this closing brief, Major Aloys Ntabakuze has spent almost ten (10) years in prison. It is obvious that his right to be tried without undue delay was violated. Moreover, during the ten (10) years of detention, he has not received any proposal for remunerated employment as provided under Rule 71 of the Rules covering the detention of persons awaiting trial or appeal before the Trial or otherwise detained on the authority of the Tribunal.
2628. It is submitted that the procedural history outlined *supra* has caused serious prejudice to the Accused, and, should the Trial Chamber find him guilty of any of the charges against him, his sentence should be reduced to reflect the serious prejudice which he has suffered.