ICTR-2001-70-I
5-3-2003
(1672-1660)

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International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

UNITED NATIONS
NATIONS UNIES

Original : English

TRIAL CHAMBER III

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

Registrar: Adama Dieng

Date: 26 February 2003

THE PROSECUTOR

v.

EMMANUEL RUKUNDO

CASE NO. ICTR-2001-70-I

DECISION ON PRELIMINARY MOTION

Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend
Adesola Adeboyejo
Dennis Mabura

Defence Counsel:

Philipe Moriceau

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA ("Tribunal")

SITTING as Trial Chamber III, composed of Judges Lloyd G. Williams, Q.C., presiding, Yakov Ostrovsky, and Pavel Dolenc ("Chamber");

BEING SEISED of the "Exceptions Préjudicielles" filed by the Defence on 17 September 2002 ("Motion");

CONSIDERING the "Prosecutor's Response to Rukundo's Preliminary Motion" filed 23 September 2002 ("Response");

RECALLING the "Indictment" dated 17 September 2001, the "Confirmation of the Indictment" of 5 July 2001, the "Additional Act of Confirmation of the Indictment" of 12 September 2001, and the "Second Additional Act of Confirmation of the Indictment" of 21 September 2001;

HAVING HEARD the parties on 25 October 2002;

NOW DECIDES THE MOTION:

Defence Submissions

Temporal Jurisdiction

1. The Defence argues that the facts alleged in paragraphs 1 to 6 and 20 to 22 of the Indictment are outside of the Tribunal's temporal jurisdiction because they concern a period prior to 1 January 1994. The Defence notes that in the Confirmation of the Indictment (5 July 2002), the confirming Judge ordered the Prosecutor to amend the allegations in paragraphs 5, 13, 14, and 18 because they did not indicate the time frame when the events alleged therein occurred. The Defence asserts that the subsequent amendments to the Indictment do not sufficiently clarify whether these paragraphs are within the temporal jurisdiction of the Tribunal.

Identity of the Accused

2. Based on Rules 47(C) and 72(H)(i) the Defence argues that the Tribunal lacks jurisdiction over the Accused. The Defence also alleges the Indictment contains a defect in its form and that the Chamber must set it aside for failing to properly identify the Accused. The Defence highlights the following errors in the Accused's identification: (i) the Accused was born in *Mukingi*, and not *Kabgayi* as alleged in the Indictment; (ii) paragraph 2 of the Indictment is implausible since the Accused would have been aged 14 at the time of the allegations; and (iv) the Accused's immigration and nationality status is inaccurate.

Cumulative Charges

3. The Defence argues that Count 1 (genocide), Count 3 (murder as a crime against humanity) and Count 4 (extermination as a crime against humanity) are based on the same underlying facts. The Defence also asserts that the three counts refer to one offence based on premeditated murder with the specific intention to destroy the Tutsi ethnic group. Invoking the discussion of *concours idéal d'infractions* in *Prosecutor v. Kayishema and Ruzindana*,[1] the Defence asserts that the Chamber should dismiss Counts 3 and 4.

Objections to the Legal and Factual Basis of the Charged Crimes

4. Based on Article 20(4)(a), the Defence argues that the Indictment does not allege any material facts to establish genocide (Count 1) with sufficient particularity to inform the Accused of the charges against him, which prevents the Accused's adequate preparation of his case under Rule 67. The Defence further objects that the Indictment violates Article 17(2) and (4) and Rule 47(B) because the Prosecution failed to allege supporting facts, failed to set out the facts with precision, and failed to provide sufficient supporting material for Count 1. The Defence alleges this is a defect in form rendering the Indictment null and void pursuant to Rule 72(B)(ii).

5. The Defence highlights that the Prosecutor invokes only Article 2(3)(a) of the Statute, without specifying which type of genocide under Article 2(2). The Defence submits that this is an obvious defect in form, as the facts related by the Prosecutor in support of the crime of genocide are not referred to in Article 2 of the Statute. The Prosecutor's reference to killing and causing serious bodily or mental harm is insufficient, according to the Defence, to remedy this defect in the characterisation of the offence. In addition, the Defence argues that the Prosecutor failed to specify the victims of the alleged criminal acts, which in the opinion of the Defence, proves that the Prosecutor lacks evidence to sustain a conviction.

6. Based on Article 17 and Rule 47, the Defence also objects that Count 3 lacks material facts and notes that the Prosecutor only recites Articles 3 and 6(1) without producing any factual allegations or supporting material to show the exact nature of the Accused's participation.

7. The Defence again objects that the count of extermination violates Articles 17 and 20(4) and Rules 47 and 72(B)(ii) because the Prosecutor failed to provide any factual basis or supporting materials for the acts described in paragraphs 27 to 35 or the nature of the Accused's involvement.

[1] *The Prosecutor v. Kayishema and Ruzindana,* Case No. ICTR-95-1-T, Judgement, 21 May 1999, para. 627.

Prosecutor's Submissions

Temporal Jurisdiction

8. The Prosecutor notes that paragraphs 1 to 6 and 20 to 22 of the Indictment do not charge crimes, but rather simply provide context. The Prosecutor also highlights that the Additional Act of Confirmation of the Indictment (12 September 2001) and the Second Additional Act of Confirmation of the Indictment (21 September 2001) approved the modifications to paragraphs 5, 13, 14, and 18.

Identity of the Accused

9. The Prosecutor submits that the alleged errors of identity do not raise a jurisdictional issue under Rules 72(B)(i) and 72(H)(i), but rather a matter for trial. The Prosecutor also notes that the Accused is a natural person and thus the Tribunal has personal jurisdiction pursuant to Article 5. The Prosecutor also highlights that the Accused conceded that he is Emmanuel Rukundo at his initial appearance.

Cumulative Charges

10. The Prosecutor argues that cumulative charges for crimes against humanity and genocide are permissible in light of the controlling test set forth by the Appeals Chamber in *Musema,*[2] and further notes that both crimes have distinct elements.

Objections to Legal and Factual Foundation

11. The Prosecutor submits that issues of fact, as objected to in the Motion, are to be resolved at trial, and that they do not constitute defects in the form of the Indictment under Rule 72.

Deliberations

Temporal Jurisdiction

12. Paragraphs 1 to 6 and 20 to 22 do not allege facts constituting elements of crimes. Rather, they simply provide context to the case and clarify the nature of the events alleged in the Indictment. An Indictment may contain factual allegations of this nature even if they occurred prior to the Tribunal's temporal jurisdiction.[3]

13. Paragraph 5, and the related paragraph 24, fail to specify whether the alleged denunciation of Mbuguje occurred prior to or during 1994. This information is crucial to

[2] *Prosecutor v. Musema,* ICTR-96-13-A, 16 November 2001, para. 370.
[3] *See Prosecutor v. Nsengiyumva,* Case No. ICTR-96-12-I, Decision on the Defence Motion Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, 13 April 2000, para. 34 ("[U]nder Rule 47(C) the Prosecution may allege facts of its case which go beyond the more limited scope (temporal or otherwise) of the crimes)(Emphasis in original).

the determination of the temporal jurisdiction of the Tribunal, and every effort should be made to amend the Indictment to include an indication of the time frame of these allegations.

14. The Chamber rejects the Defence's submissions concerning paragraphs 13, 14, and 18 because the Prosecutor has already amended the Indictment to include the time frame during which the events were alleged to have occurred.

Identity of the Accused

15. The Chamber recalls that pursuant to Article 5 the Tribunal may exercise personal jurisdiction over the Accused, a natural person. The Chamber does not find that the allegations of error concerning the Indictment's identification of the Accused constitute a defect in its form.

16. The Accused has failed to satisfy the Chamber that he is not the person charged by the Indictment. Any alleged discrepancies are therefore factual matters to be determined at trial.

Cumulative Charges

17. It is clear that the Prosecutor is permitted to charge cumulatively and therefore the Chamber denies the Defence objection on this ground.[4]

Objections to Legal and Factual Foundation

18. The Chamber finds that Count 1 properly alleges the crime of genocide and gives the Accused adequate notice of the character of the offence charged. The Count of genocide refers to "killing and causing serious bodily or mental harm to members of the *Tutsi* ethnic group". It is therefore clear that the Count is based on Article 2(2)(a) and (b) of the Statute.

19. The Chamber observes, however, that there are no factual allegations that the Accused participated in inflicting serious bodily or mental harm on any victim. The Chamber is of the view that this should be remedied without delay.

20. The Chamber finds that the Indictment contains the necessary factual elements to support the crimes of murder and extermination. The Chamber also finds that the Accused's personal participation in the crimes has also been adequately pleaded.

21. Though the Defence has raised a number of arguments concerning the vagueness of certain paragraphs in the Indictment, the Chamber notes that the only cogent arguments concern paragraphs 5, 13, 14, 17, 18, and 22 to 26.

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[4] *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001, para. 369.

22. The fundamental question in determining whether an indictment is vague is whether an accused has sufficient information to prepare his defence.[5] With this standard in mind, the Chamber finds that paragraphs 17, 25, and 35 should specify the name and/or location of the convent in Butare which the Accused allegedly visited during May 1994. If this information is not available to the Prosecution, then efforts should be made to obtain it. The Chamber also recalls its earlier finding that the Prosecutor should specify the time frame in paragraphs 5 and 24 when the Accused allegedly denounced Mbuguje.

23. The remaining arguments raised by the Defence lack the requisite precision. In the absence of specific arguments about the relevance or necessity of the particular facts, the Chamber is not in a position to speculate about their inadequacy for the preparation of the Defence.

24. The Defence's arguments concerning the veracity and accuracy of the factual allegations in the Indictment and the various defences or explanations advanced concerning the Accused's conduct are not appropriate at this stage of the proceedings. The Chamber emphasises that the factual accuracy of the allegations in the Indictment and any possible defences are matters for trial.

25. The Defence further objects to the Indictment on the ground that many factual allegations are not proven by the supporting materials. However, Rule 72 preliminary motions do not permit the Chamber to revisit the determination of the confirming judge that the supporting materials establish a *prima facie* case for all of the facts in the Indictment. Nor is a preliminary motion the proper means for the Defence to complain that the supporting materials are illegible, incomplete, over-redacted, or otherwise unusable. Such matters should first be addressed with the Prosecutor, and only brought to the Chamber's attention if no solution can be found between the parties. Again, the Chamber stresses that the adequacy of the evidence proffered by the Prosecution is a matter to be ultimately determined at trial.

26. The Chamber therefore:

(a) ORDERS the Prosecutor, within 30 days of receipt of this Decision, to:

(i) AMEND the Indictment to include factual allegations based on supporting material to support the charge that the Accused caused serious bodily or mental harm as an act of genocide or, alternatively, to omit this allegation from Count 1;

(ii) AMEND paragraphs 5 and 24 of the Indictment to specify, to the extent possible, the time frame within which the Accused is alleged to have denounced Mbuguje; and

[5] *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88.

(iii) AMEND, if possible, paragraphs 17, 25, and 35 to specify the name and/or location of the convent in Butare that the Accused allegedly visited several times during May 1994.

(b) DENIES the Motion in all other respects.

Arusha, 26 February 2003.

Lloyd G. Williams Q.C.
Presiding Judge

Yakov Ostrovsky
Judge

Pavel Dolenc
Judge

Seal of the Tribunal

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Date: 4 March 2003

THE PROSECUTOR

v.

EMMANUEL RUKUNDO

CASE NO. ICTR-2001-70-I

SEPARATE DECLARATION OF PAVEL DOLENC REGARDING DECISION ON PRELIMINARY MOTION

Office of the Prosecutor:

Silvana Arbia
Jonathan Moses
Adelaide Whest
Gregory Townsend
Adesola Adeboyejo
Dennis Mabura

Defence Counsel:

Philipe Moriceau

1. I have reviewed the Decision of the Chamber and agree with the terms of the order and with the reasoning regarding the objections based on lack of jurisdiction. However, I do not subscribe to the Chamber's approach or findings in relation to the objections apparently based on defects in the form of the indictment. I therefore attach this separate declaration to explain my position on this particular issue in order to encourage a reconsideration of the current practice of the Tribunal in relation to preliminary motions challenging the form of the indictment.

2. The Decision does not articulate a general definition of the scope of permissible Rule 72(B)(ii) objections, nor does it draw a clear distinction between objections based on lack of jurisdiction and objections based on defects in the form of a indictment. Nevertheless, without articulating or relying on any general test, the Chamber rules on certain objections in the Decision while rejecting others on the ground that they do not fall within the scope of Article 72 preliminary motions. For example, in the Decision, the Chamber finds that errors concerning the Accused's identity do not constitute a "defect in the form of the indictment" and therefore are not admissible as a Rule 72(B)(ii) objection. Similarly, the Chamber finds that objections to the accuracy of the factual allegations and to the supporting materials should be dealt with during the trial, which suggests that the Chamber also considers that these issues do not fall within Rule 72. From the fact that the Decision deals with the other objections, it is logical to conclude that the Chamber considers that these concerns do fall within the scope of Rule 72(B)(ii).

3. I am not satisfied with this approach. In my opinion, the Decision should have first set out the general definition of "defects in the form of the indictment". Only after arriving at such a definition are the parties and judges able to ascertain which objections properly concern defects in the form of an indictment pursuant to Rule 72(B)(ii), and which are based on other claims within or outside of the scope of Rule 72. It should be recalled that preliminary motions must be made within the 30 day time limit prescribed in Rule 72(A) and must be disposed of *in limine litis* pursuant to Rule 72(C). Other challenges to an indictment, which are not based on defects of form or the other objections enumerated in Rule 72, may be raised and addressed at any time pursuant to Rule 73.

4. I am well aware that the Decision follows the established practice of this Tribunal regarding the broad and nebulous scope of objections based on defects in the form of an indictment.[1] In my view, this practice has evolved in a piecemeal fashion without a careful analysis of the applicable law. I therefore consider it essential to clearly define the meaning of the terminology "defect in the form of an indictment" in the context of Rule 72(B)(ii).

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[1] See e.g., *Prosecutor v. Nzuwonemeye*, ICTR-00-56-I, "Décision sur la requête de la défense en exceptions préjudicielles" 12 December 2002; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-I, "Decision on Defence Motion to Amend Indictment and to Drop Certain Counts" 25 July 2002; *Prosecutor v. Ndindabahizi,* ICTR-2001-71-I, "Décision (Exceptions Préjudicielles de la Défense relatives a la forme de l'acte d'accusation)" 30 May 2002. See Also: *Prosecutor v. Strugar et al.*, (ICTY) IT-01-42-PT "Decision on Defence Preliminary Motion Concerning the Form of the Indictment" 28 June 2002.

Form and Substance of an Indictment

5. The Rules allow for preliminary motions objecting to defects in the form of an indictment without providing any indication of what the proper form is or what might constitute a defect. Black's Law Dictionary defines "defect of form" as "an imperfection in the style, manner, arrangement, or non-essential parts of a[n]... indictment".[2] In my view, the phrase "form of an indictment" in Rule 72(B)(ii) means the physical, visible appearance of the charging document issued by the Prosecutor in which the required content (the substance of the indictment) is set forth in a methodical manner.

6. The required content of an indictment is prescribed by the Statute and Rules and includes: the name and particulars of the accused (Rule 47(C)); a concise statement of the facts of the crime(s) with which the accused is charged (Article 17(4) and Rule 47(C)); a concise statement of the case (Article 17(4) of the Statute and Rule 47(C)); and a legal qualification of the crime(s) charged against the accused by counts (Rules 47(E) and (F), 62(A)(iii), 87, 98 *bis*).

7. Relying on the ordinary meaning of the phrase "form of the indictment", the Statute, the Rules, and practice, I am of the view that aspects of the form of an indictment include, *inter alia*:

(i) An indictment must be in a written format (Rule 47);
(ii) It must be written in one or both of the official languages of the Tribunal (Article 31 of the Statute and Rule 3(A));
(iii) An indictment must be written using the Latin alphabet (this is not specifically required by law, but is implied by the official languages and is appropriate in light of the cultural context of the Tribunal);
(iv) Where required, an indictment must be translated into other languages (Article 20 of the Statute and Rules 3 and 47(G));
(iii) It must be dated and signed by the Prosecutor or her authorized representative and affixed with a seal of the Tribunal (this is not specifically required by the Statute or Rules, but is well established in the practice of the Tribunal and is consistent with the practice of national jurisdictions);
(iv) It must be confirmed by a judge of the Tribunal (Article 18 of the Statute, Rule 47);
(v) It must be retained by the Registrar who will prepare certified copies bearing the seal of the Tribunal (Rule 47(G)).

8. The presentation and order of the contents of an indictment is another aspect of the form of an indictment. The current charging practice of the Prosecutor separates the indictment into three sections: (i) the particulars of the accused; (ii) the concise statement of the facts of the crime and of the case; and (iii) the counts which summarize the legal qualifications of the crimes. In my view, there should also be a clear distinction between

[2] Black's Law Dictionary 419 (6th ed. 1990).

the concise statement of facts of the case, which could include background, historical, and other non-essential information, and the concise statement of the facts of the crimes, which should specifically allege the material facts of the crimes and the accused's form of participation. A clear distinction between these two sets of facts is consistent with Rule 47(C), which distinguishes between the two, and would usefully focus attention on the essential elements of the crimes and of the accused's alleged criminal responsibility.

Cumulative Charges

9. At this Tribunal, objections against cumulative charges based on the same set of facts are commonly dealt with, either explicitly or implicitly (as in this case), as concerning defects in the form of the indictment. In my opinion, the question of ideal concurrence of crimes is a matter concerning the application of the material law. As the ICTY Appeals Chamber has recently confirmed, "whether the same conduct violates two distinct statutory provisions is a question of law".[3] In my view it is absurd to characterize the correct legal qualification of the alleged conduct of an accused as a matter concerning the *form* of an indictment.

10. Moreover, the Decision rejects the objection to cumulative charges, relying on the Appeals Chamber's determination that cumulative charging is generally permissible.[4] The Appeals Chamber reached this conclusion after reviewing the ICTY Appeals Chamber Judgement in the *Čelebići* Case, which held that:

> Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of 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 ICTR.[5]

However, I wish to draw attention to the fact that this reasoning is more applicable to alternative charges based on different alternate set of facts and not to cumulative charges based on the same set of facts.

11. The acts of direct and personal commission of a crime ordinarily differ from those underpinning charges of complicity or of superior responsibility, in time, location, acts, means, and other characteristics. When the factual allegations in an indictment are so broadly drafted that they accommodate the charging of an accused alternatively or cumulatively as a principal perpetrator and/or an accomplice pursuant to Article 6(1) of the Statute (in one or even all of the enumerated forms of participation), and perhaps also with superior responsibility under Article 6(3) of the Statute in relation to the same conduct, such an indictment is necessarily defective because the charges are entirely

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[3] *Prosecutor v. Kunarac*, IT-96-23 & IT-96-23/1-A, Judgement, ICTY App. Ch., 12 June 2002, para 174.
[4] Decision para. 17; *Prosecutor v. Musema*, ICTR-96-13-A, Judgement, App. Ch., 6 November 2001, para 369.
[5] *Prosecutor v. Čelebići*, IT-96-21-A, Judgement, ICTY App. Ch., 20 February 2001, para. 400.

incomprehensible. However, such defects do not affect the form of the indictment, but rather the substance of the concise statement of facts of the crime.

Vagueness and Imprecision

12. The same conclusion applies for other deficiencies related to the specificity and sufficiency of the particulars of the identification of the accused, the factual allegations regarding the crimes and the case, the factual allegations placing an accused's conduct within the temporal jurisdiction of the Tribunal, and the counts. Deficiencies in the substance of the charges against an accused cannot be regarded as defects in the form of an indictment in the ordinary meaning of this phrase. In *Kupreskic*, the Appeals Chamber characterized such deficiencies as "material defects" in the indictment.[6] Such defects run contrary to the requirement that the charges should be complete, precise, and detailed in order to give clear and specific information about the particular crime, the accused's role in it, and the grounds for his criminal responsibility. Such an individualization of a crime is necessary, not only in the interests of an accused according to Article 20(4)(a) of the Statute, but also to enable a judge, *inter alia,* to identify and assess the supporting materials, to establish common transactions as a basis for joinder, to establish objective and subjective identity between an indictment and a judgement, and for the application of the principle *non bis in idem* in Article 9 of the Statute.

13. My position is supported by the legal policy underpinning objections to the indictment. Objections based on the form of the indictment that only relate to non-essential characteristics such as the structure of the document, typographical or translation errors, formal requirements, and other facial matters, should be brought at the earliest possible opportunity and ought to be considered and rectified before trial. If the defence fails to bring such a motion within the time limits and the trial proceeds on the basis of the indictment which is defective in form, there is no substantial prejudice to the accused.

14. In contrast, objections based on the substance of the indictment, such as those challenging the adequacy of the notice provided to an accused, directly affect the right to a fair trial and may be raised at any time. It is, of course, in the interests of justice that these matters are addressed at the earliest possible opportunity. However, it must be recalled that the Prosecutor bears the ultimate burden of crafting a fair charging instrument. In certain cases, a failure to provide fair notice in the indictment may result in the imprecise allegations being disregarded by the Chamber in reaching its judgement,[7] or to convictions being overturned on appeal.[8] Thus, it makes sense to allow the Defence to bring objections to matters of substance at any time pursuant to Rule 73.

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[6] *Prosecutor v Kupreskic et al*, IT-95-16-A, Judgment, ICTY App. Ch., 23 Oct 2001, para. 114.

[7] See e.g., *Prosecutor v. Ntakirutimana*, ICTR-96-10-T & ICTR-96-17-T, Judgment, Tr. Ch., 21 February 2003, paras. 690 and 855.

[8] *Prosecutor v Kupreskic et al*, IT-95-16-A, Judgment, ICTY App. Ch., 23 Oct 2001, para. 114.

15. In conclusion, it is my opinion that the motion could be summarily denied because it objects to matters that do not relate to the form of the Indictment pursuant to Rule 72(B)(ii). The alleged defects relate to the *substance* of the Indictment and thus should be considered under Rule 73. I would grant these objections, pursuant to Article 73, to the extent ordered by the Decision.

Arusha, 4 March 2003

Pavel Dolenc
Judge

[Seal of Tribunal]