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International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

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OR: ENG

**TRIAL CHAMBER III**

**Before Judges:** Andrésia Vaz, Presiding  
Flavia Lattanzi  
Florence Rita Arrey

**Registrar:** Adama Dieng

**Date:** 15 July 2004

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[Signature]

**THE PROSECUTOR**

v.

**Protais ZIGIRANYIRAZO**  
Case No. ICTR-2001-73-I

**DECISION ON THE DEFENCE PRELIMINARY MOTION OBJECTING  
TO THE FORM OF THE AMENDED INDICTMENT**

*Rule 72 (A) (ii) of the Rules of Procedure and Evidence*

**Office of the Prosecutor:**  
Stephen Rapp  
Fatou Bensouda  
Charity Kagwi-Ndungu

**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 Andréia Vaz, Flavia Lattanzi and Florence Rita Arrey ("Chamber");

**BEING SEIZED** of the Defence "Motion Objecting to the Form of the Amended Indictment and Brief in Support" filed on 27 January 2004 ("Motion");

**CONSIDERING** the Prosecutor's "Response to the Defence Motion Objecting to the Form of the Amended Indictment" filed on 5 February 2004 ("Response"); the Defence "Brief in Reply to the Prosecution's Response to the Defence Motion Objecting to the Form of the Amended Indictment" filed on 10 February 2004 ("Reply"); and the Defence "Supplementary Case Law in Support of Brief in Reply to Prosecution's Response to Defence Motion Objecting to the Form of the Amended Indictment and Brief in Support" filed on 27 February 2004;

**CONSIDERING** the Statute of the Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules");

**RECALLING** the Decision of Trial Chamber III granting leave to amend the Indictment rendered on 15 October 2003 and filed on 16 October 2003 ("Decision of 15 October 2003");<sup>1</sup>

**NOTING** that the Prosecutor filed an Amended Indictment, an Annotated Amended Indictment and "The Prosecutor's Annexure Re: Amended Indictment" ("Annexure") on 5 November 2003;

**NOW DECIDES** solely on the basis of the written briefs of the parties pursuant to Rule 72 (A) of the Rules.

<sup>1</sup> Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003.

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## Submission of the Parties

### Defence Motion

1. The Defence contends that the Amended Indictment lacks specificity and does therefore not fully comply with the Decision of 15 October 2003.
2. In particular, the Amended Indictment does not distinguish between acts and relationships that give rise to individual responsibility and acts and relationships that give rise to superior responsibility, as the Trial Chamber had explicitly ordered.<sup>2</sup> The Defence seeks, throughout the Amended Indictment, clarification on the allegations of cumulative responsibility of the Accused pursuant to Article 6 (1) and 6 (3) of the Statute.
3. The Defence argues that the Prosecutor's cumulative charges of different types of personal criminal responsibility (Article 6 (1) of the Statute) causes unacceptable ambiguity and prevents the Accused from knowing the case against him. The Defence requests that the Prosecutor be ordered to limit, throughout the Amended Indictment, the allegations of different modalities of Article 6 (1) of the Statute to the modalities he intends to rely on and to specify, individually, event by event, the form of personal liability he intends to invoke. Alternatively, the Defence moves the Chamber to strike all charges based upon personal liability without specifying the type of personal responsibility.
4. With respect to Count I<sup>3</sup>, the Defence seeks furthermore an order compelling the Prosecutor:
  - a. to provide the names and functions of all co-conspirators and to describe the circumstances (including dates, times and sites) of the alleged conspiracy<sup>4</sup>;
  - b. to define the "tight circle" around Juvénal Habyarimana<sup>5</sup>;
  - c. to describe or identify the business interests, political beliefs and persons that the Amended Indictment refers to<sup>6</sup>;
  - d. to provide a precise factual foundation for the alleged involvement of the Accused with the *Interahamwe*<sup>7</sup>;
  - e. to either strike the reference to Ms. Agathe Kanziga as a co-conspirator or to provide a factual basis for the allegations of a conspiracy between her and the Accused<sup>8</sup>; and
  - f. to provide in detail all additional facts and circumstances permitting any inference that the Accused participated in a conspiracy to commit genocide<sup>9</sup>.
5. The Defence maintains that Counts II, III, IV and V<sup>10</sup> do not contain sufficiently precise factual allegations relating to joint criminal enterprise. The Defence submits that the Accused has not received due notice of the details of the joint criminal enterprise imputed to him. The Defence therefore moves the Chamber to order the Prosecutor to strike from the

<sup>2</sup> Idem, par. 26.

<sup>3</sup> I. e. Conspiracy to Commit Genocide, see paragraphs 4 – 11 of the Amended Indictment.

<sup>4</sup> See paragraphs 4 – 11 of the Amended Indictment.

<sup>5</sup> See paragraph 7 of the Amended Indictment.

<sup>6</sup> See paragraphs 8 and 13 (Count 2) of the Amended Indictment.

<sup>7</sup> See paragraphs 5 and 9 – 11 of the Amended Indictment.

<sup>8</sup> See paragraphs 4 and 6 of the Amended Indictment.

<sup>9</sup> See paragraphs 4 – 11 of the Amended Indictment.

<sup>10</sup> I. e. Counts II and III Genocide, alternatively Complicity in Genocide, Count IV Extermination as a Crime Against Humanity, Count V Murder as a Crime against Humanity, see paragraphs 12 – 47.

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Amended Indictment the term "or in concert with others in pursuit of a common purpose". Alternatively, the Defence seeks an order compelling the Prosecutor to specify:

- a. the nature and purpose of the joint criminal enterprise in which he allegedly participated;
- b. its period of existence;
- c. its other participants;
- d. the implication of the Accused in it; and
- e. the facts and circumstances from which the Prosecution infers the existence of and the Accused's participation in the alleged joint criminal enterprise.

6. The Defence requests that the Prosecutor should support his allegations of command responsibility of the Accused with respect to Counts II, III, IV and V<sup>11</sup> by detailed factual information.

7. With respect to the events at Gashihe Hill involving the Accused<sup>12</sup>, the Defence submits that, as far as the Prosecutor anticipates to hold the Accused liable on the basis of individual criminal responsibility, his pleadings have to be more detailed. The Defence thus seeks an order that the Prosecutor be compelled to indicate:

- a. the exact date and time of these events;
- b. the names of all known victims and perpetrators;
- c. the means of killing; and
- d. the means by which the Accused allegedly ordered the killings.

8. The Defence further argues that the charges of superior responsibility for the events at Gashihe Hill<sup>13</sup> are not supported by any specific factual allegations. The Defence moves the Chamber to order the Prosecutor either to remove his allegations of superior responsibility for the events at Gashihe Hill or to provide a factual basis for them.

9. With respect to the allegations of the involvement of the Accused in the mounting and operating of the roadblocks at Giciye<sup>14</sup>, "La Corniche"<sup>15</sup> and Kiyovu<sup>16</sup>, the Defence requests to receive detailed information on:

- a. the exact locations of roadblocks;
- b. the dates of their existence;
- c. their manning;
- d. their operation;
- e. the identity of perpetrators and victims;
- f. the modalities of the involvement of the Accused; and
- g. the mass grave adjacent to the Giciye roadblock.

<sup>11</sup> See paragraphs 12 - 47.

<sup>12</sup> See paragraphs 14 - 16 of the Amended Indictment in conjunction with paragraph 12, 2nd subparagraph.

<sup>13</sup> See paragraphs 14 - 16 of the Amended Indictment in conjunction with paragraph 12, 3d subparagraph.

<sup>14</sup> See paragraphs 17 - 20 of the Amended Indictment.

<sup>15</sup> See paragraphs 17 and 21- 23 of the Amended Indictment.

<sup>16</sup> See paragraphs 17, 24 and 25 of the Amended Indictment.

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10. With respect to the Prosecutor's allegations concerning the implication of the Accused in the killing of the Sekimonyo family<sup>17</sup> and the Bahoma Tutsi<sup>18</sup>, the Defence requests more detailed information.

11. With respect to Count IV and V<sup>19</sup>, the Defence argues that the Prosecutor ought to provide the same additional information as requested for Counts II and III<sup>20</sup>. Furthermore, the Defence moves the Chamber for an order compelling the Prosecutor to provide more detailed information on the alleged murder of three gendarmes at the Giciye roadblock.

12. The Defence requests that the Chamber render the following orders:

- a. The Prosecutor shall abide by the decision rendered on this motion within 15 days.
- b. All details or particulars provided pursuant to the decision on the present motion shall be provided in French for the benefit of the Accused.

### *Prosecutor's Response*

13. The Prosecutor requests that the Trial Chamber deny the Motion in its entirety. In the alternative that the Chamber obliges him to provide further details to the Accused, the Prosecutor moves the Chamber to allow him to provide the required details by means of filing particulars rather than a further amendment of the Indictment.

14. The Prosecutor submits that the level of specificity demanded by the Defence exceeds the requirements established by the jurisprudence of this Tribunal. Moreover, he qualifies the specifications sought by the Accused as matters of evidence.

15. The Prosecutor argues that the Defence neglects the uniqueness of the crimes in Rwanda in 1994. He claims that, due to the context of the crimes, detailed information concerning dates or the identity of victims is not available and cannot therefore be reasonably requested by the Defence.

16. The Prosecutor asserts that the Amended Indictment provides sufficient notice to the Accused to prepare his defence, especially in view of additional information contained in other instruments, such as witness statements.

17. The Prosecutor submits that his investigations are ongoing, interviews with Prosecution witnesses have not yet begun, and the witness's actual testimony might vary in minor details from the evidence that he presently anticipates. In view of the possible variances, an exaggerated degree of specificity in the present Indictment might necessitate further time-consuming amendments.

18. The Prosecutor argues that his charges of the Accused's participation in a joint criminal enterprise, as well as in a conspiracy, rely upon factual allegations that he describes in the Amended Indictment with all the details that he is aware of. The Prosecutor submits that, in this regard, the Accused is not hampered to prepare his defence.

19. The Prosecutor submits that he has clearly indicated which paragraphs of the Amended Indictment are charged under Article 6 (1) and 6 (3) of the Statute respectively. He submits that command and individual responsibility, as well as the various modes of

<sup>17</sup> See paragraph 26 of the Amended Indictment.

<sup>18</sup> See paragraph 27 of the Amended Indictment.

<sup>19</sup> I.e. Extermination and Murder as Crimes against Humanity, see paragraphs 28 – 47.

<sup>20</sup> See above, paragraphs 5 – 9.

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individual responsibility, are not mutually exclusive, and that the same set of facts may fall under all of the modes of responsibility.

***Defence Reply to the Prosecutor's Response***

20. The Defence reiterates its position. It moves the Chamber either to:
- a. grant the Defence Motion and order the Prosecutor to provide as part of the Amended Indictment the requested particulars; or
  - b. grant the Defence Motion and order the Prosecutor to provide a full "Bill of Particulars" for the requested information.
21. While the Defence recognises the difficulty in providing details of all victims in the context of the Rwandan conflict, it maintains that a proper application of *Kupreškić* demands that the Prosecutor considers dropping charges for which he lacks the necessary material details.
22. In answer to the Prosecutor's suggestion that material details be provided by way of the disclosure process, the Defence states that the time restraints of the disclosure process disable it to prepare a proper defence. The Defence warns that this approach would cause delays in the trial. Furthermore, the Defence contends that, in the present case, the criteria established by the *Kupreškić* decision, namely that the provision of detail by way of the disclosure process be clear, consistent and timely, are not met.
23. The Defence argues that the Prosecution cannot cure a defective indictment through the supporting material and pre-trial brief.
24. The Defence submits that it has been requesting precisely the type of details that were provided through the particulars in *Bikindi*. However, the Defence understands such particulars to be part of an indictment. Hence it argues that any future variance in the particulars would be subject to the same procedure as the amendment of an indictment.
25. With respect to the events at Gashihe Hill, the Defence concedes that the names of the victims are of lesser importance. However, it reiterates its request to be informed about the date of the alleged events.
26. The Defence notes that the Prosecution relied on the existence of new evidence to request leave to amend the Indictment, but has failed to include details pertaining to that new evidence in its Amended Indictment. The Defence reserves its right to seek remedies based on this contradiction at a later stage.
27. The Defence is also requesting that the relevant case material be provided to them in French and challenges the Prosecutor's assertion that this matter is entirely the responsibility of "Languages and Conference Section". The Defence submits that the Prosecution has the capacity to submit in French and thereby facilitate the expeditious conduct of the proceedings.



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### Deliberations

28. As a preliminary matter, the Chamber observes that any lack of precision or specificity in an indictment interferes with judicial economy. Not only does a clear and unambiguous indictment lie in the interest of the Accused as a matter of right; but the Prosecutor also benefits from a clear and unambiguous indictments since it enables him to focus his case and hence to allocate his limited resources reasonably. During the trial, a precise and specific indictment ensures an efficient use of valuable court time. The Chamber emphasizes thus the importance of a specific, precise, clear and unambiguous indictment as an essential prerequisite for a fair and expeditious trial.

29. The Chamber recalls that a defective indictment may cause the Appeals Chamber to reverse a conviction<sup>21</sup>. It is therefore of utmost importance that any formal defects of an indictment be cured before proceeding to trial.

30. Since this case is still in its pre-trial phase the Chamber finds no merit in the Defence requests for striking extensive parts from the Amended Indictment. At this preliminary stage of proceedings, the Prosecutor can easily correct purely formal defects in his pleadings.

#### *As to the specific type of alleged responsibility pursuant to Article 6 (1) of the Statute*

31. With respect to the pleading of various types of responsibility pursuant to Article 6 (1) of the Statute, the Chamber recalls the *Talic* decision in which the Trial Chamber held:

"It has been firmly stated that pleading individual responsibility by reference merely to all the terms of Article 7.1 is likely to cause ambiguity. The nature of the Prosecution case should not depend on such ambiguity."<sup>22</sup>

32. In the light of this holding, the Chamber observes that the wording of the Prosecutor's pleading is ambiguous, as paragraph 4 of the Amended Indictment (Count I) exemplifies. This paragraph appears to aver that the Accused has committed the crime of conspiracy to commit genocide by having aided and abetted the execution of the crime. It also appears to aver that the Accused will face charges of having planned the planning of the crime. The present lack of clarity in the wording of this paragraph results from the cumulative charging of various types of criminal responsibility pursuant to Article 6 (1) of the Statute<sup>23</sup>. This cumulative charging leaves the Accused without sufficient notice of the case he will face at trial and hampers therefore an adequate preparation of the defence.

33. The Chamber holds that it is in the interest of a fair and expeditious trial that the Prosecutor pleads only the types of responsibility pursuant to Article 6 (1) of the Statute that he intends to rely upon on the basis of specific factual allegations.

#### *As to the distinction between the alleged responsibility pursuant to Article 6 (1) of the Statute and Article 6 (3) of the Statute*

34. The Chamber recalls its previous holding:

<sup>21</sup> *Niyitegeka v. The Prosecutor*, Case No. ICTR 96-14-A, Judgement (AC), 9 July 2004, paragraph 195 f.

<sup>22</sup> *The Prosecutor v. Radoslav Brdjanin & Momir Talic*, Case No. IT-99-36 "Decision on Objections by Momir Talic to the Form of the Amended Indictment", 20 February 2001, par. 10.

<sup>23</sup> The same ambiguity reoccurs in paragraphs 9, 10, 12, 28 and 41 of the Amended Indictment.

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The Defence points out that the proposed indictment as amended does not contain a clear statement of the acts stated to give rise to individual and superior responsibility respectively. [...] The Trial Chamber is in agreement with this Defence submission and will order the Prosecution to file its amended indictment distinguishing therein for each Count the alleged acts of the Accused that give rise to individual responsibility under Article 6 (1) of the Statute and the alleged acts and relationships that give rise to criminal responsibility under Article 6 (3) of the Statute.<sup>24</sup>

35. The Chamber observes that the Prosecutor has not yet implemented its previous ruling. Instead of distinguishing between personal and command responsibility, the Amended Indictment cumulates the two types persistently and irrespective of the factual allegations underlying the imputed responsibility. To illustrate this observation, the Chamber refers to paragraph 42 of the Amended Indictment, where the Prosecutor pleads responsibility pursuant to Article 6 (3) of the Statute with respect to his allegation that the Accused ordered his son to kill certain persons<sup>25</sup>.

36. The Chamber reaffirms its previous holding and requests the Prosecutor to implement it throughout the Amended Indictment as detailed in paragraph 47 of the present Decision.

*As to the specific factual basis of the alleged type of responsibility pursuant to Article 6 (1) of the Statute*

37. The Chamber observes that the Amended Indictment fails to establish a precise link between the pleaded types of responsibility pursuant to Article 6 (1) of the Statute and a respective set of facts. It is, for instance, not clear why the Prosecutor pleads<sup>26</sup> that the Accused was on the basis of Article 6 (1) of the Statute responsible for the facts alleged in paragraph 6 of the Amended Indictment, i.e. his birthplace and family relations. The Amended Indictment should leave no doubt which facts are linked to which type of responsibility. In order to give the Accused sufficient notice of the charges against him, the Prosecutor has to establish the link between his factual allegations and the alleged specific type of responsibility pursuant to Article 6 (1) of the Statute in a more precise way.

*As to the factual basis of the alleged responsibility of the Accused pursuant to Article 6 (3) of the Statute*

38. The Chamber recalls its previous holding on the same issue:

The specific facts and relationships giving rise to the superior responsibility alleged need to be clearly set out.<sup>27</sup>

39. The Chamber recalls the *Mrksic* Decision cited by the Defence:

In a case based upon superior responsibility, pursuant to Article 7 (3), the following are the minimum material facts that have to be pleaded in the indictment: (a) that the accused is the superior (ii) of subordinates, sufficiently identified, (iii) over whom he had effective control - in the sense of a material ability to prevent or punish criminal conduct

<sup>24</sup> Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003, paragraph 26.

<sup>25</sup> The same ambiguity reoccurs in paragraphs 13, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 30, 31, 32, 33, 34, 35, 37, 38, 40, 43, 44, 45, 46 et 47d of the Amended Indictment.

<sup>26</sup> Cf. last sentence of paragraph 6 of the Amended Indictment.

<sup>27</sup> Decision on Prosecutor's Request for Leave to Amend the Indictment and on Defence Urgent Motion for an Order to Disclose Supporting Material in Respect of the Prosecutor's Motion for Leave to Amend the Indictment, 15 October 2003, paragraph 26.



- and (iv) for whose acts he is alleged to be responsible; (b) the accused knew or had reason to know that the crimes were about to be or had been committed by those others, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others will usually be stated with less precision, the reasons being that the detail of those acts (by whom and against whom they are done) is often unknown, and, more importantly, because the acts themselves often cannot be greatly in issue; and (c) the accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.<sup>28</sup>

40. The Chamber observes that the Prosecutor has not yet provided a sufficiently precise factual basis for his averment that the close contact of the Accused with other leaders gave him the possibility to discipline and punish his subordinates or to prevent their criminal conduct<sup>29</sup>; nor has the Prosecutor provided a sufficiently precise factual basis for his averment that the quality of the Accused as an "influential and powerful person" gave him the possibility to discipline and punish his subordinates or to prevent their criminal conduct<sup>30</sup>. Therefore the Amended Indictment does not yet meet the criteria established by the cited jurisprudence<sup>31</sup>.

#### *As to the required degree of factual detail*

41. In the *Niyitegeka* Judgement<sup>32</sup>, the Appeals Chamber reaffirms the law governing the standards for indictments with respect to the required degree of factual detail, as it has been set out in the *Kupreškić* Judgement. In this Judgement, the Appeals Chamber held:

(88) [...] in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

(89) [...] A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be

<sup>28</sup> *The Prosecutor v. Mrksic*, Case No. IT-95-13/1-PT, "Decision on Form of the Indictment", 19 June 2003, par. 10 with references to *The Prosecutor v. Deronjic*, Case No. IT-02-61-PT, "Decision on Form of the Indictment", 25 October 2002, par. 15 and 19; *The Prosecutor v. Delalic and Others*, Case No. IT-96-21-A, Judgement, 20 Feb 2001, ("Celebici Appeal Judgment"), par. 256, 196-198 and 266; *The Prosecutor v. Hadzihasanovic*, Case No. IT-01-47-PT, "Decision on form of indictment", 7 December 2001, par. 11 and 17; *The Prosecutor v. Brdjanin & Talic*, Case No. IT-99-36, "Decision on objections by Momir Talic to the form of the amended indictment", 20 February 2001, par. 19; *The Prosecutor v. Krajisnik*, Case No. IT-00-39-PT, "Decision Concerning Preliminary Motion on the Form of the Indictment", 1 August 2000, par. 9; *The Prosecutor v. Krnojelac*, Case No. IT-97-25, "Decision on preliminary motion on form of amended indictment", 1 February 2000, par. 18 and "Decision on the Defence Preliminary Motion on the Form of the Indictment", 24 February 1999, par. 38; *The Prosecutor v. Kvočka*, Case No. IT-99-30-PT, "Decision on Defence Preliminary Motions on the Form of the Indictment", 12 April 1999, par. 17.

<sup>29</sup> Cf. paragraph 12, 3<sup>rd</sup> sub-paragraph, in conjunction with paragraph 13 of the Amended Indictment.

<sup>30</sup> Cf. paragraph 28 and 41 of the Amended Indictment.

<sup>31</sup> This observation is of particular relevance with respect to paragraphs 21, 24, 36, 39 and 41 (first sub-paragraph) of the Amended Indictment.

<sup>32</sup> *Niyitegeka v. The Prosecutor*, Case No. ICTR 96-14-A, Judgement (AC), 9 July 2004, paragraph 193 ff.

instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".

(92) It is of course possible that an indictment may not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession. However, in such a situation, doubt must arise as to whether it is fair to the accused for the trial to proceed. In this connection, the Appeals Chamber emphasises that the Prosecution is expected to know its case before it goes to trial. It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.<sup>33</sup>

42. In the light of these holdings, the Chamber recalls that the Prosecutor has to avoid imprecision and vagueness when setting out his allegations on the conduct of the Accused. In considering whether an indictment is defective by virtue of lack of precision or material details, the fundamental issue is whether the Accused has sufficient information to adequately prepare his defence.

43. The Chamber observes that, throughout the Amended Indictment, the Prosecutor specifies dates of acts and omissions that are imputed to the Accused. The Chamber is satisfied that the Prosecutor gives these indications in good faith and to the best of his knowledge.

44. The Chamber considers that the degree of precision requested by the Defence at the current stage is excessive in view of the nature and the extent of the Prosecutor's charges and the enormity of the events which occurred in Rwanda in 1994<sup>34</sup>.

45. The Defence seeks detailed information on the identity of certain persons. However, in its reply brief it concedes that the names of the victims are of lesser importance to its defence. The Chamber notes that an adequate defence does not depend upon the Prosecutor's pleading of the names of individual victims. Moreover, the Chamber observes that certain persons whose names the Defence requests might qualify as protected witnesses<sup>35</sup>. The Amended Indictment shall not compromise the security of protected witnesses by revealing their names.

46. In the light of these observations, the Chamber is satisfied that, with the exception of the formal defects specified in the following paragraph, the Amended Indictment describes in a sufficiently precise and detailed way the acts, omissions, events, locations, dates and other circumstances that it refers to. The Chamber concludes that, in this regard, the Amended Indictment does not suffer from any defects in its form that would fall within the scope Rule 72 (A) (ii) of the Rules.

47. Conversely, in the light of the cited jurisprudence and on the basis of the foregoing observations, the Chamber sets out the matters in respect of which the Amended Indictment requires formal modifications:

- i. With respect to all Counts, the Prosecutor should only plead the types of personal responsibility pursuant to Article 6 (1) of the Statute that he intends to rely upon.

<sup>33</sup> *The Prosecutor v. Kupreškić*, Case No. IT-95-16, Appeal Judgment, 23 October 2001 par. 88 f. and 92 (Footnotes omitted).

<sup>34</sup> Cf. *Prosecutor v. Nahimana*, Case No. ICTR-96-11, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997, par. 30: "... The Chamber acknowledges that, given the particular circumstances of the conflict in Rwanda and the alleged crimes, it could be difficult to determine the exact times and places of the acts with which the accused is charged."

<sup>35</sup> See, for instance, paragraphs 26 and 43 of the Amended Indictment.

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- ii. With respect to all Counts, the Prosecutor should clearly indicate upon which factual allegations he bases his pleadings of personal responsibility pursuant to Article 6 (1) of the Statute.
- iii. With respect to Counts II, III, IV and V, the Prosecutor should either omit the cumulative pleading of personal and command responsibility pursuant to Article 6 (1) and (3) of the Statute or support both types of responsibility by specific factual allegations referring precisely to the respective type of responsibility.
- iv. With respect to Counts II, III, IV and V, the Prosecutor should, in all instances where he pleads command responsibility pursuant to Article 6 (3) of the Statute, either omit the pleading of command responsibility or complete his pleading so that it consistently includes the following material information:
  - (a) the factual basis for the allegation that the Accused is a superior;
  - (b) the factual basis of the effective control of the Accused, in the sense of his material ability to prevent or punish criminal conduct;
  - (c) the sufficient identification of subordinates;
  - (d) the criminal conduct of subordinates that is imputed to the Accused;
  - (e) whether the Accused knew or had reason to know that his subordinates were about to commit or had committed the crimes imputed to him;
  - (f) whether the Accused failed to take the necessary and reasonable measures to prevent such crimes or to punish the persons who committed them.
- v. 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" from the respective 2<sup>nd</sup> subparagraphs of paragraphs 12, 28 and 42.
- vi. With respect to Count I, the Prosecutor should, to the best of his knowledge, indicate the facts supporting his inference that, during the period which is covered by the charges of the Amended Indictment the Accused "was a powerful and influential businessman", as it is alleged in paragraphs 8 and 13 of the Amended Indictment.
- vii. With respect to Count I, the Prosecutor should either strike the reference to Ms. Agathe Kanziga as a co-conspirator from the Amended Indictment or provide a factual basis for the allegations of a conspiracy between her and the Accused.
- viii. With respect to Count I, the Prosecutor should, to the best of his knowledge, indicate the approximate dates and locations of the meetings alleged in paragraph 10 of the Amended Indictment.
- ix. With respect to Counts II, III and IV, the Prosecutor should, to the best of his knowledge, indicate the approximate date of the payment to the Interahamwe alleged in paragraphs 20 and 35 of the Amended Indictment.

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- x. With respect to Counts II, III and V, the Prosecutor should, to the best of his knowledge, indicate the approximate date of the order alleged in paragraphs 26 and 46 of the Amended Indictment.

*As to the required form of fair notice*

48. The Chamber recalls the *Kupreškić* Appeals Judgement:

The Appeals Chamber notes that, generally, an indictment, as the primary accusatory instrument, must plead with sufficient detail the essential aspect of the Prosecution case. If it fails to do so, it suffers from a material defect. [...] The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category.<sup>36</sup>

49. On the basis of the *Kupreškić* Appeals Judgement, the *Mrksic* decision further elaborates the formal requirements for the provision of sufficient notice to the Accused:

Generally, an indictment, as the primary accusatory instrument, must plead with sufficient particularity the material aspects of the Prosecution case, failing which it suffers from a material defect. In the light of the primary importance of an indictment, the Prosecution cannot cure a defective indictment by its supporting material and pre-trial brief. In the situation where an indictment does not plead the material facts with the requisite degree of specificity because the necessary information is not in the Prosecution's possession, doubt must arise as to whether it is fair to the accused for the trial to proceed. The Prosecution is therefore expected to inform the accused of the nature and cause of the case, as set out above, before it goes to trial. It is unacceptable for it to omit the material facts in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. Where the evidence at trial turns out differently than expected, the indictment may be required to be amended, an adjournment may be granted or certain evidence may be excluded as not being within the scope of the indictment.<sup>37</sup>

50. The Chamber reiterates that the Prosecutor's right to cure - in exceptional cases - the lack of precision in an indictment does not imply that all of his accusatory instruments are equivalent. The indictment remains the primary accusatory instrument, and all material aspects must be pleaded in it with sufficient particularity.

51. The Chamber observes that the Prosecutor's mere disclosure of witness statements does not give the Accused sufficient notice of specific charges against him. The respective functions of indictments and witness statements are fundamentally different: An indictment has to inform the Accused of the legal and factual allegations against him; a witness statement provides but a preliminary assessment of the evidence that will be adduced during trial and can therefore not be an instrument to provide sufficient notice to the Accused in order to enable him to prepare his defence adequately.

<sup>36</sup> *The Prosecutor v. Kupreškić*, Case IT-95-16, Appeal Judgment, 23 October 2001 par. 114 (footnotes omitted).

<sup>37</sup> *The Prosecutor v. Mrksic*, Case No. IT-95-13/1 "Decision on Form of the Indictment", 19 June 2003, par. 13 (footnotes omitted).

*ny*

**FOR THE ABOVE REASONS  
THE TRIAL CHAMBER**

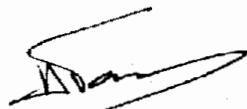
**I. Grants** the measures requested by the Defence to the extent set out in paragraph 47.

**II. Grants** the Prosecutor leave to file an Amended Indictment in the form of the text of the Amended Indictment filed on 5 November 2003 with the specific amendments referred to in paragraph 47.


**III. Orders** the Prosecutor to file its Amended Indictment implementing the required changes by 31 August 2004.

**IV. Denies** the Defence Motion in all other respects.


Arusha, 15 July 2004



Andréia Vaz  
Presiding Judge



Flavia Lattanzi  
Judge



Florence Rita Arrey  
Judge

