

ICTR-2001-73-I
2-3-2005
(2036-2029)

2036
2005



UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C.M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 2 March 2005

JUDICIAL RECORDS ARCHIVES
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THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-R50

**DECISION ON THE PROSECUTION CONDITIONAL MOTION FOR LEAVE TO
AMEND THE INDICTMENT AND ON THE DEFENCE COUNTER-MOTION
OBJECTING TO THE FORM OF THE RECAST INDICTMENT**

Article 18 of the Statute, Rules 50(A), 47(E) and (F) of the Rules of Procedure and Evidence

Office of the Prosecutor:
Stephen Rapp
Charity Kagwi

Defence Counsel
John Philpot
Peter Zaduk

2035

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber III, composed of Judge Dennis C.M. Byron, Presiding, Judge Emile Francis Short and Judge Gberdao Gustave Kam (“Chamber”);

BEING SEIZED of

- a) the “Prosecutor’s Conditional Motion for Leave to Amend the Indictment” (“Motion”) filed on 31 August 2004,
- b) the Defence “Response to the Prosecutor’s Conditional Motion for Leave to Amend Indictment and Motion Objecting in Part to the Form of the Amended Indictment Filed on August 31, 2004” (“Counter-Motion”) filed on 9 September 2004,
- c) the Prosecution “Reply to Defence Response to Prosecutor’s Conditional Motion for Leave to Amend Indictment and Response to Defence Motion Objecting in Part to the Form of the Amended Indictment of 31 August 2004” filed on 14 September 2004,
- d) the Defence “Reply to the Prosecutor’s Reply to the Defence Response to the Prosecutor’s Conditional Motion for Leave to Amend Indictment and Reply to the Prosecutor’s Response to the Defence Motion Objecting in Part to the Form of the Amended Indictment” filed on 16 September 2004,
- e) the Prosecution “Supplemental Reply to the Defence Response of 16 September 2004 RE: Amended Indictment of 31 August 2004” filed on 22 September 2004,
- f) the “Defence Submission Opposing Reopening Prosecutor’s Argument in his Amendment Application” filed on 21 September 2004,
- g) the Prosecution “Submission of Attested Statement Re: Conditional Motion for Leave to Amend Indictment” filed on 23 September 2004,
- h) the “Defence Submission in Reply to Prosecutor’s Supplemental Submissions Filed on September 21, 2004” filed on 24 September 2004,
- i) the Defence “Additional Submissions Concerning the Prosecutor’s Conditional Motion for Leave to Amend Indictment and Motion Objecting in Part to the Form of the Amended Indictment Filed on August 31, 2004” filed on 23 December 2004,
- j) the “Prosecutor’s Response to the Additional Submissions Filed by the Defence on 23 December 2004” filed on 29 December 2004, and
- k) the “Defence Reply to Prosecutor’s Response to the Additional Submissions Filed by the Defence on December 23, 2004” filed on 6 January 2005.

RECALLING the Chamber’s Decisions of 15 October 2003 and of 15 July 2004 (“Decision of 15 October 2003” and “Decision of 15 July 2004”);¹

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

¹ Respectively: *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*; and *Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment*.

ARGUMENTS OF THE PARTIES

Prosecutor's Submissions

1. In his Motion, the Prosecutor requests the Chamber
 - (i) to declare that the Indictment of 31 August 2004 (the "Recast Indictment") does not require leave to amend; or in the alternative
 - (ii) to grant leave to file the Recast Indictment as a further Amended Indictment.
2. In support of his motion and in his pleadings responding to the Defence Counter-Motion and other pleadings, the Prosecutor submits that all modifications of language and content in the Recast Indictment are in compliance with the Decision of 15 July 2004.
3. As to Count I, relying on information contained in the previously filed supporting material, he has specified the meetings that the Accused and others attended, and detailed the acts that the Accused and others committed in furtherance of the alleged conspiracy. However, he has relied on new witness statements to supply the new details relating to Agathe Kanziga and the meeting at the Gisenyi football field in mid-April 1994.
4. In response to a challenge by the Defence, he clarifies that the "various meetings" mentioned in the first sentence of Paragraph 7 of the Recast Indictment are only the ones that are described in the witness statements, and accepts that Paragraph 21 of the Recast Indictment should read like its Paragraph 41.
5. The Prosecutor indicates that he has given the best information available, and states that further names of victims and perpetrators and precise locations are contained in several witness statements which have already been disclosed. He stated that he could insert these in the relevant Paragraphs if so required.
6. As to Counts II, III, IV, and V, the Prosecutor asserts that the allegations encompass a second attack on Tutsi who sought refuge on hills near the Rubaya tea factory. Whereas in the previous Indictments he alleged only one attack on the Gashihe or Kesho Hill, the Prosecutor now relies upon a witness who asserts a similar attack on the surviving Tutsi who sought refuge on the nearby Rurunga Hill. Both attacks allegedly occurred in the same *Secteur* and involved the same pattern of conduct on the part of the Accused. The Prosecutor emphasizes that the evidence on the second attack imputed to the Accused is highly relevant. He sees no irreparable prejudice in its admission at this pre-trial stage of the proceedings. The Prosecutor submits that, according to the *Ntakirutimana* Appeals Judgement,² the events at Rurunga Hill ought to be pleaded specifically.

Defence Submissions

7. The Defence requests the Chamber, as a Counter-Motion,
 - (i) to declare that there is no need to apply for leave to file the Recast Indictment;

² *The Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Cases Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004.

(ii) to strike from the Recast Indictment the allegations concerning Rurunga Hill; and moves to strike several Paragraphs or phrases from the Recast Indictment for non-compliance with the Decision of 15 July 2004.³

8. The Defence submits that the allegation of an attack on Rurunga Hill in the Recast Indictment is new, there is a considerable time gap between this attack and the one that was previously pleaded, and the attacks target different victims at different locations. The Defence avers that the new allegations would cause undue delay since they require new investigations. It considers the request to be untimely and negligent and prays that the Chamber should deny leave to amend the Indictment with respect to the allegations concerning Rurunga Hill.

9. In its pleadings it argues that no further amendment should be allowed because on 1 December 2003 the Prosecutor had promised he would not re-amend the Indictment. He contends that the Recast Indictment does not fully comply with the Decision of 15 July 2004, and does not satisfy the requirements set forth in the *Ntakirutimana* Appeals Judgement. In particular it contends that the Prosecutor cannot rely upon witness statements to identify facts that ought to be pleaded in the Indictment. In this context the Defence renews its request that the Chamber orders the Prosecutor to indicate the names of all members of the Sekimonyo family and the Bahoma Tutsi who were killed, and the names of the subordinates of the Accused.

DELIBERATIONS

10. In the Decision of 15 July 2004, the Chamber ordered the Prosecutor to file his Amended Indictment, implementing specified changes, by 31 August 2004. The required changes included adjustments to or the deletion of the pleading of personal responsibility and command responsibility pursuant to Articles 6(1) and (3) of the Statute and joint criminal enterprise. They also included the insertion of additional facts and increased specificity with regard to dates and locations to eliminate the vagueness of certain allegations. The Chamber specifically ruled that the material facts must be pleaded in the Indictment with sufficient particularity. Following that Decision, the Prosecutor filed the Recast Indictment on 31 August 2004. Since then, both the Defence and the Prosecutor filed responsive and ancillary motions and submissions.

11. Paragraphs 7, 14, 15, 34 and 35 of the Recast Indictment allege an attack against Tutsi at Rurunga Hill. This is different from the attack against Tutsi on Gashihe or Kesho Hill pleaded in the Amended Indictment: the two allegations concern different locations, different times, and – at least to some extent – different victims. The allegation of a second attack cannot be construed as a precision of the first attack, as the Prosecutor submits. The Chamber concludes that the allegation of the attack against Tutsi at Rurunga Hill is new, and that it is necessary to consider whether to grant leave to include this allegation in the Recast Indictment.

12. In deciding whether to grant leave to amend an Indictment pursuant to Rule 50(A)(ii) of the Rules, the Chamber follows the procedures and applies the standards set out in Sub-Rules 47(E) and (F) of the Rules. This requires consideration of the establishment

³ Defence specifically refers to Paragraphs 7, 12, 13, 19, 20, 21, 22, 23, 27, 28, 32, 33, 39, 40, 41, 42, 43, and to the phrase "gendarmes, immigration police and custom officers".

of a *prima facie* case, issues of unfair prejudice to the parties, the incidence of undue delay, and other relevant factors including the diligence of the Prosecutor.⁴

13. The allegation of an attack against Tutsi at Rurunga Hill is based upon Witness ATM only. Although the probative value of the testimony cannot be anticipated a factual finding can be based upon the testimony of only one witness.⁵ The Chamber considers that a *prima facie* case has been presented.

14. The Chamber notes the Defence submissions that on 1 December 2003 the Prosecutor declared that he would not re-amend the Indictment. On 25 March 2004, Witness ATM spoke, during his second interview, for the first time about an attack against Tutsi at Rurunga Hill. Given the seriousness of the new assertions, the Prosecutor's premature commitment by itself cannot justify the exclusion of this allegation. It is in the interest of justice to ascertain the truth about serious charges against an accused.⁶ On the other hand, prejudice to the Accused which could arise from the amendment can be remedied by giving the Defence additional time for its preparation.

15. The new allegation is highly specific and as such is not legally or factually complex. The Defence can realistically be expected to conduct its additional investigations within a reasonable period of time. In any event, the trial date has not yet been fixed, permitting adequate time to be granted to the Defence for any further investigation that may be required. Furthermore, nothing has been presented to suggest that the Prosecutor acted with negligence by delaying his investigations, or that he sought a strategic advantage by introducing the new charges belatedly. At the current stage, the amendment could have no more than a slight impact on the overall expeditiousness of the proceedings. In the circumstances the Chamber will grant leave to the Prosecutor to include this allegation in the Recast Indictment.

16. The Chamber observes an inconsistency between the date of the attack as pleaded and the date in the supporting material provided. The Recast Indictment places the attack at an uncertain date about the second week of April 1994, which would be approximately between 8 and 14 April 1994. On the other hand, the Witness indicates the second week following President Habyarimana's death as the time of the attack, which would be the period between 14 and 20 April 1994. The Prosecutor should rectify this inconsistency.

17. In its Decision of 15 July 2004, the Chamber recalled its previous holding and concluded that the pleadings of command responsibility in the Amended Indictment had not met established criteria because the Prosecutor had not provided a sufficiently precise factual basis that the Accused had the possibility to discipline and punish his subordinates or to prevent their criminal conduct.⁷ The Chamber re-emphasises the need for sufficient factual

⁴ See: *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24-AR73, Decision Stating Reasons for Appeals Chamber's Order of 29 May 1998 (AC), 2 July 1998, para. 28; *The Prosecutor v. Prosper Mugiraneza*, Case No. ICTR-99-50-AR73, Decision on Prosper Mugiraneza's Interlocutory Appeal from Trial Chamber II Decision of 2 October 2003 Denying the Motion to Dismiss the Indictment, Demand Speedy Trial and for Appropriate Relief (AC), 27 February 2004.

⁵ *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (TC), 15 May 2003, paras. 209-213. See also *Georges Anderson Nderubumwe Rutaganda v. the Prosecutor*, Case No. ICTR-96-3-A, Judgement (AC), 26 May 2003, paras. 400 et seq.

⁶ *The Prosecutor v. Justin Mugenzi et al.*, Case No. ICTR-99-50-I, Decision on Justin Mugenzi's Motion for Stay of Proceedings or in the Alternative Provisional Release (Rule 65) and in Addition Severance (Rule 82(B)) (TC), 8 November 2002, para 32.

⁷ See Paragraphs 39, 40, and 47(vi) of the Decision of 15 July 2004.

detail of how the “relationship in the nature of that of an employer and employee”⁸ or the alleged family ties,⁹ implies the alleged superior responsibility to give rise to a *prima facie* case and to permit the Accused to meet the allegation in his defence. The jurisprudence on Article 6(3) of the Statute, establishes that a superior is one who possesses effective control through either *de jure* or *de facto* power or authority to prevent a subordinate’s crime or to punish the commission of a crime by a subordinate after the crime is committed.¹⁰ Hence, the proper pleading of civilian superior responsibility requires the Prosecutor to allege a *prima facie* case that the accused exercised effective control over his subordinates. As the ICTY Appeals Chamber stated in the *Čelebići* Appeal Judgement: “[...] it is necessary to look to effective exercise of power or control and not to formal titles.”¹¹

18. The Chamber notes that, in the *Musema* Trial, the contention that command responsibility could be found on the basis of Musema’s position as a local “...figure of authority and as someone who wielded considerable power in the region...” was rejected.¹² Yet the Trial Chamber had considered the issue of whether a socially and politically prominent person could be found to incur superior responsibility as a result of “psychological pressure.” It had also reviewed the *Herman Roehling* Judgement¹³ in which the family relationship – that of being a son-in-law of a powerful figure – was sufficient to give rise to superior responsibility on the facts of the case.

19. In the Recast Indictment, however, there is still insufficient factual basis to support the contention that the Accused had the possibility to discipline and punish his alleged subordinates or prevent their criminal conduct. The Chamber observes that, whenever the Prosecutor pleads command responsibility,¹⁴ he refers to personal, individual activities of the Accused.¹⁵ The charges are buttressed by allegations that the Accused led armed convoys, ordered and instigated other perpetrators, paid certain persons for committing particular acts, etc. Thus, the Prosecutor supports command responsibility by allegations of the Accused’s active participation. However, charges of command responsibility seek to establish the responsibility for omissions: where command responsibility is rightfully pleaded, an accused is held responsible for having failed to take necessary and reasonable measures to prevent certain acts, or for having failed to punish the perpetrators thereof. Where subordinates are alleged to have followed the orders of an accused, the charge is not one of command responsibility pursuant to Article 6(3) of the Statute.

20. The Chamber concludes that, in the Recast Indictment, the factual allegations do not sufficiently support the pleading of command responsibility, and recalls that this is the third time that the Prosecution has failed to provide sufficient support to such pleading. Providing a further opportunity would cause unfair prejudice to the Defence. In the Decision of 15 July 2004 the Prosecutor was ordered to omit references to command responsibility if he

⁸ See Paragraph 26 of the Recast Indictment.

⁹ See Paragraph 51 of the Recast Indictment.

¹⁰ *The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, paras. 192, 198.

¹¹ *The Prosecutor v. Zejnil Delalic et al.*, Case No. IT-96-21-A, Judgement (AC), 20 February 2001, para. 197.

¹² *The Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement (TC), para. 881.

¹³ *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roehling and Others*, Law Reports, Vol. XIV, Appendix B, p. 1075, para. 1092.

¹⁴ See Paragraphs 17, 26, 30, 37, 46, 51, 54, and 58 of the Recast Indictment.

¹⁵ See, in particular, the cross-references to Paragraphs 12-15 and 18-24, of the Recast Indictment.

could not support them with specific facts. That decision causes no prejudice to the Prosecutor since the pleading of command responsibility is supported by the same facts pleaded in support of charges of individual responsibility, and should be implemented with respect to Counts II to V.

21. The Chamber notes that when Paragraphs 11, 16-17, 25-26, 29-30, 36-37, 45-46, 50-51, 53-54, 57-58 are read in conjunction with other Paragraphs providing details of the factual allegations, the Prosecutor has complied in all other respects with the Decision of 15 July 2004, requiring him to state the different forms of participation in the crimes alleged, and in particular with regard to the pleading of personal responsibility and the nature and purpose of the joint criminal enterprise alleged.

22. The requirement to insert additional facts and increased specificity with regard to dates and locations to eliminate the vagueness of certain allegations has been addressed. In Paragraph 3, the Prosecutor has implemented the Chamber's Order to buttress the allegations regarding the social position of the Accused in Rwanda in 1994. In Paragraph 8 the Prosecutor has implemented the Chamber's Order to support the charges of a conspiracy between the Accused and Agathe Kanziga with a factual basis.¹⁶ In Paragraph 7 the Prosecutor has implemented the Chamber's Order to indicate dates and locations of meetings. The Paragraph also informs the Defence about the material facts underpinning the charges. The Chamber concludes that the Defence request for further particulars on the meetings pleaded in Paragraph 7 is unjustified. In Paragraph 41 the requirement to specify the dates *Interahamwe* were paid to dig a mass grave known as "the pit" has been implemented, and the precision of time contained in Paragraph 41 applies to all other occurrences of the identical allegation. The Chamber recalls and reaffirms its previous holding that the Defence does not require the names of the victims of the Sekimonyo family and the Bahoma Tutsi clan in order to adequately prepare its defence.¹⁷ However, in the context of the Prosecutor's assertion that he disclosed some names of unprotected victims and co-perpetrators in witness statements, the Chamber recalls that the disclosure of witness statements does not give the Accused sufficient notice of specific charges against him. In the *Ntakirutimana* Appeals Judgement, it was recognized that this type of information is useful in the preparation of the defence.¹⁸ The names and related details in the possession of the Prosecutor should therefore be inserted in the relevant Paragraphs.

23. Paragraphs 19-23 and 39-43 of the Recast Indictment raise allegations that the Accused was involved in the setting up and manning of roadblocks next to his residence in Giciye commune and on "La Corniche" Roadway. The Chamber finds that sufficient information about the roadblocks and the related events have been provided to enable the defence preparation. The gendarmes, guards, customs officers, etc. allegedly manning the roadblocks are suitably identified by their status, presence at a specific place at a specific time, and the functions they allegedly exercised at these locations. The names of the individuals manning the roadblocks are not necessary in order to enable the Defence to adequately prepare its case. The Chamber concludes that Paragraphs 19-23 and 39-43 of the Recast Indictment give the Defence fair and sufficient notice of the case it will face at trial with respect to the involvement of the Accused in the setting up and manning of roadblocks.

¹⁶ See Paragraph 47(vii) of the Decision of 15 July 2004.

¹⁷ See Paragraph 45 of the Decision of 15 July 2004.

¹⁸ *Ntakirutimana* Appeals Judgement, para. 25.

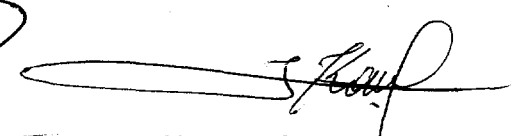
FOR THE ABOVE MENTIONED REASONS, THE CHAMBER

- I. GRANTS** the Prosecutor leave to file an Indictment that includes the allegation of an attack against Tutsi at Rurunga Hill under the conditions set out below.
- II. ORDERS** the Prosecutor:
- (1) with respect to Counts II to IV, *either* to strike Paragraphs 14, 15, 34 and 35 from the Recast Indictment *or* to plead a date of the alleged attack on Tutsi at Rurunga Hill which is consistent with the submitted supportive material;
 - (2) with respect to Counts II to V, to strike from the Recast Indictment all references to command responsibility, in particular Paragraphs 17, 26, 30, 37, 46, 51, 54, and 58; and
 - (3) to insert the names of unprotected witnesses in the relevant Paragraphs as stated in Paragraph 25 above, or to attach a schedule of particulars containing those names if there are more than ten.
- III. ORDERS** the Prosecutor to file the Indictment amended and corrected as per the two previous orders within seven (7) days from the service of this Decision.
- IV. DENIES** the remainder of the Defence Counter-Motion.

Arusha, 2 March 2005, done in English.


Dennis C. M. Byron
Presiding Judge


Emile Francis Short
Judge


Gberdao Gustave Kam
Judge


[Seal of the Tribunal]