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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
Karin Hökberg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 26 May 2005

THE PROSECUTOR

v.

André RWAMAKUBA
Case No. ICTR-98-44C-R72

JUDICIAL RECORDS/ARCHIVES
ICTR

2005 MAY 26 P 6: 05

DECISION ON DEFECTS IN THE FORM OF THE INDICTMENT

Rule 72 of the Rules of Procedure and Evidence

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David Hooper and Andreas O'Shea

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

SITTING as Trial Chamber III, composed of Judges Dennis C. M. Byron, Presiding, Karin Hökberg and Gustave Gberdao Kam ("Chamber");

BEING SEIZED OF the "Preliminary Motion on Defects in the Form of the Indictment of 23 February 2005" ("Motion"), filed on 28 April 2005;

CONSIDERING the Prosecution's Response thereto, filed on 4 May 2005;

HEREBY DECIDES the Motion pursuant to Rule 72 of the Rules of Procedure and Evidence ("Rules").

INTRODUCTION

1. Following the Decision granting severance of André Rwamakuba ("Accused"),¹ a Separate Indictment against the Accused has been filed on 23 February 2005 ("Indictment").² The trial is scheduled to commence on 9 June 2005.³

2. The Chamber has now to address a Motion filed by the Defence of the Accused André Rwamakuba ("Defence") alleging defects in the form of the Indictment pursuant to Rule 72(B) of the Rules.

ARGUMENTS OF THE PARTIES*Defence*

3. The Defence contends that the Indictment remains insufficiently precise or detailed to put the Accused on fair notice of the nature and extent of the charges against him, in accordance with Article 20(4)(a) of the Statute of the Tribunal ("Statute") and Rule 47(C) of the Rules. The Defence submits that its application is supported by jurisprudence of both *ad hoc* Tribunals.⁴

4. The Defence asserts that most of the alleged defects follow from a lack of specificity amounting to broadening the case against the Accused. Such a broadening would be contrary to the Prosecution's stated intention to focus its case only on the direct participation of the Accused in the alleged events of Gikomero and Butare and, therefore, contrary to the basis of the agreement of the Accused on the severance. The defects in the form in the Indictment would consist of:

- Lack of or insufficiently specific time-frames at Paragraphs 3 to 5, 14 and in the introduction of Counts 1 and 2;

¹ *Prosecutor v. Edouard Karemera, Mathieu Ndirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on severance of André Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005 (*Karemera et al.* Case, Decision on Severance).

² That Indictment has been re-filed on 9 March 2005, due to typographical errors and in accordance with the Order to Re-File the Amended Indictment (TC), 8 March 2005.

³ See *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Scheduling Order (TC), 24 March 2005.

⁴ The Defence refers to *Prosecutor v. Nahimana*, Case No. ICTR-96-11-T, Decision on Preliminary Motion filed by the Defence based on Defects in the Form of the Indictment (TC), 24 November 1997; *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-T, Decision on Defence Motion for Defects in the Form of the Indictment (TC), 31 May 2000; *Prosecutor v. Kupreskic*, Judgment (AC), 30 October 2001.

- Lack of or insufficiently specific time-frames and locations at Paragraphs 6 to 8 and in the introduction of Counts 3 and 4;
- Lack of specific details surrounding the alleged conduct of the Accused: the Defence requests additional details for Paragraphs 7 and 8, including names of any subordinate; insertion, at Paragraphs 12, 13 and 15, of the names of the alleged accomplices, subordinates and victims, or, in alternative, mention that they are unknown; and deletion of the fourth limb of Paragraph 23 for its total generality and inconsistency with the case that the Prosecution would intend to present at trial.

Prosecution

5. The Prosecution submits that the principles set out by Article 20(4)(a) of the Statute and Rule 47(C) of the Rules have to be balanced with the Prosecution's duties under Article 17(4) of the Statute. The Indictment combined with the witness statements and the supporting material would sufficiently allow the Accused to understand the charges against him.

6. The Prosecution submits that in accordance with the Decision of 14 February 2005,⁵ it has provided additional details where they were in its possession. It further contends that, following the jurisprudence,⁶ the time-frames given in the Indictment are sufficiently specific with respect to the nature and the scope of the events in 1994. In addition, most of these time-frames would be included in introductory paragraphs, while more specific time-frames would be contained in the subsequent paragraphs detailing dates where the events took place. With respect to the lack of specificity of the locations, the Prosecution contends that the Defence cannot ignore the context in which the events took place: the Indictment would clearly state that Rwamakuba is prosecuted for the alleged facts committed in Gikomero *commune* and Butare Hospital. Finally, regarding the request of the Defence on details surrounding the alleged conduct of the Accused, the Prosecution submits that it has an obligation to state the material facts underpinning the charges in the Indictment, but not the evidence by which such facts are to be proven. The Accused guilt could not be challenged through preliminary motions.

DELIBERATIONS

7. The obligation of the Prosecution to set out a "concise statement of the facts" in the Indictment under Article 17(4) of the Statute and Rule 47(C) must be interpreted in the light of the Articles 20(4)(a) and 20(4)(b) of the Statute. In the *Ntakirutimana* Judgement, the Appeals Chamber recalled that "[t]he question of 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 or her so that he or she may prepare his or her defence*".⁷ The degree of specificity depends on the allegations of the Prosecution. However, "the Prosecution's obligation to provide particulars in the indictment is at its highest when it seeks to prove that the accused killed or harmed a specific individual."⁸ When alleging that the Accused personally carried out the acts underlying the crime in question, it is necessary for the Prosecution to set out the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by

⁵ *Karemera et al.* Case, Decision on Severance.

⁶ The Prosecution refers to a *Kvovka* Decision of 12 April 1999.

⁷ *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-A and 96-17-A, Judgment (AC), 13 December 2004, par. 470 (*Ntakirutimana* Appeals Judgment); see also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgment (AC), 26 May 2003, par. 301-303.

⁸ *Ntakirutimana* Appeals Judgment, par. 74.

which they were committed “with the greatest precision”.⁹ In its assessment of the Motion described hereinafter, the Chamber has applied the above-mentioned principles to the Indictment.

Alleged Lack of or Insufficiently Specific Time-Frames at Paragraphs 3 to 5, 14 and in the Introduction of Counts 1 and 2

8. The Chamber accepts the Defence’s assertion that the phrase “towards the end of 1993” at Paragraph 3 of the Indictment is not accurate enough and could raise ambiguities. The Prosecution should therefore specify the meaning of the said expression to clarify the exact time-frame it alleges at Paragraph 3 of the Indictment.

9. Paragraphs 3 and 4 have to be read in relation to each other. The insertion by the Prosecution of a more accurate time-frame at Paragraph 3, in compliance with the reasoning set out above, will provide the Defence with sufficient notice of the period when the “sensitization campaigns” took place, and therefore of the time-frame applicable to the allegations contained at Paragraph 4. Contrary to the Defence’s contention, the Chamber is of the view that the word “particularly” at Paragraph 4 emphasizes a more specific period during which the alleged events took place and could enhance the preparation of the Defence.

10. With respect to Paragraph 5, the Chamber considers that the time-frames given are sufficiently specific in the light of the allegation of genocide or, alternatively, complicity in genocide.

11. Conversely, the Chamber finds that the current wording of Paragraph 14 alleging the appointment of the Accused as spokesman for the Interim Government lacks specificity and contains ambiguities. The Indictment should explicitly mention the date of the appointment of the Accused and the period during which he acted in that capacity according to the same Paragraph.

12. The Chamber accepts the Defence’s complaint that the time-frames set out in the introduction of Counts 1 and 2 could appear not accurate enough in the light of the other time-frames given in the Indictment. The Prosecution’s contention that those paragraphs would be introductive to the subsequent paragraphs providing more specific time-frames is not persuasive and, on the contrary, raises more ambiguity about the extent of the charges against the Accused. The Prosecution should therefore remedy that ambiguity and put the Defence on better notice of the period during which the factual allegations against the Accused took place.

Alleged Lack of or Insufficiently Specific Time-Frames and Locations at Paragraphs 6 to 8 and in the Introduction of Counts 3 and 4

13. The Chamber finds that the phrase “during 1994” at Paragraph 6 of the Indictment does not provide sufficient notice to allow the preparation of the Defence. A more specific time-frame than “during 1994” should be inserted. For the same reasons, the Prosecution should better specify the locations to which it refers at the same Paragraph.

14. With respect to Paragraphs 7 and 8, the Chamber does not consider that additional specification is required in the light of the allegations of genocide or, alternatively, complicity in genocide.

15. The Chamber accepts the Defence’s complaint that the time-frames and the phrase “throughout the territory of Rwanda” set out in the introduction of Counts 3 and 4 could raise

⁹ *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgment (AC), 29 July 2004, par. 213.

ambiguities. In addition, if these paragraphs are introductive to the subsequent allegations as stated by the Prosecution, the time-frames and locations should be more accurate in accordance with the subsequent allegations.

Lack of specific details surrounding the alleged conduct of the Accused

16. For the same reasons as stated above, the Chamber does not consider that Paragraphs 7 and 8 request specification or additional details.

17. In accordance with the above-mentioned jurisprudence, the Prosecution should specify, at Paragraphs 12, 13 and 15, the names of the alleged perpetrators, accomplices, subordinates and victims, if the information is in its possession. If it is not so, the Indictment should explicitly mention that they are unknown.

18. In its Decision of 14 February 2005 granting severance of the Accused, the Chamber noted that the Prosecution has explicitly indicated that any reference to joint criminal enterprise has been removed from the Indictment and that the Separate Indictment contains only allegations that are unique and relevant to the Accused. The Chamber considers however that the allegation contained at the fourth limb of Paragraph 23 raises ambiguities about the exact nature of the responsibility alleged against the Accused.¹⁰ Accordingly, the fourth limb of Paragraph 23 of the Indictment should be struck out from the Indictment.

19. The Chamber notes the Prosecution's statement that the Indictment contains all the relevant details in its possession regarding time, locations and names of victims. While the Prosecution cannot be compelled to disclose information which is not in its possession, the Chamber recalls that it is not acceptable for the Prosecution to omit material aspects of its main allegations in the Indictment with the aim of moulding its case in the course of the trial depending on how the evidence unfolds.¹¹ The Prosecution is expected to know its case before it goes to trial and should provide any additional details in its possession to put the Accused on better notice of the charges against him.

20. Finally, to reduce any delay in the proceedings and if the Prosecution intends to file with the Chamber a submission describing how it complies with this Decision, such a submission should be also filed with the Defence.

FOR THE ABOVE REASONS, THE CHAMBER

I. GRANTS the Motion in part.

II. ORDERS the Prosecution no later than 1st June 2005:

- (i) At Paragraph 3 of the Indictment, to define "towards the end of 1993" and to specify the time-frame alleged;
- (ii) At Paragraph 6 of the Indictment, to provide a more specific time-frame than "during 1994";

¹⁰ The fourth limb of paragraph 23 of the Indictment reads as follows:

"De nombreuses autres personnes tuées dans le cadre de la campagne généralisée entreprise par le Gouvernement intérimaire d'avril à juin 1994, dans le but de détruire les Tutsis en tant que groupe et à laquelle André RWAMAKUBA a largement contribué." (Authoritative version)

"Many other persons killed as part of the widespread campaign of April-June 1994, conducted by the Interim Government, with the intent of destroying, in whole or in part, the Tutsi as a group, and to which André RWAMAKUBA largely contributed" (Translated version).

¹¹ *Karemera et al.* Case, Decision on Severance, par. 45.

- (iii) At Paragraph 14 of the Indictment, to indicate explicitly the date of the appointment of the Accused as spokesman of the Interim Government and to specify the period during which the Accused acted in such a capacity;
- (iv) At Paragraphs 12, 13 and 15, the names of the alleged perpetrators, accomplices, subordinates and victims, if the information is in its possession; or, in the alternative, mention that they are unknown.
- (v) To strike out the fourth limb of Paragraph 23 of the Indictment, which reads as follows:
 - “De nombreuses autres personnes tuées dans le cadre de la campagne généralisée entreprise par le Gouvernement intérimaire d’avril à juin 1994, dans le but de détruire les Tutsis en tant que groupe et à laquelle **André RWAMAKUBA** a largement contribué.” (Authoritative version)
 - “Many other persons killed as part of the widespread campaign of April-June 1994, conducted by the Interim Government, with the intent of destroying, in whole or in part, the Tutsi as a group, and to which **André RWAMAKUBA** largely contributed” (Translated version).
- (vi) To better specify the time-frames in the introduction of Counts 1 and 2 of the Indictment;
- (vii) To better specify the time-frames and locations in the introduction of Counts 3 and 4 of the Indictment.

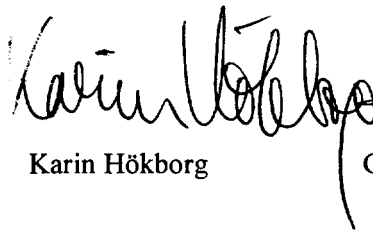
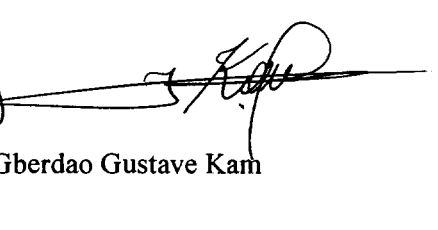
III. DISMISSES the remainder of the Motion.

Arusha, 26 May 2005, done in English.



Dennis C. M. Byron

Presiding Judge

Karin Hökberg

Judge

Gberdao Gustave Kam

Judge

[Seal of the Tribunal]

