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UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TRIAL CHAMBER I

Before: Judge Erik Møse, presiding
Judge Jai Ram Reddy
Judge Sergei Alekseevich Egorov

Registrar: Adama Dieng

Date: 30 May 2005

THE PROSECUTOR

v.

Jean MPAMBARA

Case No. : ICTR-2001-65-1

DECISION ON THE DEFENCE PRELIMINARY MOTION CHALLENGING THE AMENDED INDICTMENT

Office of the Prosecutor:
Richard Karegyesa

Counsel for the Defence:
Arthur Vercken
Vincent Courcelle-Labrousse

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA,

SITTING as Trial Chamber I, composed of Judge Erik Møse, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

BEING SEIZED OF the Defence's "Requête de la défense en exception préjudicielle pour vice de forme de l'acte d'accusation modifié", filed on 5 April 2005;

CONSIDERING the Prosecution's response, filed on 14 April 2005; and the Defence's reply, filed on 20 April 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Defence motion challenges the form of the Amended Indictment and argues that it is vague in its characterization of the forms of criminal participation and the crimes as well as in respect of several paragraphs which lack sufficient particularities.[1] The Chamber granted the Prosecution leave to amend the original Indictment on 4 March 2005, adding among other things additional counts of complicity in genocide and extermination as a crime against humanity.[2]

DELIBERATIONS

2. Article 20 (4)(a) of the Statute guarantees an accused the fundamental right "to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him or her". This translates into an obligation for the Prosecution to plead all material facts in the indictment with as much specificity as reasonably possible.[3] The law governing challenges to the specificity of the Indictment is set forth in detail in the Appeals Chamber judgement in *Kupreskic* as well as subsequent jurisprudence.[4]

3. The Defence argues that the Amended Indictment is vague because it alleges all forms of criminal responsibility under Article 6 (1) and fails to establish a link between each form and the specific underlying paragraphs. The Defence contends that the Amended Indictment also fails to identify which form of joint criminal enterprise the Prosecution intends to pursue.

4. The mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set forth in the indictment; mere reference to Article 6 (1), which

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[1] The Defence also requests that the Amended Indictment be conveyed to the Accused in French. The French version of the Amended Indictment was filed with the Registry on 8 April 2005. Consequently, this request is now moot. In addition, the Defence contends that the Prosecution's response is not timely because it was filed after the five day limit mentioned in Rule 73. The five day period mentioned in Rule 73 is the minimum delay that the Chamber must wait before disposing of a motion. A party is at liberty to respond to a pending motion until the Chamber files its decision.

[2] *Mpambara*, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 4 March 2005.

[3] *Kupreskic*, Judgement (AC), 23 October 2001, para. 88; *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 25; *Simba*, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, para. 12.

[4] *Kupreskic*, Judgement (AC), 23 October 2001, paras. 88-90, 92, 114; *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 24-28; *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 193-195; *Krnojelac*, Judgement (AC), 17 September 2003, paras. 129-134, 138-139; *Rutaganda*, Judgement (AC), 26 May 2003, paras. 301-303. *See also Ntagerura et al.*, Judgement (TC), 25 February 2004, paras. 29-39; *Semanza*, Judgement (TC), 15 May 2003, paras. 42-45.

lists multiple forms of participation, is insufficient.[5] In addition, the specific form of joint criminal enterprise should be clearly identified in the indictment.[6] However, an indictment is not vague simply because the Prosecution seeks to proceed on all forms of criminal participation, including all forms of joint criminal enterprise.[7] The Tribunal's jurisprudence permits cumulative and alternative charging; consequently, this practice does not result in ambiguity.[8] What is important is that the concise statement of facts adequately identify the accused's alleged role in the crime and that the allegations pleaded in the indictment, if proven, could support each form of participation which is charged.[9] The Amended Indictment clearly identifies the specific acts the Accused's is alleged to have engaged in, which, if established, could be characterized as one or more forms of participation under Article 6 (1). Furthermore, the Chamber has already stated that the manner in which the Prosecution has pleaded joint criminal enterprise reflects its intention to pursue all three forms.[10]

5. The Defence also contends that the use of the term "command responsibility" is misleading in paragraphs 6 and 21 because the Amended Indictment does not charge superior responsibility pursuant to Article 6 (3). In the Chamber's view, it is apparent that the phrase "command responsibility and control" is used in the Amended Indictment to indicate a position of *de jure* or *de facto* authority. Such use is not inappropriate or misleading in these circumstances, since a position of authority may be relevant to the forms of participation under Article 6 (1), notably that of "ordering".[11]

6. According to the Defence, the Amended Indictment does not indicate which facts support the count of extermination. The Chamber notes that paragraph 22 of the Amended Indictment clearly indicates that the facts pleaded in paragraphs 1 to 19 in support of the counts of genocide and complicity in genocide also support the count of extermination. As noted above, cumulative charging is permissible under the Tribunal's jurisprudence.

7. The Defence points to a number of paragraphs, which it argues lack sufficient particulars. It asserts that paragraph 10 and 15 are too general. In the Chamber's view, however, these allegations, while general in nature, are not vague because they operate as an introduction to and must be read in context with the more specific allegations that follow in paragraphs 11 to 14 and 16 to 20.[12]

8. In addition, the Defence argues that the Amended Indictment's reference to "Rukara Commune" as the location of the event described in paragraph 14 is too broad. The Prosecution responds that the Amended Indictment is as specific as possible insofar as it

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[5] *Krnojelac*, Judgement (AC), 17 September 2003, para. 138; *Ntagerura et al.*, Judgement (TC), 25 February 2004, para. 31; *Simba*, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004, para. 5.

[6] *Krnojelac*, Judgement (AC), 17 September 2003, para. 138; *Ntagerura et al.*, Judgement (TC), 25 February 2004, para. 34; *Simba*, Decision on the Defence's Preliminary Motion Challenging the Second Amended Indictment, 14 July 2004, para. 5. Joint criminal enterprise is a form of "commission" within the meaning of Article 6 (1). *See Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 462, 468.

[7] *Semanza*, Judgement (TC), 15 May 2003, paras. 59, 60.

[8] *Musema*, Judgement (AC), 16 November 2001, paras. 361, 363, 369. *See also Semanza*, Judgement (TC), 15 May 2003, para. 60.

[9] *Semanza*, Judgement (TC), 15 May 2003, para. 59.

[10] *Mpambara*, Decision on the Prosecution's Request for Leave to File an Amended Indictment (TC), 4 March 2005, para. 12.

[11] *Semanza*, Judgement (AC), 20 May 2005, paras. 360-363.

[12] *Ntagerura et al.*, Judgement (TC), 25 February 2004, para. 30 ("In assessing an Indictment, the Chamber is mindful that each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment"). *See also Gacumbitsi*, Judgement (TC), 17 June 2004, para. 176 (interpreting a general and introductory paragraph only to the extent of the greater detail provided in subsequent paragraphs).

gives the date, the name of the victim, and a description of the killers who allegedly killed the victim in the presence of the Accused. It also notes that further details can be found in the statement of Witness LEM, disclosed in French on 19 July 2001. The Chamber notes that in certain circumstances a defective indictment may 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.[13] With this in mind, the Chamber has reviewed this statement and notes that it provides the approximate location of the event. However, this location has been obscured by redactions made for witness protection purposes. The Chamber notes that witness protection concerns may justifiably prevent the Prosecution from fulfilling its legal obligation to provide prompt and detailed notice of all material facts.[14] The Chamber finds that, once the unredacted version of this statement is disclosed to the Defence before trial, the Prosecution will have given notice curing any ambiguity. The Prosecution should clarify this in its Pre-trial Brief.

9. The Defence asserts that paragraph 16 does not identify the individuals whom the Accused transported to Rukara parish. The Prosecution argues that the paragraph adequately identifies these people as Tutsi. The Chamber agrees that the identity of those urged to go to Rukara parish or transported there is not a material fact. Rather, what is important is that they are identified as members of the targeted group. In any event, the Chamber notes that some of these people are protected witnesses whose particulars will be disclosed prior to their testimony. In making these disclosures before trial, the Prosecution should specifically highlight these individuals to the Defence to ensure clear and timely notice, including making reference to them in its Pre-trial Brief.[15]

10. The Defence also argues that paragraphs 20 (i) and 20 (ii) are vague because they insufficiently identify the victims or the assailants. The Prosecution states that the attackers referred to in paragraph 20 (i) are Hutu men named Sebishwi and Gasaza and those referred to in paragraph 20 (ii) are Murwanashyaka and other Hutu men. It adds that the identities of the victims will be disclosed ahead of trial in accord with protective measures in force. In the Chamber's view, the Prosecution's submissions provide the Defence with clear and timely notice concerning the identity of the attackers. In making disclosures before trial relevant to the identities of the victims, the Prosecution should specifically highlight these individuals to the Defence to ensure clear and timely notice of these material facts, including making reference to them in its Pre-trial Brief.[16]

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[13] *Kupreskic*, Judgement (AC), 23 October 2001, para. 114; *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 27.

[14] *Ntagerura et al.*, Judgement (TC), 25 February 2005, para. 32; *Semanza*, Judgement (TC), 15 May 2003, paras. 55, 57-58. *See also Gacumbitsi*, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses (TC), 20 May 2003 ("The protection of witnesses should not … serve to frustrate or hinder an effective defence.").

[15] The Chamber notes that the "'mere service of witness statements by the [P]rosecution pursuant to the disclosure requirements' of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial". *Niyitegeka*, Judgement (AC), para. 197 (internal citations ommitted). *See also Ntagerura et al.*, Judgement (TC), 25 February 2004, para. 66 ("The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or goal submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular because some of this material is not made available until the eve of trial.").

[16] *Id.*

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Defence's motion;

Arusha, 30 May 2005

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]