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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 Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 5 August 2005

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-R72

DECISION ON DEFECTS IN THE FORM OF THE INDICTMENT

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

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

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

BEING SEIZED of "Joseph Nzirorera's Preliminary Motion to Dismiss for Defects in the Form of the Amended Indictment" ("Motion"), filed by Defendant Joseph Nzirorera ("Defendant Nzirorera") on 11 May 2005; and Mathieu Ngirumpatse's joinder filed on 16 May 2005;

BEING ALSO SEIZED of "Requête préliminaire pour Mathieu Ngirumpatse. Irrégularité de l'acte d'accusation" and "Requête de M. Ngirumpatse. Exception d'incompétence" ("Defendant Ngirumpatse"), filed on 11 May 2005; and Joseph Nzirorera's joinder to both motions filed on 12 May 2005;

BEING FINALLY SEIZED of "Requête d'Édouard Karemera en exception préjudicielle pour vices de forme de l'acte d'accusation" and "Requête relative à l'exception préjudicielle pour incompétence *ratione materiae*, *ratione personae*, *ratione temporis* et *nullum crimen, nuella poena sine lege*" ("Defendant Karemera") filed on 17 May 2005;

CONSIDERING the Prosecution's responses to those Motions;[1]

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

INTRODUCTION

1. The Accused made their initial appearance on 7 April 1999 pursuant to an Indictment charging eight accused persons. There were a number of orders allowing severance of various accused from this case and amendments of the Indictment.

2. On 14 February 2005, the Chamber granted severance of André Rwamakuba and amendments of the Indictment against the Accused.[2] Consequently an Amended Indictment was filed by the Prosecution on 25 February 2005, which presently remains in effect.

3. The commencement of the trial in the instant proceedings is scheduled on 5 September 2005.

4. The Chamber is now seized of Motions filed by Defendants Karemera, Ngirumpatse and Nzirorera on the defects in the form of the Amended Indictment. Defendants challenge the form of the Amended Indictment pursuant to Rule 72(A)(ii) of the Rules in that it fails to provide specificity which gives fair notice of the charges against them.

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[1] "Prosecutor's Response to Nzirorera's Preliminary Motion to Dismiss for Defects in the Form of the Indictment", filed on 16 May 2005; "Prosecutor's Response to Ngirumpatse's Preliminary Motion Alleging Defects in Form and Jurisdictional Defects", and "Prosecutor's Response to Ngirumpatse's *Requête préliminaire. Irrégularité de l'acte d'accusation*", filed on 16 May 2005; "Prosecutor's Response to Karemera's *Requête en exception préjudicielle pour vices de forme de l'acte d'accusation*", and "Prosecutor's Response to Karemera's *Requête relative à l'exception préjudicielle pour incompétences* ratione materiae, ratione personae, ratione temporis *et* nullum crimen, nuella poena sine lege " filed on 23 May 2005.

[2] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment (TC), 14 February 2005.

DISCUSSION

Preliminary Matter: the Alleged Breach of the Rights of the Accused Mathieu Ngirumpatse

5. Defendant Ngirumpatse contends that a trial on the basis of the Amended Indictment violates his rights under Article 20 of the Statute. Since it was presented eleven years after the alleged facts and seven years after his arrest, it infringes his right to be informed promptly of the nature and cause of the charge against him, to be tried without undue delay, and impinges on the fairness of the proceedings due to the unavailability of evidence. Consequently, he requests the Chamber to reject the Indictment, and if not, to direct the Prosecutor to make further specifications.[3]

6. The Tribunal's jurisprudence has consistently affirmed that contrary to Defendant Ngirumpatse's contention, there is no specific period of time which will automatically amount to an excessive delay in the proceedings.[4] The question must be addressed on a case by case basis considering the complexity of the proceedings and the case, including the scale of the offences charged, the number of motions filed by the parties, the complexity of the issues raised by the joinder and severance of parties to the trial, the conduct of the Accused, and the organs of the Tribunal.[5]

7. This exact point was already considered with regard to André Rwamakuba who was previously joined in the Indictment with the Defendants. In that case, after reviewing the relevant criteria, the Chamber ruled against the contention that the delay had violated the provision of Article 20 of the Statute. This case has had a very complex procedural history, with a trial that started in 2003, and is currently scheduled for rehearing on 5 September 2005 as a result of orders made by the Appeals Chamber upholding applications by the Accused.

8. Similarly to *Rwamakuba*, the Chamber has considered the interests of justice in the present case, and determined that the right of each Accused to be tried fairly have not been prejudiced by the length of time for this trial process. Conversely, as the Chamber previously stated in the severance of André Rwamakuba, the right of the Accused to be tried without undue delay will be enhanced by the narrowing of the case against each Accused and the simplification of their defence.[6] Accordingly, the Chamber is satisfied that Defendant Ngirumpatse's request should be denied.

Alleged Defects in the Form of the Indictment

9. Article 17(4) of the Statute and Rule 47(C) of the Rules instruct the Prosecution to set out a concise statement of the facts of the case and of the crime in the Indictment. That obligation must be read in light of Articles 20(2), 20(4)(a) and (b) of the Statute to ensure the minimum guarantees of the rights of the Accused. The jurisprudence of both *ad hoc* Tribunals therefore requires the Prosecution to state the material facts underpinning the charges in the Indictment with sufficient particularity to clearly inform an accused of the charges against him so that he may prepare his defence, but not the evidence by which such

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[3] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera*, ("*Karemera et al.*") Case No. ICTR-98-44-PT, Requête préliminaire pour Mathieu Ngirumpatse. Irrégularité de l'acte d'accusation, 11 mai 2005.

[4] *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-PT, Decision on Defence Motion for Stay of Proceedings (TC), 3 June 2005, para. 26.

[5] *Id.*

[6] *Id.* para. 31.

facts are to be proven.[7] Specifically, the Indictment needs not achieve the impossible standard of reciting all aspects of the evidence against the accused as it will unfold at trial.[8]

10. Defendants contend that the Indictment is so deficient that it should be dismissed for the following reasons:

i) it alleges all modes of individual liability found in Article 6(1) of the Statute;

ii) that there are still many allegations in the Indictment which are unclear and unspecified regarding dates, identities of individuals, locations of alleged events, and particular acts which allege that the Accused executed an offence;

iii) that the Indictment does not properly plead the command responsibility of the Accused since it does not specify the means by which he exercised effective control over their alleged subordinates;

iv) that the Indictment is inconsistent with the representations made by the Prosecution to obtain severance of André Rwamakuba by its references to the Interim Government;

v) that the charge of complicity in genocide in the alternative cannot rely on the same factual allegations as the charge of genocide; and

vi) that the charge of rape as a crime against humanity is vague.

Mode of Liability

11. Defendants Nzirorera and Ngirumpatse complain that Paragraph 4 of the Amended Indictment has left them without sufficient notice of the case against them by charging all possible forms of liability set out in Article 6(1).

12. The material facts to be plead in an Indictment may vary depending on the particular form of participation under Article 6(1) of the Statute.[9] 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 which they were committed with the greatest precision. However, where it is alleged that the Accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is

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[7] See *The Prosecutor v. George Anderson Nderubumwe Rutaganda,* Case No. ICTR-96-3, Judgement (AC), 26 May 2003, para. 301-303; *The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana,* Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement (AC), 13 December 2004, paras. 24-125, 469 and 470, quoting mainly ICTY *Prosecutor v. Kupreskic et al.,* Case No IT-95-16-A, Judgement (AC), 23 October 2001, paras. 88-92; *Prosecutor v. Krnojelac,* Case No IT-97-25-A, Judgement (AC), 17 September 2003, paras. 129-130; *Prosecutor v. Blaskic,* Case No IT-95-14-A, Judgement (AC), 29 July 2004, paras. 208-210, 220.

[8] *The Prosecutor v. Emmanuel Ndindabahizi,* Case No ICTR-2001-71-T, Judgement (TC), 15 July 2004, citing *The Prosecutor v. Laurent Semanza,* Case No ICTR-97-20-T, Judgement (TC), 15 May 2003, para. 44 ("The fundamental question in determining whether an indictment was pleaded with sufficient particularity is whether an accused had enough detail to prepare his defence"); *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No ICTR-99-46-T, 25 February 2004, Judgement (TC), para. 32 ("The Chamber, however, does not expect the Prosecutor to perform an impossible task and recognizes that the nature or scale of the crimes, the fallibility of the witnesses' recollections, or witness protection concerns may prevent the Prosecution from fulfilling its legal obligations to provide prompt and detailed notice to the accused. If a precise date cannot be specified, a reasonable range of dates should be provided").

[9] *Blaskic*, Judgement (AC), para. 212.

required to identify the "particular acts" or "the particular course of conduct" on the part of the accused which forms the basis for the charges in question.[10]

13. The jurisprudence is mixed as to the appropriateness of the Prosecution to allege every form of participation allowed in Article 6(1) of the Statute. However, this practice can be deemed vague without further particularizing the alleged acts of the accused that give rise to each form of participation charged.[11] It is in the interests of a fair and expeditious trial that the Prosecution pleads only the type of responsibility that it intends to rely upon on the basis of specific factual allegations.[12] A precise link between the types of responsibility plead pursuant to Article 6(1) and a respective set of facts must exist in order to give the Accused sufficient notice of the charges against him.[13] The Indictment should leave no doubt as to which form of liability is invoked by the specific facts alleged.[14]

14. In this case, the Chamber reads Paragraph 4 to be a general paragraph introducing the forms of liability and, as explained by the Prosecution, serves primarily to specify that the term "committing" includes participation in a joint criminal enterprise. The Prosecution has made specific factual allegations in the remainder of the Indictment, from which the forms of liability that have been alleged throughout could be inferred if the allegations are successfully proved at trial. The Chamber has not yet heard evidence to consider whether the forms of liability alleged have been proved for each respective factual scenario.

15. The Chamber therefore finds that the general allegation in Paragraph 4, along with the precise facts and forms of liability alleged with those facts, satisfy the Indictment requirements. As a result, no defect is found with regard to Paragraph 4.

Lack of specificity in the Indictment

16. The materiality of a particular fact and the degree of specificity depends on the Prosecution Case.[15] It is 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.[16] The Prosecution, however, is expected to know its case before it goes to trial.

17. The materiality of other facts and the specificity with which the Prosecutor must plead these facts depend on the form of participation alleged in the Indictment and the proximity of the accused to the underlying crime.[17] As noted above, a distinction has been drawn in the *ad hoc* Tribunal's jurisprudence between the level of specificity required when pleading an act where it is alleged that the accused had 1) individual responsibility by personally carrying out the acts underlying the crimes charged; 2) individual responsibility where the accused did not

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10 *Id.*, para 213.

11 *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-97-36, Judgment (TC), 25 February 2004, footnote 38, citing *Semanza,* Judgement (TC), para. 59. See also *Krnojelac*, Judgement (AC), para. 138.

12 *The Prosecutor v. Protais Zigiranyirazo*, Case No ICTR 2001-72-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment (TC), 15 July 2004, para. 33.

13 *Id.*, para 37.

14 *Id.*

15 *Rutaganda*, Judgement (AC), 26 May 2003, para. 301, quoting *Kupreskic et al.*, Judgement (AC), para. 89.

16 *The Prosecutor v. Éliezer Niyitegeka,* Case No ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 193, citing *Kupreskic et al.*, Judgement (AC), paras. 88-89 and 92.

17 *Kupreskic et al.*, Judgement (AC), para. 89; *Prosecutor v. Galic,* Case No. IT-98-29-AR72, Decision on Application by Defence for Leave to Appeal (AC), 30 November 2002, para. 15.

personally carry out the acts underlying the crimes charged; and 3) superior responsibility for the acts underlying the crimes charged.[18]

Identity of Members of the Joint Criminal Enterprise

18. In Paragraph 6 and Count 1, Defendant Nzirorera requests the names of all known members of the joint criminal enterprise, instead of the addition of the phrases "among others," or "with others." Prosecution responds that the members have been sufficiently identified by category and in addition, individuals from those categories have been named. Prosecution states that they do not know any more names of the individuals involved.

19. To understand the charges against him, an accused person must know the role that he is accused of playing, with whom he is alleged to have participated in the joint criminal enterprise.[19] However, the Chamber emphasizes that the accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes of his alleged co-perpetrators, subordinates or accomplices.[20] The Chamber understands that it is not possible to name everyone in this alleged joint criminal enterprise due to the scale of the allegations as long as the accused knows the role he is accused of playing. When the information is known, it should be released to comport with the rights of the accused.

20. Paragraph 6 to which Count 1 refers in Paragraph 23 lists named individuals with whom the Accused are alleged to be in a joint criminal enterprise. It also includes Paragraph 6(iii) which states "many unnamed others," and Paragraphs 6(i), 6(ii) and 6(iv) which mention "many others." The Chamber notes in the Prosecution's statement that is does not know any more names. However, these phrases in the Indictment are ambiguous and the Chamber finds that the Prosecution should:

- Clarify the statements in Paragraphs 6(i), 6(ii), and 6(iii) by indicating if more names are known, and if not, that these individuals are unknown.

Command Responsibility and Identity of Subordinates

21. Defendant Nzirorera complains that Paragraph 18 of the Indictment failed to specify the nature and extent of the Accused's command responsibility as previously ordered by the Chamber and did not identify the subordinates for whose crimes he is alleged to be responsible. In this paragraph, the Indictment is only illustrative of the subordinates using the terms "such as," "among others," and "particularly." The Defence complains that in Paragraphs 63.1 and 63.2, perpetrators alleged to be subordinates are too generally described as "militia men," "a leader of the *Interahamwe* militias," "the *Interahamwe*," and the date of the alleged incidents are stated to be between 6 and 30 April and 7 and 12 April, respectively.

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[18] *Ntakirutimana*, Judgment (AC), para. 74; *Ntagerura et al.*, Judgment (TC), 25 February 2004, para. 35.

[19] *The Prosecutor v. Innocent Sagahutu et al.*, Case No ICTR-00-56-T, Decision on Sagahutu's Preliminary, Provisional Release and Severance Motions (TC), 25 September 2002, para. 34, citing *The Prosecutor v. Ferdinand Nahimana*, Case No ICTR-99-52-T, Decision on the Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment (TC), 24 November 1997, paras. 26-27; *Prosecutor v. Blaskic*, Decision on the Defence Motion to Dismiss the Indictment Based Upon Defects in the Form Thereof (TC), 4 April 1997, paras. 29-30.

[20] *Id.* See also *The Prosecutor v. Protais Zigiranyirazo*, Decision on Defence Preliminary Motion Objecting to the Form of the Amended Indictment (TC), 15 July 2004, para. 39, citing *Prosecutor v. Mrksic*, Case No. IT-95-13/1-PT, Decision on the Form of the Indictment (TC), 19 June 2003, para 10; *Prosecutor v. Blaskic*, Judgement (AC), para. 218.

Prosecution responds that the individuals have been sufficiently identified by category, and in some instances it has named particular individuals within the group, and that a more precise date is not available. It claims that the Indictment pleads the means by which the Accused exercised control in Paragraph 20. However, the Prosecution adds that it is not averse to providing greater detail of the source and means of the alleged control.

22. Where superior responsibility is alleged, the relationship of the accused to his subordinates is most material, as are his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.[21] "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."[22] The Chamber notes the offer of the Prosecution to provide greater detail on this issue and its obligation to give proper notice to the Accused in the Indictment when information is in its possession.

23. In Paragraph 18 of the Amended Indictment, the Chamber notes that the use of the word "particularly" seems contradictory or ambiguous in the context of "members of the *Interahamwe* militia particularly the *National Committee of the Interahamwe*" and "commanders of the 'civil defence program,' particularly those military officials that held appointments..." It does not indicate whether the Accused are alleged to have responsibility for all of the groups stated, or just the subsections of the groups stated. The Chamber finds that the context of the Indictment does not clarify this ambiguity. The use of the phrases "among others" and "such as" in Paragraphs 18(i) and 18(iii) is also unclear and could indicate either that the Prosecution is in possession of these identities or that the names mentioned are the only ones about whom evidence will be led at trial.

24. Regarding the issue of identity of subordinates, if the Prosecution is in a position to name an individual, the Indictment should set it forth.[23] When people cannot be individually identified, then the Indictment should refer to their category or position as a group.[24] Where the Prosecution cannot provide greater detail, then the Indictment must clearly indicate that it provides the best information available to the Prosecution.[25] Ultimately, however, it is not acceptable for the Prosecution to omit material aspects of its main allegations in the Indictment with the aim of moulding the case against this Accused in the course of the trial depending on how evidence unfolds.[26]

25. The Chamber remarks that according to the Prosecution Witness statements of BM and CB, the date of the alleged events at the Canadian Embassy can be more precise. 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

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21 *Id.*

22 *Ntagerura et al.*, Judgement (TC), para. 30 citing *Rutaganda*, Judgement (AC), para. 304.

23 *Prosecutor v. Kupreskic et al.*, Judgement (AC), para. 90; *Ntakirutimana*, Judgement (AC), para. 25.

24 See, for example, *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, para. 22; *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, paras. 40, 55, 58 ("The prosecution must provide some identification of who died (at least by reference to their category or position as a group), and it is directed to amend the indictment accordingly").

25 See, for example, *Prosecutor v. Brdjanin*, Decision on Objections by Momir Talic to the Form of Amended Indictment (TC), para. 22; *Prosecutor v. Krnojelac*, Decision on Preliminary Motion on Form of Amended Indictment (TC), paras. 33-34, 43.

26 *Niyitegeka*, Judgement (AC), paras. 193 et seq., citing *Prosecutor v. Kupreskic et al.*, Judgement (AC), paras. 88-89 and 92.

factual basis underpinning the charges against him or her.[27] However, the Chamber recalls that whenever the Prosecution has information in its possession, it must notify the Defence.

26. The Chamber therefore finds that the Prosecution should make the following changes to the Indictment:

- Elaborate on the issue of command responsibility as offered on the alleged control of their subordinates;
- Clarify the use of the word "particularly" in Paragraph 18, and identify exactly which groups are alleged to be the subordinates of the Accused;
- Clarify the meaning of the words "such as" and "among others" in Paragraphs 18(i) and 18(iii), to put the Accused on proper notice of the allegations against them;
- Reveal the identities of subordinates if known, otherwise a statement that this information is unknown; and
- Clarify the dates regarding the events at the Canadian Embassy in accordance with the Prosecution Witness Statements referred to above.

Various Meetings

27. The Defendants complain that Paragraphs 25, 27, 30, 32 (including subparagraphs), 38 refer to various meetings without identifying the dates, locations and participants.

28. The Chamber finds that the paragraphs are clarified when read in context with their subparagraphs. However, Paragraph 32 alleges that Defendant Nzirorera acted "over the course of January through June 1994," and the subparagraphs that follow only allege actions in April, May and June 1994. With regard to the allegations in Paragraph 27, it appears from the Prosecution Witness Statements of ANP and GFA that the Prosecution is in possession of the names of the persons attending the meetings alleged therein and of more specific time frames than stated in the Indictment. Paragraph 32.3 describes a particular occasion with the only date range stated as sometime after 6 April 1994, and with no location indicated. It also uses the phrase "high level government officials" specifying only the "Prime Minister." The context suggests that the Prosecution is again in possession of information that would allow specification of the term. Paragraph 38 gives the identity of participants using the terms "national leadership" and "recently appointed Interim Government Ministers."

29. The Chamber notes that if the Prosecution is in a position to provide details, it should do so.[28] Accordingly, the Chamber therefore finds that the Prosecution should:

- Reconcile the dates in Paragraph 32;
- State the names and time frame alleges in Paragraph 27 to the extent known;
- Specify a date range, location and identify the "high level government officials" for the allegations in 32.4 to the extend known.

30. The Chamber notes that although no individuals were actually named in Paragraph 38, the groups of people are specified as are the date and location of the meeting.

31. Defendant Nzirorera complains of a lack of specificity with regard to the identity of persons, dates and locations for meetings contained in Paragraph 62 and its following subparagraphs. In particular, for Paragraph 62.12, he claims that there is a lack of specificity for 1) the identities of the "other regional authorities", 2) the identities of the perpetrators of

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27 *Kupreskic et al.*, Judgement (AC), para. 114; *Ntakirutimana*, Judgement (AC), para. 27.
28 *Ntakirutimana* Judgement (TC), 21 February 2003, para. 58.

the crime over which he exercised effective control and the means of command, 3) acts of the Accused making him responsible for ordering the attack, 4) whether he is accused of ordering the attack or simply having knowledge of its occurrence and 5) dates and locations of the public gatherings. Prosecution responds that the group of people referred to in this case has been sufficiently specified, including the names of specific individuals in the category, and that it is unable to be more specific with the date range. Prosecution asserts that the modes of responsibility have been adequately described but that it can elaborate on Nzirorera's responsibility for this particular attack.

32. The Chamber notes that Paragraph 62 and its subparagraphs should be read in context with each other. Many of the details required have been supplied. For example, the date range in Paragraph 62.6 is clarified by Paragraph 62.5 to be from the founding of AMIHINDURE, which took place between June and October 1993 to April 1994. Paragraph 62.7 states that after 6 April 1994, AMIHINDURE expanded significantly, and alleges Nzirorera's role in the expanded organization.

33. However, there is still concern about the way the term "others" is used in Paragraphs 62.2, 62.3, and 62.4. The Chamber has already ordered the Prosecution to specify the dates and locations of the meetings, gatherings and rallies referred to in 62.7[29] and notes the Prosecution's response that it complied with the Chamber's order to provide particulars that were in its possession and its inability to be more specific in these paragraphs. The Chamber recalls the need to protect the right of the Accused to have notice of the case against them and that delayed notice of certain details could be deemed prejudicial at trial.

34. The Chamber finds that Paragraph 62.12 has been adequately plead for Indictment purposes due to the scale of the allegations, but the Chamber also finds that the Prosecution should:

- Clarify the phrase "others" in Paragraphs 62.2, 62.3, and 62.4 by names or a statement that they are unknown;
- Elaborate on the attack alleged in Paragraph 62.12 as offered.

Content of Speeches

35. In Paragraphs 33, 33.1, and 33.2, Defendant Karemera requests the content of the speeches he is alleged to have given.

36. The Chamber, in reviewing the Indictment, finds that these requests are evidentiary and not required to be plead in the Indictment.

General Imprecision

37. Defendants complain that Paragraph 24 is too imprecise. It alleges that the Accused agreed "collectively" with "others" to undertake "initiatives." The reference to periods before 1994 raises concerns about the Tribunal's temporal jurisdiction. In relation to Paragraph 24.4 they complain about imprecision of the allegation being "complicit in" decisions taken by "certain FAR Officers" without alleging when these decisions were taken. In Paragraph 24.8, there is an allegation of "several meetings" for fundraising, but only one meeting taking place in February or March 1994 is specified. In Paragraph 59, there is an allegation of several fund raising meetings, specified in the month of June 1994. In Paragraphs 24.1, 24.5, 24.6, 24.7, Defendants complain that the allegations are vague and imprecise. The Prosecution responds

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[29] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment, 14 Feburary 2005, para. 53.

that these allegations have been sufficiently plead. The Prosecution contends that the context clarifies the allegations and that it is unable to provide any further information in the date range in the paragraphs.

38. Defendant Karemera also complains that Paragraphs 9, 10, 11, 12, 14, 26, 28, 68, 69, 71, and Count 7 are vague in the same way and should be modified.

39. The Chamber reads Paragraph 24 in context with its subparagraphs 24.1 – 24.8, and Paragraph 6. The context indicates that "collectively" refers to the three Accused, and "others" are defined in Paragraph 6. The alleged initiatives are spelled out in the subparagraphs. However, the context does not reveal the manner of complicity, the names of the FAR Officers, nor provide any time frame for the alleged activities in Paragraph 24.4. The reference to "several meetings" for fundraising activities in Paragraph 24.8 with one meeting detailed is ambiguous to the extent that it is not clear whether evidence will be adduced only on the meeting specified or on other unspecified meetings. The confusion is amplified by Paragraph 59 which suggests that the fundraising activities were held in the month of June 1994. The confusion infringes on the principle that the Defence should know the case they have to meet at trial.

40. With regard to the temporal jurisdiction, it is worth recalling the settled jurisprudence allowing evidence of facts prior to 1994, as an introduction or as a basis for inference of crimes committed in 1994.[30] In this case, the challenged count related to the Conspiracy Count, and for such crime, by its very nature of continuous offence, the Prosecution can adduce evidence of facts prior to 1994.

41. The Chamber therefore finds that:

- The expressions "collectively," "others," and "initiatives" complained of in this section are explained by their context;
- Paragraph 24.1 is an introduction to the formation of the *Interahamwe*;
- The requests concerning Paragraphs 24.5, 24.6, and 24.7 are evidentiary and not the type of requests to be made when alleging defects in the form of the Indictment;
- Paragraphs 9, 10, 11, 12, 14, 26, 28, 68, 69, 71 have been sufficiently plead and that the requests for specificity in these cases are evidentiary.

42. The Chamber however also finds that the Prosecution should:

- Clarify the dates of the "several meetings" alleged in Paragraph 24.8;
- Clarify the dates of the meetings in Paragraph 59 and the names of the participants should be disclosed or a statement that they are unknown;

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[30] *Hassan Ngeze and Ferdinand Nahimana v. the Prosecutor*, Case Nos. ICTR-97-27-AR72 and ICTR-96-11-AR72, Decision on Interlocutory Appeals (AC), 5 September 2000, p. 6; *Jean-Bosco Barayagwiza v. the Prosecutor*, Case No. ICTR-97-19-AR72, Decision (Interlocutory Appeals Against the Decisions of the Trial Chamber Dated 11 April and 6 June 2000) (AC): "an indictment can refer in an introductory way to crimes prior to 1994". See also: *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Proposed Testimony of Witness DBY (TC), 18 September 2003, paras. 5-18, confirmed in the Appeals Chamber Decision on Prosecutor's Interlocutory Appeals Regarding Exclusion of Evidence, 19 December 2003, paras. 12-20; *Aloys Simba v. the Prosecutor*, Case No. ICTR-01-76-AR72.2, Decision on Interlocutory Appeal Regarding Temporal Jurisdiction, pp. 3-4.

43. With regard to Count Seven, the Chamber refers the Defendants to the separate decision issued on Count Seven[31] and reminds the Defendants that it is inappropriate to submit duplicate complaints in separate motions.

44. Defendants complain of lack of specificity in Paragraph 8, in Paragraph 23 for using the phrases "over several years" and "various locations," Paragraph 28.2 for using the phrase "to place structures of authority... at the service of the Interim Government", in Paragraph 32.1 for using the term "engaged in communications" and in Paragraph 36, where the Accused is alleged to have planned, executed, collaborated and enlisted resources.

45. The Chamber reiterates that the above paragraphs must be read in context with each other. Consequently, the Chamber finds that Paragraphs 8, 23, and 36 are general paragraphs of an introductory nature. Paragraph 28.2, read in context with Paragraph 28.3, explains clearly enough for the present purpose how the alleged agreement was manifested. The Chamber further finds that the requested information for this paragraph and Paragraph 32.1 is evidentiary with sufficient notice given to the Accused to defend these allegations.

Joint Criminal Enterprise: Rape

46. In Count 5, Defendant Nzirorera requests that the rape charges be dismissed because the allegations are so deficient making it impossible for him to prepare a defence. Prosecution responds that it has been sufficiently plead because the identity of the victims and details of the rape in this case are not material to the allegation.

47. The Chamber would like to adjourn on this aspect of the Motion for the purpose of hearing an oral argument. A scheduling order will be filed in due course.

Joint Criminal Enterprise: Membership of the Accused

48. Defendant Karemera states that Paragraphs 44, 45, 46 and 56 do not concern him because he was not a member of the Interim Government at the time plead in the paragraphs and as a result, he claims that he is not directly implicated in Paragraphs 48, 49 and 51. In Paragraph 50, Defendant Nzirorera submits that the Indictment fails to specify his responsibility or participation with the *Fonds de Défense Nationale*, and is therefore ambiguous.

49. The Chamber notes that when the impugned Paragraphs 44, 45, 46 and 56 are read in the context of the Indictment as a whole, it is observed that Paragraphs 42 and 43 specifically allege the participation of Édouard Karemera in the activities of the Interim Government at that time. This issue is a matter for the Prosecution to prove at trial, rather than a matter of deficiency in the pleading. Paragraphs 48, 49 and 51 raise questions of law with regard to the application of the doctrine of Joint Criminal Enterprise which cannot be resolved when determining a pleading deficiency.

50. The Chamber notes that Paragraph 50 does not allege Nzirorera's participation in the meeting held by Kabuga who, the Prosecution alleges, was in a joint criminal enterprise with the Accused. The Accused responsibility for Kabuga's acts as described, if proved, will also be a question of the application of the law.

51. The Chamber therefore finds that the pleadings concerning Defendant Karemera's participation in the Interim Government, and Paragraph 50 which does not directly implicate Defendant Nzirorera, are not defective.

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[31] *Karemera et al.*, Decision on Count Seven of Amended Indictment - Violence to Life, Health and Physical or Mental Well-Being of Persons (TC), 5 August 2005.

Inconsistency with Severance Granted

52. Defendant Nzirorera complains that all the references to the Interim Government in Paragraphs 10, 14, 20, 28, 28.3, 35, 43, are contrary to the Prosecution's representations when the Chamber granted severance of André Rwamakuba, and should therefore be stricken. He asserts that the severance was to allow the Prosecution to narrow its focus from the large level of government apparatus to the level of the MRND party and control of the *Interahamwe*.

53. The Prosecution responds that the Chamber's Decision granting Rwamakuba severance did not require it to focus "exclusively" on the Accused control of the *Interahamwe*. The Chamber considers that this response is inadequate. The Chamber did grant severance to narrow the focus of the charges against the Accused considering the representations of the Prosecution.[32] However, the Chamber does not see any inconsistency with the representations of the Prosecution after reviewing the impugned paragraphs which primarily allege the MRND party's influence on the formation, action and resources of the Interim Government. As such, the alleged conspiracy between the Accused was reflected through the policies of the Interim Government. It is for the Prosecution to prove these allegations at trial.

54. Therefore, since there is no factual basis for this complaint, the Chamber does not have to reach the issue of whether it is outside the scope of a preliminary motion as permitted by Rule 72 of the Rules as asserted by the Prosecution.

Counts of Genocide, or alternatively Complicity in Genocide

55. In Counts 3 and 4, Defendants submit that the charge of complicity in genocide in the alternative should be dismissed since it relies on the same factual allegations as the charge of genocide. Defendants cite the *Bikindi* case for this premise.

56. In the Chamber's view, the Defence has relied on the *Bikindi* case out of context. Judge Pavlev Dolenc, in the confirmation of the Indictment, dismissed the count of genocide in the alternative because he found no *prima facie* basis for it in the concise statement of facts.[33] The Trial Chamber later allowed amendments to the Indictment on this issue when the Prosecution introduced additional evidence to support the previously dismissed count.[34] The Trial Chamber confirmed the accepted practice of cumulative charging of several crimes through the same conduct because it is not always possible to determine whether the charges alleged will be proven with the early presentation of evidence.[35] The Prosecution does not dispute that the Accused cannot be convicted for both counts, as this would be inconsistent with settled case law.[36]

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[32] *The Prosecutor v. Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera and André Rwamakuba*, Case No. ICTR-98-44-PT, Decision on Severance of Andre Rwamakuba and for Leave to File Amended Indictment, 14 February 2005, para 29.

[33] *The Prosecutor v. Simon Bikindi*, Case No ICTR-2001-72-I, Confirmation of the Indictment (TC), 5 July 2001, paras. 7-8.

[34] *The Prosecutor v. Simon Bikindi*, Decision on the Defence Motion Challenging the Temporal Jurisdiction of the Tribunal and Objecting the Form of the Indictment and the Prosecutor's Motion Seeking Leave to File an Amended Indictment (TC), 22 September 2003, paras. 19-22.

[35] *Id.*, para. 25; See also *The Prosecutor v. Alfred Musema,* Case No. ICTR-96-13, Judgement (AC), 16 November 2001, para 369; *The Prosecutor v. Élizaphan and Gérard Ntakirutimana*, Judgement (TC), 21 February 2003, paras 862 et seq.; *Semanza*, Judgement (TC), paras. 408-409.

[36] See, for example, *Prosecutor v. Delalic et al.*, Case No IT-96-21, Judgement (AC), 20 February 2001, para. 412.

57. Consequently, the Chamber finds that there are facts alleged throughout the Amended Indictment that support both the counts of genocide and complicity in genocide in the alternative. Therefore, such cumulative charging is permissible and the Defence's request on this issue fails.

THE CHAMBER

GRANTS the Motion as stated above in Paragraphs 20, 26, 29, 34, 42.

DENIES the remainder of the Motion.

Arusha, 5 August 2005, done in English.

Dennis C. M. Byron
Presiding

Karin Hökborg
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]