ICTR-2001-73-PT
22-9-2005
(3492-3488)

3497
2mm

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
NATIONS UNIES

OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Karin Hökborg
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 22 September 2005

THE PROSECUTOR

v.

Protais ZIGIRANYIRAZO

Case No. ICTR-2001-73-R72

DECISION ON DEFENCE MOTIONS (i) OBJECTING TO THE FORM OF THE THIRD AMENDED INDICTMENT AND (ii) REQUESTING THE HARMONIZATION OR RECONSIDERATION OF THE DECISION OF 2 MARCH 2005

Rules 72(B)(ii) and 73 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Wallace Kapaya
Gina Butler
Iskandar Ismail
Jane Mukangira

Defence Counsel:
John Philpot
Peter Zaduk

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 the Defence "Motion Objecting to the Form of the Third Amended Indictment (Rule 72 (B) ii) of the Rules of Procedure and Evidence) and Motion to Harmonise or to Reconsider the 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 rendered on March 2, 2005 (Rule 73 of the Rules of Procedure and Evidence)" filed on 25 May 2005 ("Motions");

CONSIDERING the Prosecutor's Response filed on 30 May 2005; the Defence Reply filed on 3 June 2005; the Prosecutor's Further Response filed on 7 June 2005; and the Defence Further Reply filed on 8 June 2005;

RECALLING the Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, delivered on 15 July 2004 ("Decision of 15 July 2004"); and the 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, filed on 2 March 2005 ("Decision of 2 March 2005");

NOTING the "Amended Indictment" filed by the Prosecutor on 8 March 2005 ("Third Amended Indictment");

NOW DECIDES the Motions on the basis of the written briefs of the parties pursuant to Rule 72(A) of the Rules of Procedure and Evidence ("Rules").

DISCUSSIONS

On the Decision of 2 March 2005 and the pleading of de facto *power*

1. In its submissions, the Defence argues that the Decision of 2 March 2005 required the Prosecutor to strike out all references to command responsibility in the Third Amended Indictment. The Defence requests the Chamber to apply its own reasoning and confirm that the allegations in Paragraph 3 and, by reference, in Paragraphs 11, 16 (twice), 24, 27, 33 (twice), 41, 45, 47 and 50 do not provide sufficient factual basis to invoke *de facto* control by the Accused over his alleged subordinates. The Chamber should order the Prosecutor, as a result, to strike out all references to *de facto* power of the Accused as alleged in Paragraph 3 of the Third Amended Indictment and incorporated throughout this Indictment relationship as well as the allegation related to the nature of employer-employee relationship. It considers that Paragraph 3 is nothing more than a command authority allegation except that the Prosecutor relies only on Article 6(1) and not on Article 6(3) of the Statute. The Defence adds that its motion also applies to the new charges relating to the attacks at Rurunga Hill and that it has the right to raise these objections under Rule 50(C) of the Rules. The Defence points out that it does not object *per se* to the Prosecutor making allegations of the Accused giving orders but it objects to the general and vague omnibus allegations of superior power contained in Paragraph 3 of the Third Amended Indictment which is applied without distinction to the entire Indictment.

2. The Defence further submits that the Prosecutor is resorting to multiple modalities of criminal liability in spite of the fact that the Chamber urged him to avoid such a practice. The Defence concludes that the Accused has no factual basis for preparing a defence to the allegation of global power which would draw from Paragraph 3 of the Third Amended Indictment.

3. The Defence ultimately seeks the Chamber to review or reconsider the Decision of 2 March 2005. It expresses the view that the objective is to make a logical finding in the issue of *de facto* power because the Decision "was technically erroneous and its formulation slightly inconsistent with its own logic". The Defence considers that if not reviewed the Decision will cause serious prejudice to the Accused since it will oblige him to go to trial knowing that the Prosecutor will be trying to prove that he was a virtual *de facto* Rwandan authority who had the power to make orders under the pain of punishment. The Defence adds that it will be unable to conduct investigations on this *de facto* power and he will have no remedy against this difficult legal situation except before the Appeals Chamber if he is convicted.

4. The Prosecutor submits that in compliance with the Decision of 2 March 2005 he has eliminated all references to command responsibility pleading under Article 6(3) of the Statute in the Third Amended Indictment. The Prosecutor deems that the Chamber did not order him to purge references of any *de facto* control. Furthermore, the Prosecutor submits that Article 6(1) of the Statute provides that a person may be criminally responsible under the Statute by ordering a crime and this implies a superior-subordinate relationship between the person giving the order and the one executing it. In the Prosecutor's view, in order to prove "ordering" as a mode of liability under Article 6(1), it is necessary to prove some position of authority on the part of the accused that would compel another to commit a crime upon an order from the accused. The Prosecutor specifies that Paragraph 3 of the Third Amended Indictment does nothing more than setting out the basis upon which the Prosecutor will lead evidence to prove the allegation. As a result, the Prosecutor considers that, contrary to the submission of the Defence, there is nothing erroneous or illogical in the Decision of 2 March 2005.

5. The Chamber notes that in its Decision of 2 March 2005 it stated, *inter alia*, that charges of command responsibility seek to establish the responsibility for omissions and that 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.[1] The Chamber then concluded that, in the Recast Indictment, the factual allegations did not sufficiently support the pleading of command responsibility, and recalled that, since it was the third time that the Prosecution had failed to give sufficient support to such pleading, providing a further opportunity would cause unfair prejudice to the Defence.[2] Consequently, the Chamber ordered the Prosecutor, 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 thereof. The Chamber now finds that the Prosecutor has complied with the Decision of 2 March 2005 and sees no prejudice towards the Accused as the Third Amended Indictment now reads. This finding also applies to the *de facto* allegations relating to the Rurunga Hill events. Consequently the Defence submissions cannot succeed.

---

1 Decision of 2 March 2005, para. 19.
2 Decision of 2 March 2005, para. 20.

6. The Chamber considers that the issue of the proof of a superior-subordinate relationship for an *ordering* under Article 6(1) of the Statute is a legal determination to be made at a later stage. Moreover, the Chamber does not consider that there exists any vague allegation of global power in the formulation of Paragraph 3 which infringes the rights of the Accused. The Chamber however recalls that the Prosecution bears the burden to prove that such *de facto* power does exist.

7. On the Defence Request for reconsideration or harmonization, the Chamber considers that the two words in the present case are synonymous. The Chamber recalls that the jurisprudence of the *ad hoc* Tribunals has established that a Chamber may reconsider a decision it has previously made, because of a change of circumstances or where it is realised that the previous decision was erroneous or that it has caused an injustice.[3] The Chamber notes that in the absence of the particular circumstances justifying a Chamber to reconsider one of its decisions, motions for reconsideration cannot be granted[4] and that whether or not a Chamber reconsiders a prior decision itself is a discretionary decision. In the present case, the Defence has not shown good cause for justifying its application for reconsideration and in particular has not shown how the Decision of 2 March 2005 was unfair to the Accused. The Chamber therefore finds that the requirements for review or reconsideration have not been met.

On the location of Rurunga Hill

8. With regard to Paragraphs 14, 15, 31 and 32 of the Third Amended Indictment relating to the attacks at Rurunga Hill the Defence submits that the Indictment does not itself provide the location of Rurunga Hill. It adds that no map of the location has been provided after the Status Conference held in September 2004. It further notes that the coloured diagram provided by the Prosecution to the Defence on 26 April 2005 and the details provided in the Indictment do not constitute a sufficient basis for the Defence to undertake investigations. The Defence consequently asks the Chamber to order the Prosecutor to file particulars to the Third Amended Indictment consisting of the said diagram and a statement that the crest of the two hills (Kesho and Rurunga) are less than 500 meters apart. The Defence also seeks the Chamber to order the Prosecutor to provide further details as to the exact date and time of the attacks at Rurunga Hill involving the Accused; the names of all known attackers and victims; and the means by which the Accused gave the orders to kill and of inflicting death. The Defence submits that if the Prosecutor is unable to provide this information, he shall strike the Rurunga Hill allegations from the Third Amended Indictment.

---

[3] *The Prosecutor v. Stanislav Galic* Case No. IT-98-29-AR73, Decision on Application by Prosecution for Leave to Appeal (AC), 14 December 2001, para 13; *The Prosecutor* v. *Laurent Semanza*, Case No. ICTR-97-20-A, Decision on the Appeal Against the Oral Decision of 7 February 2002 Dismissing the Motion for Review of the Decision of 29 January 2002 relating to the Appearance of the French Expert Witness Dominique Lecomte and the Acceptance of His Report (AC), 16 April 2002, first considerandum, p. 2.

[4] *Joseph Kanyabashi v. The Prosecutor*, Case No. ICTR-96-15-AR72, Decision (Motion for Review or Reconsideration) (AC), 12 September 2000, p. 2; *Le Procureur c. Athanase Seromba*, Affaire No. TPIR-2001-66-T, Décision sur les requêtes en annulation de sanction et en intervention en qualité d'*amicus curiae* (TC), 22 octobre 2004, para. 16; *The Prosecutor v. Théoneste Bagosora, Gratien Kabiligi, Aloys Ntabakuze, Anatole Nsengiyumva*, Case No. ICTR-98-41-T, Decision on Motion to Harmonize and Amend Witness Protection Orders (TC), 1 June 2005, para. 3.

10. The Prosecutor submits that the evidence to be relied on to prove the elements of the crimes have been disclosed to the Defence and that other materials will continuously be disclosed as and when it is available, under Rules 67(D) and 68 of the Rules. He further notes that the Chamber has expressed satisfaction with the particulars provided regarding that crime site. Finally, the Prosecutor submits that there is nothing "vague" in the pleadings as regards neither the place, the time, the period of the crimes nor the identity of the co-perpetrators and the victims of the said crimes.

11. The Chamber notes that Paragraph 14 of the Third Amended Indictment specifies that Rurunga Hill is located in Rwili secteur, Gaseke commune, in Gisenyi préfecture, within the vicinity of the Rubaya tea factory as well as the approximative date of the events referred to (about the week of 14 to 20 April 1994). The Chamber also notes that the Prosecutor filed his Pre-Trial Brief on 22 July 2005 which includes further information and documents concerning the location of Rurunga Hill. The Chamber finds this sufficient. The Chamber further notes, with regard to the names of the attackers, references are made to specified groups of them, identified in similar ways throughout the Indictment These groups are deemed to be sufficiently identified by their status and presence at a specific location at the indicated time. Their individual names are not necessary to enable the Defence to prepare its case. The Defence will not be prevented from preparing its case if the means by which the Accused gave the orders to kill are not further specified in the Indictment. Concerning the names of the victims of the attacks the Chamber reiterates that in its Decision of 15 July 2004 (Para. 45) it noted that an adequate defence does not depend upon the Prosecutor's pleading of the names of individual victims. Thus, and in conclusion regarding the issues relating to the Rurunga Hill, the Chamber considers that the Prosecutor has provided sufficient details in the Indictment and other accusatorial instruments in respect of the charges contained in Paragraphs 14, 15, 31 and 32. Consequently the Defence request falls to be denied.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the Motion in its entirety.

Arusha, 22 September 2005, done in English.

Dennis C. M. Byron
Presiding Judge

Karin Hökborg
Judge

Gberdao Gustave Kam
Judge

[Seal of the Tribunal]