UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR-98-41-T
27-09-2005
(25451-25446)

25451
S. Musa

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 27 September 2005

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gratien KABILIGI

Aloys NTABAKUZE

Anatole NSENGIYUMVA

Case No. : ICTR-98-41-T

DECISION ON KABILIGI REQUEST FOR PARTICULARS OF THE AMENDED INDICTMENT

The Prosecution
Barbara Mulvaney
Drew White
Christine Graham
Rashid Rashid

The Defence
Raphaël Constant
Paul Skolnik
Peter Erlinder
André Tremblay
Kennedy Ogetto
Gershom Otachi Bw'Omanwa

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 25450

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

BEING SEIZED OF the Kabiligi "Motion Requesting Particulars of the Amended Indictment," filed on 27 June 2005;

CONSIDERING the Prosecution "Response to Kabiligi Defence Motion Requesting Particulars of the Amended Indictment," filed on 12 July 2005; the Kabiligi "Motion to Preclude the Prosecution from Replying to Its 'Motion Requesting Particulars of the Amended Indictment' Filed 27 June 2005," filed on 11 July 2005; and the Kabiligi "Exception to 'Prosecutor's Response to Kabiligi Defence Motion Requesting Particulars of the Amended Indictment'", filed on 14 July 2005;

HEREBY DECIDES the motion.

INTRODUCTION

1. The Kabiligi Defence argues that the Amended Indictment of 13 August 1999 is deficient for failing to plead the factual allegations against the Accused with sufficient specificity and requests an order compelling the Prosecution to provide particulars of the Amended Indictment against Gratien Kabiligi.

PROCEDURAL ISSUES

2. The motion was filed on 27 June 2005. Pursuant to Rule 73 (E), the Prosecution had five days from the date on which it received the motion to respond. On 1 July 2005, the Chamber granted a Prosecution request for a one-week extension of time, thereby giving the Prosecution until 8 July 2005. The Prosecution did not file its Response until 12 July 2005 and gave no explanation for the delay. The Kabiligi Defence has filed two submissions asking the Trial Chamber to disregard the Prosecution Response.

3. The Trial Chamber has discretion to consider late-filed submissions and, in the present instance, chooses to do so.[1]

DELIBERATIONS

4. Article 20 (4)(a) of the Statute guarantees an accused the right "[t]o be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her". In addition, Rule 47 (C) of the Rules of Procedure and Evidence ("the Rules") provides that "[t]he indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged". The Appeals Chamber has interpreted this provision to require that the Prosecution plead all material facts underpinning the charges in the indictment but not the evidence by which such material facts are to be proven at trial.[2] The determination of whether

[1] *See Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005 para. 1.

[2] *Kupreskic et al.*, Judgment (AC), 23 October 2001, paras. 88-90. *See also Ntakirutimana*, Judgement (AC), 13 December 2004, para. 24.

a particular fact is material and whether that fact has been pleaded with the requisite degree of specificity must be made on case-by-case basis.[3] In cases where the Prosecution alleges personal physical commission of specific criminal acts, such as murder of a named individual, the Prosecution's burden in setting forth the material facts is greater than instances where the sheer scale of the alleged crimes makes it impracticable to require the same degree of specificity.[4]

5. Defects in the indictment may be cured where the Prosecution provides the accused with timely, clear and consistent information underpinning the charges against him or her.[5] The Appeals Chamber has expressly found that certain defects in an indictment may be cured through the Prosecution's Pre-trial Brief, during disclosure of evidence or through proceedings at trial.[6] Whether vagueness in the indictment has been cured by subsequent disclosure involves consideration of the following factors: the consistency, clarity and specificity with which the material fact is communicated to the Accused;[7] the novelty and incriminating nature of the new material fact;[8] and the period of notice given to the Accused.[9] Mention of a material fact in a witness statement does not necessarily constitute adequate notice: the Prosecution must convey that the material allegation is part of the case against the

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[3] *Kupreskic*, Judgement (AC), paras. 89-90. *Ntakirutimana*, Judgement (AC), para. 25.

[4] *Kupreskic*, Judgement (AC), para. 89, *Ntakirutimana*, Judgement (AC), para. 25.

[5] *Kupreskic*, Judgement (AC), para. 114.

[6] *Ntakirutimana*, Judgement (AC), para. 27.

[7] *Niyitegeka*, Judgement (AC), 9 July 2004, paras. 221-222 (disclosure in a witness statement of an allegation not mentioned in the pre-trial brief did not provide the "timely, clear and consistent" notice required to cure a defect in the indictment because "the [Accused] could well have concluded from the failure to mention Kivumu in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe"); *Ntakirutimana*, Judgement (AC), para. 111 (Trial Chamber erred in basing conviction on a particular incident where it was alleged that the Accused was present during an attack, but without precisely specifying the location, date, or his conduct: "the information available to [the Accused] before trial, however, provided no notice of the location of the event, contained a date that the Trial Chamber found was inaccurate, and did not allege that [the Accused] had pointed out refugees to attackers during the event"); *id.*, para. 57 (a single, somewhat ambiguous reference in a pre-trial brief provided inadequate notice of a new material fact when the testimony of five other witnesses was also used at trial to prove the material fact); *Kamuhanda*, Judgement (AC), 19 September 2005, paras. 25-26 (disclosure in witness statement and pre-trial brief of precise commune in which weapons had allegedly been distributed provided sufficient information to the Accused, even though the Indictment itself identified only the prefecture).

[8] *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 95-98 (Trial Chamber erred in considering allegation of killing by the Accused of a specific named individual where only the general attack in which the killing took place had been mentioned in the pre-trial brief and witness statement); *id.*, para. 75; *Bagosora et al.*, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003, para. 20 ("The Defence cannot be considered to be on notice of any and all possible orders to a witness in a specific location merely because there is notice that the witness is alleged to have been under the command of the Accused and was at that location. Here, the Defence for Ntabakuze has no notice of the killings of the fifty civilians in hiding in Remera; no notice that he gave the order that they be killed; and, indeed, no notice that he issued any particular order at all at that location. The nature of the criminal conduct alleged is at least arguably changed from one of superior responsibility for killings at roadblocks by subordinates, to a direct order to kill fifty individuals. The Defence's need to rebut the charge is substantial; and its ability to do so is seriously impaired in the absence of meaningful advance notice").

[9] Disclosure four days before trial, and eleven days before the testimony, that an accused had been armed and fired upon victims during an attack, was not timely, particularly because the Prosecution had the statement in its possession two months prior to the disclosure. Previous disclosure in the pre-trial brief of the Accused's participation in the attack, but without mentioning his specific involvement in the violence, provided insufficient notice. *Ntakirutimana*, Judgement (AC), 13 December 2004, paras. 82-84; *Ndindabahizi*, Judgement (TC), 15 July 2004, para. 29.

Accused.[10] The essential question is whether the Defence has had reasonable notice of, and a reasonable opportunity to investigate and confront, the Prosecution case.[11]

6. Having considered the three issues raised by the Kabiligi Defence, the Trial Chamber will address each argument separately:

(i) Multiple Counts Based on the Same Material Facts

7. The Kabiligi Defence argues that the Amended Indictment is defective because the same factual allegations are cited as support for each of the ten counts. The Prosecution is not barred from cumulative charging on the basis of the same factual allegations. Cumulative charging has been standard practice at both the ICTR and ICTY.[12] Moreover, the Trial Chamber rejected the same argument in this very case as to the initial indictment filed against the Accused and concluded that "no difficulties arise from the use of overlapping facts".[13] The request for particulars on this ground is denied.

(ii) Identification of the Modes of Participation under Article 6 (1)

8. Under Article 6 (1) of the ICTR Statute, an accused may bear individual criminal responsibility for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime. The Defence argues that the Amended Indictment is deficient in that it does not specify the mode of individual participation alleged against the Accused.

9. While early ICTR jurisprudence did not seem to require that such information be expressly pleaded in the indictment, the Appeals Chamber has articulated a clear standard and now requires that the mode of participation of the Accused be specified in the indictment.[14]

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[10] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 27 ("'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") (citations omitted); *Niyitegeka*, Judgement (AC), 9 July 2004, para. 197.

[11] *Niyitegeka*, Judgement (AC), 9 July 2004, para. 196 ("[A] Trial Chamber should naturally consider whether the Prosecution has previously provided clear and timely notice of the allegation such that the Defence has had a fair opportunity to conduct investigations and prepare its response"). This does not, however, foreclose the Trial Chamber's discretion to reject allegations which radically alter the indictment, even if the Defence has a reasonable opportunity to investigate the charge. *Gacumbitsi*, Judgement (TC), 17 June 2004, para. 188 ("Consequently, the Chamber finds that the Indictment does not contain any specific allegation about the murder of Kanyogote and his children. That the Prosecutor mentioned the murder of Kanyogote and his children in his Pre-Trial Brief is not such as to cure the vagueness in the Indictment, especially as such brief does not establish a link between the new allegation and paragraph 33 of the Indictment. The Pre-Trial Brief does not seek to render the Indictment more specific, but rather alters the Indictment substantially by either changing the identity of the victims referred to in paragraph 33 or including a new allegation of murder. The Pre-Trial Brief cannot be used as an instrument to amend the Indictment substantially").

[12] *Semanza*, Judgement (AC), 20 May 2005, para. 309; *Musema*, Judgement (AC), 16 November 2001, para. 370. *See also Delalic, Mucic, Delic, and Landzo ("Celebici")*, Judgement (AC), 20 February 2001, para. 400 ("Cumulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence.")

[13] *Ntabakuze et al.*, Decision on the Defence Preliminary Motions Relating to Defects in the Form and Substance of the Indictment (TC), 5 October 1998, para. 14.

[14] *Ntakirutimana*, Judgement (AC), 13 December 2004, para. 473 (referring to *Prosecutor v. Aleksovski*, 24 March 2000, Judgement (AC), n. 319).

Blanket references to Article 6 (1) are insufficient.[15] Rather, the form or forms of liability within Article 6 (1) must be specifically identified.[16]

10. Although such information should generally be contained in the indictment, the Appeals Chamber made clear that, in certain circumstances, a failure to set forth the precise mode of participation in the indictment could be cured by a later submission from the Prosecution, even up to the start of trial.[17]

11. Although the Amended Indictment does not expressly set forth the mode of liability under Article 6 (1), the Pre-trial Brief includes a detailed summary of intended Prosecution witnesses and exhibits. The summary of Prosecution witnesses specifically sets forth the topics to which each witness will testify and the allegations that will be made against the Accused in terms of his actual statements and actions, thereby informing the Accused of the particular mode of participation alleged by the Prosecution. The Pre-trial Brief was filed on 21 January 2002, which was more than seven months before the first hearing of evidence (2 September 2002). This gave sufficient notice to the Accused. Consequently, the Chamber finds that whatever defect existed in the Indictment as to alleging criminal responsibility under Article 6 (1) has been cured through the Pre-trial Brief and denies the Accused's request for such particulars.

(iii) Identification of Specific Subordinates and Other Related Information under Article 6 (3)

12. The Kabiligi Defence argues that the Amended Indictment is deficient because it fails to plead certain required information under Article 6 (3) of the Statute. According to this provision, criminal responsibility as a superior occurs if certain conditions are met, namely (i) that the accused is a superior of subordinates who are sufficiently identified and over whom he had effective control; (ii) that the accused knew or had reason to know that crimes had been or were about to be committed by his subordinates; and (iii) that the accused failed to take action either to prevent such acts or to punish the perpetrators of these acts.[18] The level of detail that is required in making allegations under Article 6 (3) is not meaningfully different from the standard for pleading other types of allegations.[19] An essential element in pleading criminal responsibility under this provision is the identity of the subordinates over whom the accused had effective control and for whose acts he is alleged to be responsible.[20] The specificity required may vary depending on the number of subordinates over whom the accused is alleged to have had control.[21]

13. The Amended Indictment sufficiently pleads the material facts for criminal responsibility as a superior under Article 6 (3). Paragraphs 4.2 to 4.4 allege that, between

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[15] *Ntakirutimana*, Judgement (AC), para. 473.

[16] *Ntakirutimana*, Judgement (AC), para. 475 (citing *Prosecutor v. Krnojelac*, Judgement (AC), 17 September 2003, paras. 138-144).

[17] *Ntakirutimana*, Judgement (AC), para. 475 (adopting the *Krnojelac* approach), and *Ntakirutimana*, Judgement (AC), para. 471 (referring *Prosecutor v. Rutaganda* Judgement (AC), 26 May 2003, para. 303). .

[18] *Blaskic*, Judgement (AC), 29 July 2004, para. 218.

[19] *See supra*, para. 4.

[20] *Karemera et al.*, Decision on Severance of André Rwamakuba and for Leave to File Amended Indictment, 14 February 2005, para. 52.

[21] *See, e.g., Rasevic*, Decision Regarding Defence Preliminary Motion on the Form of the Indictment (TC), 28 April 2004, para. 63. The Trial Chamber found the allegation that the accused was "commander of the prison guards" (numbering at least thirty-seven) sufficient for purposes of pleading criminal responsibility as a superior.

April and July 1994, the Accused held the position of Commander of Military Operations (G-3) in the High Command of the Rwandan Army. Moreover, the Amended Indictment specifically alleges that the Accused had command over "the units of the sectors of Byumba, Ruhengeri, Mutara and Kigali, as well as the elite units such as the Presidential Guard and the Para-Commando Battalion and the Reconnaissance Battalion".[22] Given his high rank in the Rwandan Army, it is neither realistic nor necessary for the Prosecution to plead the identity of the Accused's subordinates in any further detail. The Prosecution has set forth his precise title within the Rwandan Army and has specifically identified the units over which the Accused had control.

FOR THE ABOVE REASONS, THE CHAMBER

DENIES the motion.

Arusha, 27 September 2005

Erik Møse	Jai Ram Reddy	Sergei Alekseevich Egorov
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[22] Amended Indictment, 13 August 1999, para. 4.4.