



UNITED NATIONS
NATIONS UNIES

ICTR-99-50-T
23-03-2006
(22882-22877)

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

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TRIAL CHAMBER II

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Emile Francis Short

Registrar: Mr. Adama Dieng

Date: 23 March 2006

THE PROSECUTOR
v.
CASIMIR BIZIMUNGU
JUSTIN MUGENZI
JÉRÔME-CLÉMENT BICAMUMPAKA
PROSPER MUGIRANEZA

Case No. ICTR-99-50-T

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**DECISION ON JÉRÔME BICAMUMPAKA'S REQUEST FOR A DECLARATION
THAT THE INDICTMENT DOES NOT ALLEGE THAT HE IS LIABLE
FOR ANY FORM OF JOINT CRIMINAL ENTERPRISE**
Rules 72 (A) (ii), 72 (G), and 73 (A) of the Rules of Procedure and Evidence

Office of the Prosecutor:

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Ms. Michelyne C. St. Laurent and Ms. Alexandra Marcil for **Casimir Bizimungu**
Mr. Ben Gumpert and Mr. Jonathan Kirk for **Justin Mugenzi**
Mr. Pierre Gaudreau and Mr. Michel Croteau for **Jérôme-Clément Bicamumpaka**
Mr. Tom Moran and Ms. Marie-Pierre Poulain for **Prosper Mugiraneza**

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THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“Tribunal”),

SITTING as Trial Chamber II, composed of Judge Khalida Rachid Khan, presiding, Judge Lee Gacuga Muthoga and Judge Emile Francis Short (the “Trial Chamber”);

BEING SEIZED of both “Bicamumpaka’s Request for a Declaration that the Indictment does not Allege that he is Liable for any Form of Joint Criminal Enterprise”, filed on 19 September 2005 (the “Request”) and the “Appuie de Casimir Bizimungu à la Requête de Jérôme Bicamumpaka Intitulée Bicamumpaka’s Request for a Declaration that the Indictment does not Allege that he is Liable for any Form of Joint Criminal Enterprise”, filed on 22 September 2005 (the “Support”);

CONSIDERING the “Prosecutor’s Consolidated Response to Mr Jérôme Bicamumpaka’s and Dr. Casimir Bizimungu’s Request for a Declaratory Order in Respect of Non Pleading of Joint Criminal Enterprise (JCE) in the Indictment”, filed on 26 September 2005 (the “Consolidated Response”);

CONSIDERING the “Réplique de Casimir Bizimungu à la Réponse Consolidée du Procureur aux Requêtes de Jérôme Bicamumpaka et de Casimir Bizimungu Concernant la Théorie de L’Enterprise Criminelle Commune”, filed on 3 October 2005 (the “Reply”);

CONSIDERING the Rules of Procedure and Evidence (the “Rules”), particularly Rules 72, 73, and 98 *bis*;

NOW DECIDES the matter solely on the basis of the briefs of the parties pursuant to Rules 72 (A) (ii), 72 (G), and 73 (A).

SUBMISSIONS OF THE PARTIES

The Defence Request

1. The Defence asks the Chamber to declare that joint and criminal liability is not a form of liability in the charges against Mr. Bicamumpaka pursuant to rule 73.¹ The Defence notes that Chambers have previously relied on this rule to make declarations clarifying ambiguities, and asks the Chamber to resolve the ambiguity in the case at hand over whether Joint and Criminal Enterprise (JCE) was pleaded.²
2. The Defence submits that JCE must be explicitly pleaded in the Indictment, including the specific type of JCE alleged. The Defence cites a decision from the case of *Čermak and Markač*, which held that the Indictment must specify the following four categories of material facts related to JCE: (a) the nature and purpose of the JCE; (b) the time at which or the period over which the JCE is said to have existed; (c) the identity of those engaged in the JCE; and (d) the nature of the participation by the

¹ Rule 73 (A) of the Rules of Procedure and Evidence provides:

“Subject to Rule 72, either party may move before a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Trial Chamber, or a Judge designated by the Chamber from among its members, may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the Motion in open Court.”

² See the five decisions listed in the Defence Request, footnotes 2, 3, and 4. These decisions are discussed in the Deliberations of this Decision.

Accused in the JCE.³ The Defence submits that the Prosecution has provided none of the above, which, if JCE were allowed to be pleaded, would violate the Accused right to a fair trial.

3. The Defence also submits that references made to JCE in the Pre-trial Brief do not cure the lack of pleading in the Indictment, as the only proper charging document is the Indictment.⁴ In support, the Defence cites *Krnojelac*, in which the Appeals Chamber considered JCE as it was pled in the Indictment, but refused to consider Type III JCE as it was only included in the Pre-trial Brief.⁵ Lastly, the Defence states the prejudice to the Accused is compounded by references in the Pre-trial Brief to the previously rejected Proposed Amended Indictment.

The Defence Support

4. In the Support, Defence Counsel for Mr. Bizimungu reiterates many of the arguments made in Mr. Bicamumpaka's Request, submitting that the Indictment lacks the precision to support a charge of JCE; that, according to *Kupreskić*, the Accused must be clearly informed of the charges against him.⁶ The Defence argues that the absence of reference to JCE in the Indictment in the case at hand does not constitute a mere imprecision, a minor defect or a technical imperfection, but amounts to the Accused being insufficiently informed of the case he must meet. The Defence notes further that the specific type of JCE was not specified, and argues that the Pre-trial Brief cannot be used to correct deficiencies in the Indictment. The Defence therefore asks the Chamber, in the interests of efficiency, for a declaratory ruling on this issue.

The Prosecution's Consolidated Response

5. In response, the Prosecution submits that the Chamber lacks jurisdiction to rely on Rule 73 in this context, as Rule 73 offers an administrative remedy, inappropriate for a substantive criminal issue. Although Rule 72 (A) is the appropriate rule for such an application, the Defence is estopped from relying on this rule, as pursuant to Rule 72 (G), the Defence has failed to raise any objections to the Indictment in the given time. The Prosecution submits further that the earlier Rule 98 *bis* application was the correct rule on which to decide this issue, and therefore, that the Defence is attempting to circumvent the legal process as defined under the Rules.
6. In the alternative, and without prejudice to the foregoing, the Prosecution submits that JCE was alleged in the Indictment through the charges and underlying facts;⁷ and in fact, that JCE is an implicit mode of responsibility in the charges of Conspiracy and

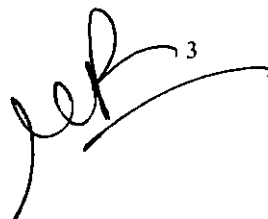
³ *Prosecutor v. Čermak and Markač*, Case No. IT-03-73, "Decision on the Defence Motion on the Form of the Indictment", 8 March 2005, para. 9, citing *Krnojelac*, "Decision on Preliminary Motion on Form of Amended Indictment", 11 February 2000, para. 16.

⁴ For this, the Defence cites *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, "Appeals Chamber Judgement", 17 September 2003, para. 138, and the plain meaning of Rule 98 *bis*. Rule 98 *bis* allows the Trial Chamber to find that the evidence is insufficient to sustain a conviction on one or more of the counts charged in the indictment (emphasis added).

⁵ *Krnojelac*, 17 September 2003, paras. 142-144.

⁶ *Prosecutor v. Kupreskić*, IT-95-16-A, Appeals Judgement, 23 October 2001, para. 88.

⁷ The Prosecution lists paragraphs in the Indictment which make reference to JCE in both footnote 10 and paragraph 18.



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Complicity to Commit Genocide.⁸ Further, the Prosecution argues that it has satisfied the four necessary criteria of material facts related to JCE to be specified in the Indictment,⁹ namely the nature and purpose of the JCE, the period over which the JCE existed, the identity of those engaged, and Accused participation in the JCE.¹⁰

7. Further, the Prosecution notes that in *Simić*, a failure to plead the four material criteria results in “no injustice to the accused if he is given an adequate opportunity to prepare an effective defence.”¹¹ The Prosecution submits that the Accused was given notice of a pleading of JCE: in the Pre-trial Brief; in the explicit reference in the Prosecution’s opening address; in the evidence presented at trial; and in the arguments put forward in the Prosecutor’s Rule 98 *bis* response. The Accused, therefore, had adequate opportunity to prepare an effective defence.
8. The Prosecution challenges the Defence’s contention that JCE must be expressly pled in the Indictment, including that the type of JCE be specified, citing various ICTY jurisprudence which support a lesser burden of specificity.¹² The Prosecution also challenges the Defence’s submission that the Pre-trial Brief cannot be used to put the Accused on notice, citing two ICTY judgements which have held that it can.¹³
9. For the reasons above, the Prosecution asks that JCE be admissible as a mode of a liability, and that the applications be dismissed in their entirety.

The Defence Reply

10. In reply, the Defence for Mr. Bizimungu insists that the Request is based on Rule 73 (A) and Rule 54, not Rule 72 as the Prosecution suggests, and that the Chamber is competent to rule on such matters. The Defence is asking for a declaration in the interests of judicial efficiency.
11. On the merits of the request, the Defence reiterates their arguments that the Indictment must be precise, and that the type of JCE must be pled. The Defence further submits that the Prosecution has:
 - i. given an erroneous interpretation of the *Kupreskić* precedent;
 - ii. confused Conspiracy and Complicity to Commit Genocide with JCE;
 - iii. focussed on ICTY case law, when ICTR case law is more on point; and has
 - iv. exaggerated the ease with which Pre-trial Briefs can be considered to correct flaws in Indictments.

⁸ Namely that implicit in the charge of Conspiracy to Commit Genocide is the notion of concerted action, or joint criminal enterprise, meaning at least two persons sharing a common plan or purpose, and that implicit in the charge of Complicity to Commit Genocide is the participation of at least two persons acting in concert. For more detail, see the arguments made in the Consolidated Response, paras. 20-22.

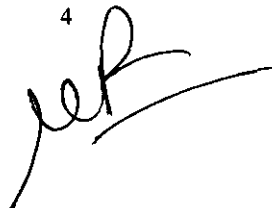
⁹ For this test, the Defence cited *Čermak and Markač*, 8 March 2005; the Prosecution cited *Prosecutor v. Simić*, Case No. IT-95-9-T, (TC), 17 October 2003, para. 145.

¹⁰ For details on each of these arguments, see Consolidated Response, paras. 23-26.

¹¹ *Simić*, para. 146.

¹² See *Krnoljeluć*, paras. 138, 140, 141, 144, and 145; *Mejakić et al.* (TC), Decision on Mejakić’s Preliminary Motion on the Form of the Indictment, 14 November 2003, p. 3; *Stanisić*, (TC), Decision on Defence Preliminary Motions, 14 November 2003; *Simić* (TC), paras. 23, 30-36.

¹³ *Prosecutor v. Krstić*, Case No. IT-98-33-T, (TC) 2 August 2001, paras. 602, 602; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, (TC), 2 November 2001, paras. 246-247.



DELIBERATIONS

12. The Chamber has strong reservations on whether an alleged ambiguity or defect in the Indictment is the proper subject for an application pursuant to Rules 54 and 73. The Defence's intention to rely on Rule 54 is only briefly mentioned in the final Reply, and the Chamber finds that this Rule is in a "Pre-Trial Proceedings" section of the Rules, and is intended for less legally substantive matters, such as summonses, subpoenas, and transfer orders.¹⁴
13. Regarding the Chambers' competence to rule on such a matter under Rule 73, the Defence cited a number of decisions in support of this proposition in its initial Request. The Chamber notes, however, that Rule 73 operates in these decisions in two contexts, either to determine the relationship between the Statute and the Regulations,¹⁵ or to determine the scope of authority exercised by various organs or functionaries.¹⁶ Although one of the five decisions cited by the Defence, *Blaskić*, dealt with an alleged defect in the Indictment, the reliance on Rule 73 was dismissed as the matter had already been decided in its "Decision on the Defence Motion to dismiss the Indictment based upon Defects in the Form Thereof", which appears to have been brought on the basis of Rule 72.¹⁷
14. This Chamber finds, therefore, that the legal mechanism for raising the issue at bar is not Rule 73. Alleged defects in the Indictment can be raised either as preliminary motions under Rule 72 (A) (ii), or as part of a Motion for Judgement of Acquittal under Rule 98 bis.
15. Rule 72 (A) (ii) provides:

Preliminary motions, being motions which:

(...)

(ii) allege defects in the form of the Indictment;

(...)

shall be in writing and be brought not later than thirty days after disclosure to the Defence of all material and statements referred to in Rule 66 (A) (i) and shall be

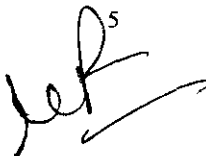
¹⁴ Rule 54 of the Rules of Procedure and Evidence provides:

"At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."

¹⁵ *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, "Decision on the Defence Motion for Pre-Determination of Rules of Evidence", 7 July 1998; *Prosecutor v. Bicomumpaka*, Case No. 99-50-I, "Decision on the Defence Motion on a Point of Law (Rule 73)", 8 April 2003, *Prosecutor v. Blaskić*, Case No. IT-95-14, "Decision rejecting the Defence Motion in limine alleging Command Responsibility and for a Bill of Particulars Re Command Responsibility Portions of the Indictment", 4 April 1997.

¹⁶ *Prosecutor v. Ntuyahaga*, "Declaration on a point of law by Judge Laity Kama, President of the Tribunal, Judge Lennart Aspergren and Judge Navanethem Pillay", 22 April 1999; *Prosecutor v. Bicomumpaka*, Case No. 99-50-I, "Decision on the Defence Motion on a Point of Law (Rule 73)", 8 April 2003, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1, "Decision on the Defence Motion regarding Concurrent Procedures before International Criminal Tribunal for the former Yugoslavia and International Court of Justice on the same Questions", 5 December 2000.

¹⁷ *Prosecutor v. Blaskić*, Case No. IT-95-14, "Decision rejecting the Defence Motion in limine alleging Command Responsibility and for a Bill of Particulars Re Command Responsibility Portions of the Indictment", 4 April 1997, which references *Prosecutor v. Blaskić*, Case No. IT-95-14, "Decision on the Defence Motion to dismiss the Indictment based upon Defects in the Form Thereof", 4 April 1997.



disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

16. Pursuant to Rule 72 (G), a failure to comply with the time limits prescribed in the rule constitutes a waiver of the right to lodge a motion; however, a Trial Chamber may allow a late submission should good cause be shown. The Chamber notes that the Defence Request was submitted almost a year and a half after the commencement of opening statements on 29 March 2004, and that there have been no submissions on the issue of good cause for delay.
17. Regarding the other method for raising alleged defects in the Indictment, Rule 98 *bis*, the Chamber notes that such a Motion has already been brought and decided in this case. The Chamber refers the Defence to the earlier 22 November 2005 "Decision on Defence Motions pursuant to Rule 98 *bis*".
18. Therefore, the Chamber is of the view that Rule 73 is an inappropriate mechanism for such a Request, Rule 72 is time barred, and that a Rule 98 *bis* application has already been adjudicated. The parties may raise this issue during their final submissions at the end of the case.

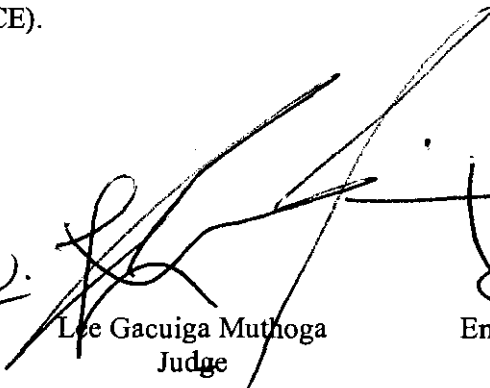
FOR THE FOREGOING REASONS, THE CHAMBER

DENIES the Defence Request for a declaration that the Indictment does not allege liability for joint criminal enterprise (JCE).

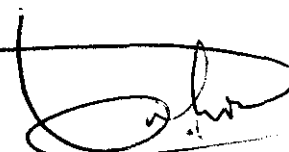
Arusha, 23 March 2006



Khalida Rachid Khan
Presiding Judge



Le Gacuiga Muthoga
Judge



Emile Francis Short
Judge

[Seal of the Tribunal]

