

ICTR-97-31-I
04-10-2006
(1637-1627)

1637
PM



International Criminal Tribunal for Rwanda
Tribunal pénal International pour le Rwanda

TRIAL CHAMBER II

Case No. ICTR-97-31-I

ENGLISH
Original: FRENCH

Before: Judge Arlette Ramaroson, presiding
Judge William H. Sekule
Judge Solomy B. Bossa

Registrar: Adama Dieng

Date: 5 September 2006

THE PROSECUTOR

v.

THARCISSE RENZAIHO

JUDICIAL RECORDS ARCHIVES
RECEIVED
ICTR
2006 OCT - 11 P 4: 23

**DECISION ON PRELIMINARY MOTION ON DEFECTS
IN THE FORM OF THE INDICTMENT**

Office of the Prosecutor:
Jonathan Moses
Charity Kagwi
Ignacio Tredici

Defence Counsel:
François Cantier

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

SITTING as Trial Chamber II composed of Judge Arlette Ramaroson, presiding, Judge William H. Sekule and Judge Solomy B. Bossa;

BEING SEIZED of:

- (i) The Preliminary Motion on Defects in the Form of the Indictment (Rule 72(B)(ii) of the Rules of Procedure and Evidence), filed on 31 March 2006 (the "Motion");
- (ii) The Prosecutor's Response to the Accused's *Requête en exception préjudicielle pour vices de forme de l'acte d'accusation*, filed on 10 April 2006 (the "Prosecutor's Response");
- (iii) The Defence Reply to the Prosecutor's Response to the Preliminary Motion on Defects in the Form of the Indictment (Rule 72(B)(ii) of the Rules of Procedure and Evidence), filed on 23 May 2006 (the "Defence's Reply").

CONSIDERING:

- (i) The Decision on the Prosecutor's Application for Leave to Amend the Indictment pursuant to Rule 50(A) of the Rules of Procedure and Evidence, rendered on 13 February 2006 (the "Decision of 13 February 2006");
- (ii) The Second Amended Indictment against Tharcisse Renzaho, dated 16 February 2006 (the "Amended Indictment of 16 February 2006");
- (iii) The Prosecutor's Pre-Trial Brief, filed on 31 October 2005 (The "Prosecutor's Pre-Trial Brief");
- (iv) The Status Conference of 3 June 2005; and
- (v) The Status Conference of 10 March 2006;

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules"), in particular Rule 72 of the Rules;

DECIDES on the basis of the briefs of the parties, pursuant to Rule 73(A) of the Rules

SUBMISSIONS OF THE PARTIES***The Defence***

1 The Defence submits that the charges in the Amended Indictment are vague and imprecise, which is inconsistent with prevailing case law ¹

2 The Defence prays the Chamber to order the Prosecution:

- To draw a distinction between the crimes charged pursuant to Article 6(1) of the Statute and the ones charged under Article 6(3) of the Statute;
- To provide further particulars as to the nature and extent of the Accused's alleged control over the different organizations and administrations;
- To drop the charges in respect of joint criminal enterprise alleged in paragraphs 6 to 44 and 56 of the Amended Indictment;
- To specify the nature of the relationship between the Accused and the perpetrators of the acts for which he allegedly incurs superior responsibility;
- To provide details for identification of the alleged victims. Alternatively, to order the Prosecution to disclose information in its possession for proper identification of the victims and determination of their number. Otherwise, to order that where the Prosecution is unable to provide any of the above information, it should clearly state so in the Indictment;
- Lastly, to order the Prosecution to specify the dates and place of commission of the alleged crimes.

3. The Defence submits that the facts alleged with respect to the Accused's superior responsibility should be pleaded differently from those which form the basis of his individual responsibility; this, the Defence claims, has not been done in the instant case.² In this connection, the Defence cites, among others, Count 2 (paragraphs 7 and 25, 9 and 29, 10 and 27), Count 3 (paragraphs 45 and 49) and Count 5 (paragraphs 58 and 50).³

¹ Paragraphs 38 and 39 of the Motion. The Defence refers to the *Kupreškić* Judgement of 23 October 2001, the *Niyitegeka* Judgement of 16 May 2003 affirmed by the Appeals Chamber on 9 July 2004, the *Ntakirutimana* Judgement of 19 February 2006, and the *Bizimungu* Decision of 15 July 2004.

² Paragraph 43 of the Motion

³ Paragraphs 50-52 of the Motion

4. The Defence contends that no persons are named in the charge of conspiracy in respect of war crimes, but that only organizations are named, such as FAR, Presidential Guard and *Interahamwe*.⁴

5. The Defence submits that the charges of participation in a joint criminal enterprise should be withdrawn from the Amended Indictment, arguing that it seems absurd to indicate that the supposed co-perpetrators or accomplices of the Accused participated in a joint criminal enterprise, whereas they have not been afforded the opportunity to defend themselves against such charges. The Defence further submits that participation in a joint criminal enterprise with unnamed persons is not provided for in the Statute nor any other legal system.⁵

6. The Defence submit that it is by virtue of his control and authority, as alleged in the Amended Indictment, that the Accused committed or ordered the commission of the crimes charged, adding that there is, however, no material fact underpinning such authority.⁶

7. With regard to the Accused's superior responsibility, the Defence submits, among others, that his superior position *vis-à-vis* the gendarmes is not specified, neither is the militia group he is alleged to have belonged to, or those who had control over him and those over whom he had control.⁷ The Defence further submits that the Accused is alleged to have played the role of "*de facto* Minister of the Interior" during the events, whereas no material fact supports such allegation and it is not stated how he acquired this position.⁸

8. The Defence also avers that the allegations relating to the Accused's individual responsibility are vague and imprecise.⁹

9. The Defence submits that the adverb "*about*", whenever used to indicate a date in the Indictment, should be stricken, as it is synonymous with the adverb "*around*", the use of which has already been rejected in case law.¹⁰ The Defence points out that the adverb "*about*" is used 25 times in the current Amended Indictment.¹¹

10. The Defence submits that the Indictment contains numerous expressions that are considered to be too vague. It cites, for instance, such expressions as "*from June 1994*" in paragraphs 7 and 25, and "*on an unknown date within the period between, on or about 7 and*

⁴ Paragraph 54 of the Motion

⁵ Paragraphs 55-57 of the Motion

⁶ Paragraphs 59-60 of the Motion

⁷ Paragraph 61 of the Motion.

⁸ Paragraphs 65-66 of the Motion

⁹ Paragraph 72 of the Motion.

¹⁰ Paragraphs 82-83 of the Motion

¹¹ Paragraph 84 of the Motion

30 May 1994 or around that period” in paragraph 18.¹² The Defence further avers that the adjective “unknown” is synonymous with “vague”.¹³

11. The Defence contends that the Amended Indictment is imprecise as to the venue of some of the alleged crimes, citing as such examples as: “throughout Kigali-ville préfecture” in paragraphs 7 and 25 and “at Ste Famille parish, St Paul’s, Kadaffi mosque and CELA, among other places in the Nyarugenge secteur” in paragraph 37. The Defence further contends that the locations where the crimes were committed are not specified in many paragraphs, including paragraphs 8, 9, 10, 53 and 63.¹⁴

12. It is the submission of the Defence that the Amended Indictment is imprecise, as it contains counts which do not mention the names of victims of the alleged crimes,¹⁵ and that according to case law, the Prosecution is required to provide, to the extent possible, details as to the identity and number of victims of the crimes charged¹⁶ or at least indicate their category or position as a group.¹⁷ The Defence also submits that where, for objective reasons, the Prosecution is unable to meet the aforementioned requirements, it must state clearly in the Indictment that it is unable to do so and that it has provided the best information it can, which has not been done in the instant case.¹⁸ The Defence also argues that simply referring to the victims as “Tutsi” is insufficient.¹⁹ Lastly, the Defence submits that the use of the advert “among others” in paragraphs 45 and 49 of the Indictment to identify the victims of a crime should be avoided as it may prejudice the Accused’s preparation of his defence.²⁰

13. The Defence submits that all the alleged subordinates of the Accused are not identified in the introductory paragraphs of the counts relating to his superior criminal responsibility,²¹ or are not identified at all.²² In fact, the Indictment simply mentions “Interahamwe” in paragraphs 28, 29, 30, 32, 34, 38, 39, 41, 42, 43, 49, 50, 51, 53, 55, 60, 63, 64 and 65, and “soldiers” in paragraph 30.²³ The Amended Indictment equally uses even more imprecise expressions such as in paragraph 31, where the perpetrators are identified as “those under his effective control” or in paragraph 63, where they are identified as “other individuals”.²⁴ The Defence underlines that such imprecise expressions are bound to impair the preparation of the Accused’s defence,²⁵

¹² Paragraph 88 of the Motion.

¹³ Paragraph 90 of the Motion.

¹⁴ Paragraphs 91-95 of the Motion.

¹⁵ Paragraph 98 of the Motion. The Defence mentions paragraphs 7 to 13, 15, 16, 18, 19, 21 to 23, 25 to 29, 32 to 34, 38 to 43, 53 to 55, 58, 60, 63 to 65.

¹⁶ Paragraphs 96 and 101 of the Motion.

¹⁷ Paragraph 99 of the Motion.

¹⁸ Paragraphs 102-103 of the Motion.

¹⁹ Paragraph 100 of the Motion.

²⁰ Paragraphs 104-105 of the Motion.

²¹ Paragraph 111 of the Motion. The Defence refers to the paragraphs 24, 48, 52, 59 and 61 of the Indictment.

²² Paragraph 113 of the Motion.

²³ Paragraph 114 of the Motion.

²⁴ Paragraphs 116 of the Motion.

²⁵ Paragraph 118 of the Motion.

The Prosecutor v. Tharcisse Renzaho, Case No. ICTR-97-31-I

adding that where the Prosecution cannot specify the identity of the perpetrators of the alleged crimes for objective reasons, it will be sufficient for the Prosecution to identify them by reference to the "category" or group to which they belong. The Defence further states that where the Prosecution is unable to identify them by name, it must clearly state in the Indictment that it was unable to do so.²⁶ The Defence also contends that if any of these matters is to be established by inference, the Prosecution "must identify in the indictment the facts and circumstances from which the inference is sought to be drawn".²⁷

14. In conclusion, the Defence submits that the Indictment is not sufficiently precise on certain points to enable the Accused to exercise his rights, and that the lack of precision as to dates, causes the Accused, among others things, serious prejudice, as it deprives him of the possibility of presenting a defence of alibi. Wherefore, the Defence concludes, the Indictment must be pleaded in sufficient detail to enable the Defence to exercise its full rights.²⁸

The Prosecution

15. The Prosecution submits that it is a matter for the Trial Chamber, after hearing all the evidence, to conclude which, if any, of the alleged modes of responsibility pleaded is most appropriate. The Prosecution stresses that it is the duty of the Prosecution to prepare an indictment, setting out the facts which it considers it can prove together with the mode or modes of responsibility charged. The Prosecution therefore submits that the Defence claim that the Prosecution failed to distinguish allegations of the Accused's superior responsibility from those of his individual responsibility is unfounded.²⁹

16. The Prosecution contends that the Amended Indictment and the Pre-Trial Brief (pp. 9-14) provide sufficient detail as to the alleged authority of the Accused.³⁰

17. As to the alleged imprecision regarding the dates, places, victims and perpetrators of the crimes charged, the Prosecution states that the degree of precision sought by the Defence is excessive. The Prosecution states that it has included in the Amended Indictment as much detail as it is able, without pleading evidence or revealing the identity of protected witnesses.³¹ The Prosecution further submits that the Indictment should be read as a whole.³²

18. The Prosecution contends that in the context of the events which occurred in Rwanda during the period referred to in the Indictment, it is impossible to specify the identity of each of the Accused's co-perpetrator in the joint criminal enterprise, arguing that the alleged

²⁶ Paragraphs 119-120 of the Motion

²⁷ Paragraph 121 of the Motion.

²⁸ Paragraphs 174-177 of the Motion

²⁹ Paragraph 6 of the Response.

³⁰ Paragraph 7 of the Response

³¹ Paragraph 12 of the Response

³² Paragraph 9 of the Response

co-perpetrators very often belonged to large militia groups, or bands of soldiers or civilians whose members were not individually identifiable. The Prosecution submits that in any case, the Pre-Trial Brief contains information that sheds light on this issue.³³

The Defence Reply

19. The Defence reiterates that in keeping with prevailing case law, the Indictment must clearly distinguish the facts relating to the Accused's criminal responsibility under Article 6(1) of the Statute from those by which he incurs responsibility under Article 6(3).³⁴

20. The Defence submits that details regarding the dates, locations, victims and perpetrators of the alleged crimes must be provided in the Indictment to enable the Accused to make full answer and defence and that if the Prosecution is unable to provide such details with respect to the victims, it has to give the reason therefor.³⁵

21. The Defence submits that it is possible to state with precision the circumstances of the events which occurred in a specific location in the presence of many persons, such as the events at Saint Paul, Sainte Famille or CEILA. Lack of precision would be prejudicial to the Accused's rights, as he would be unable to present, among others, a defence of alibi. Lastly, the Defence submits that a Pre-Trial Brief cannot cure defects in the Indictment.³⁶

DELIBERATIONS

22. The Chamber notes that the present Motion was filed within the time limits provided for in Rule 72 of the Rules and is therefore admissible

23. The Chamber further notes that the issues raised by the Defence in the present Motion may be classified into three categories, namely, the need to distinguish between the crimes charged under Article 6(1) and those charged under Article 6(3); lack of precision as to the Accused's alleged authority; and lack of precision as to the dates and places of commission of the crimes, the identify of the victims, the Accused's subordinates and co-perpetrators in the context of the joint criminal enterprise.

³³ Paragraph 13 of the Response

³⁴ Paragraph 171 of the Reply

³⁵ Paragraphs 174 and 176 of the Reply

³⁶ Paragraphs 178-179 of the Reply

Need to distinguish between the crimes charged under Article 6(1) and those charged under Article 6(3)

24. The Chamber notes that it is settled jurisprudence that an accused may be charged for the same crime under Articles 6(1) and 6(3) of the Statute, only if the Prosecution clearly specifies in the Indictment the manner in which the accused allegedly incurs criminal responsibility both as a perpetrator and as a superior under the aforementioned articles.³⁷

25. After reviewing all the paragraphs of the Indictment referred to by the Defence in its Motion,³⁸ the Chamber finds that the Prosecution has sufficiently articulated, for each crime charged, the manner in which the Accused allegedly incurs criminal responsibility both as a perpetrator and as a superior. Accordingly, the Defence request is denied.

Lack of precision as to the Accused's alleged authority

26. The Chamber notes the Defence submissions, particularly the assertion that no material fact has been articulated in the Amended Indictment to establish the basis of the Accused's alleged authority.

27. The Chamber notes that paragraph 2 of the Amended Indictment sets out such particulars as the identity and duties of the Accused during the events of 1994. In the Chamber's opinion, such details sufficiently inform the Accused of the position of authority he may have held. In particular, the Chamber finds that paragraph 2(C) clearly mentions the persons over whom the Accused exercised control when he was a member of the crisis committee set up on the night of 6 April 1994, as well as groups of people placed under his authority, and that paragraph 6 specifically mentions such names as Angeline Mukandutiye, an alleged *Interahamwe*, and Father Wecenslaus who allegedly participated in the genocide.

28. With regard to the specific facts underpinning the Accused's alleged position of *de facto* Minister of the Interior, paragraph 2(E) of the Amended Indictment states that any person wishing to leave the town of Kigali needed an authorization signed by the Accused. In the Chamber's view, such detail is sufficient to inform the Accused of the nature and cause of the charge against him in order for him to prepare a meaningful defence.

29. Accordingly, the Chamber denies the Defence request for more particulars as to the alleged authority of the Accused

³⁷ *Prosecutor v. Delalić*, Decision on Motion by the Accused Zeljko Delalić Based on Defects in the Form of the Indictment" (TC), 2 October 1996

³⁸ The Defence refers to Count 2, paragraphs 7 and 25, 9 and 29, 10 and 27, 11 and 28, 12 and 29, 13 and 30, 14 and 31, 15 and 32, 16 and 33, 17 and 35, 20 and 36, 21 and 38, 22 and 39, 23 and 40; Count 3, paragraphs 45 and 49, 46 and 50, 47 and 51 and Count 5, paragraphs 58 and 60.

30. The Chamber further notes the Defence assertions on the imprecision of the allegations relating to the Accused's individual responsibility. The Chamber considers that the Defence has failed to demonstrate such imprecision. Accordingly, the Defence request is denied.

Lack of precision as to the dates and places of commission of the crimes, the identity of the victims, the Accused' subordinates and his co-perpetrators

31. As regards the determination of dates and places of commission of the crimes and the identity of victims, the Chamber refers to *Kupreškić*, where it was held that:

The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Articles 21(2) and (4) (a) and (b) of the Statute. These provisions state that, in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.³⁹

The Appeals Chamber must stress initially that the materiality of a particular fact cannot be decided in the abstract. It is dependent on the nature of the Prosecution case. A decisive factor in determining the degree of specificity with which the Prosecution is required to particularise the facts of its case in the indictment is the nature of the alleged criminal conduct charged to the accused. For example, in a case where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victims, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail. Obviously, there may be instances where the sheer scale of the alleged crimes "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims and the dates for the commission of the crimes".⁴⁰

32. The Chamber endorses the above opinion in *Kupreškić* and considers that the "sheer scale of the crimes" alleged against the Accused in the instant case "makes it impracticable to require a high degree of specificity in such matters as the identity of the victims, dates and places of commission of the crimes". Accordingly, the Chamber finds that the details provided in the

³⁹ *Kupreškić Appeals Judgement (AC)*, 23 October 2001, para. 88

⁴⁰ *Id.*, para. 89

Amended Indictment on the said matters are sufficient to enable the Accused to prepare his defence.

33. With regard to the Defence claims on the lack of precision as to the identity of the other participants in the crimes charged, the Chamber endorses the finding in the *Krnjelac* Decision, namely that "if the Prosecution is unable to identify those directly participating in such events by name, it will be sufficient for it to identify them at least by reference to their 'category' (or their official position) as a group".⁴¹

34. In the light of the foregoing jurisprudence, the Chamber finds that the use of such expressions "*Interahamwe*", "militiamen", "soldiers", "gendarmes", "*Impuzamugambi*", "demobilized soldiers", "*conseillers*", "*responsables of cellule*", "*nyumbakumi*", "*bourgmestres*", "communal police", "armed civilians" or "other *Interahamwe* leaders" in the Amended Indictment is sufficient to describe the persons over whom the Accused exercised authority or who acted concomitantly with him during the period referred to in the Indictment. Furthermore, the Chamber is of the view that the other defects alleged by the Defence in paragraphs 115 to 117 of its Motion⁴² are not prejudicial. Accordingly, the Defence request on this point is denied.

35. Lastly, the Chamber finds unfounded the Defence submission that the charges of participation in a joint criminal enterprise should be withdrawn from the Amended Indictment on the grounds that it is absurd to indicate that the purported co-perpetrators or accomplices of the Accused participated in a joint criminal enterprise, whereas they have not been afforded the opportunity to defend themselves against such charges.

⁴¹ *Krnjelac*, "Decision on the Defence Preliminary Motion on the Form of the Indictment" (TC) 24 February 1999, para. 46.

⁴² Paragraph 115 of the Motion reads as follows: "The Indictment uses even more imprecise expressions in some paragraphs".

Paragraph 116: "Such paragraphs include :

- Paragraph 31 where the perpetrators are identified as "*those under his effective control*".
- Paragraphs 41 and 53 where the perpetrators are identified as "*other individuals*".
- Paragraph 63 where the perpetrators are identified as "*Tharcisse Renzaho's subordinates, including but not limited to ...*"; and
- Paragraph 40 "*including but not limited*"

Paragraph 117: "The Prosecutor even refers to '*those present*' in paragraph 19"

The Prosecutor v. Tharcisse Renzaho, Case No. ICTR-97-31-I

FOR THESE REASONS

THE TRIBUNAL,

DENIES the Defence Motion

Arusha, 5 September 2006

Arlette Ramaroson
Presiding Judge

William H. Sekule
Judge

Solomy Balungi Bossa
Judge

[Seal of the Tribunal]
