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INTRODUCTION

1. The trial in the instant case commenced on 25 September 2006 with the Prosecution's Opening Statement. On 17 July 2006, Trial Chamber I granted the Prosecution leave to amend, in part, the Indictment of 29 June 2001.¹ In conformity with this Decision, the Prosecution filed an Amended Indictment on 18 July 2006. On 25 July 2006, the Prosecution filed a Corrigendum to the Indictment, which only changed certain incorrect paragraph numbers, and the French translation to the Indictment. The Amended Indictment charges the Accused with four counts: genocide, and murder, extermination and other inhumane acts as crimes against humanity. On 29 August 2006, the Defence submitted the present motion raising objections on defects in the form of the Amended Indictment under Rule 50 (C) of the Rules of Procedure and Evidence.

DISCUSSION

I. Preliminary Matter

2. This motion was filed after the end of the 30-day period following the filing of the Amended Indictment during which the Defence may submit preliminary motions according to Rule 50 (C) of the Rules. Although the Defence has not offered any explanation for its delay in submitting the Motion, the Chamber notes that pursuant to Rule 72(G), it has discretion to consider late-filed preliminary motions on defects in the form of an indictment upon showing good cause.² In the Chamber's view, the same principle can apply when a submission is made under Rule 50(C) of the Rules since it also concerns the defects in the form of new charges as a result of the amendment of an Indictment. Due to the fact that it is still early in the trial process, the Chamber finds it necessary in the interests of justice and the rights of the Accused to a fair trial, to use its discretion and entertain the Defence submission.

II. Allegations of Defects in the Form of the Indictment

3. Article 17(4) of the Tribunal's Statute and Rule 47(C) of the Rules require the Prosecution to set forth in the Indictment a concise statement of the facts of the case and of the crime(s) with which the suspect is charged. According to the jurisprudence of the International Criminal Tribunal for Former Yugoslavia and of this Tribunal, this obligation must be interpreted in light of the rights of the accused³ and obliges the Prosecutor to inform an accused of the charges against him in a prompt and detailed manner.⁴ The key issue is whether the material facts are pleaded in an indictment with enough specificity so that an accused can adequately prepare his defence.⁵ In assessing an indictment, each paragraph should not be read in isolation but rather should be considered in the context of the other paragraphs in the indictment.⁶ 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. But the Prosecution is expected to know its case before it goes to trial. 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. An indictment, which does not set out the material facts with enough detail in this respect, is defective.

¹ *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-I, Decision on Request for Leave to Amend the Indictment (TC), dated 14 July but filed on 17 July 2006.

² See also *Prosecutor v. Bagosora*, Case No. ICTR-98-41-T, Trial Chamber, Decision on Disclosure of Defence Witness Statements in Possession of the Prosecution pursuant to Rule 68(A) (TC), 8 March 2006, at para. 2.

³ Statute, Articles 19, 20(2), 20(4)(a) and 20(4)(b).

⁴ *Prosecutor v. Kupreškic*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 88, 92; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement (TC), 20 May 2005, para. 85;

⁵ *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgement (AC), 7 July 2006, para. 22.

⁶ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgement (AC), 26 May 2003, para. 304.

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4. In its motion of 29 August 2006, the Defence submits that the form of the Amended Indictment against Siméon Nchamihigo is defective to the extent that it does not properly plead (i) the form of criminal responsibility under Article 6(1) of the Statute, (ii) the category of joint criminal enterprise,⁷ and (iii) fails to specify details relating to certain dates, places and persons. It claims that these defects affect his right to adequately prepare his defence and his right to a fair trial. The Prosecution opposes the Motion and claims that the Indictment conforms to the requirements set out by the jurisprudence and, in any event, much of the information that is requested in the Motion is detailed in material found in the disclosure of documents, witness statements and other pre-trial material.⁸

5. The Chamber accepts that according to the established jurisprudence, a defect in an indictment may be cured where the accused has received timely, clear, and consistent information from the Prosecution which resolves the ambiguity or clears up the vagueness.⁹ However, in the instance case, since this case is at the outset of the trial, it is more appropriate that any more specific information on the allegations, which is currently in the Prosecution's possession, be included in the Indictment from now to ensure that any ambiguity concerning the charges against the Accused is removed. This would give effect to the right of the Accused to understand the charges against him and prepare adequately his defence. For these reasons, the Chamber will address the three categories of defects alleged in the Defence Motion.

(i) Defects Related to the Form of Individual Criminal Responsibility

6. According to the established jurisprudence, the mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set out in the indictment. The Prosecution must specify the form of criminal responsibility charged against an accused.¹⁰ When the Prosecution alleges more than one form of participation for each crime, it has the obligation to specify the alleged acts of an accused giving rise to each form of participation charged.¹¹ Each count in the indictment must identify the precise legal qualification of the crime charged based on the material facts alleged in the indictment as well as the mode of the accused's alleged participation in the crime.¹² The count must also specify which paragraphs of the concise statement of the facts of the crime support the charge.¹³

7. The Defence submits that the Prosecution failed to specify which form of criminal liability is being invoked against the Accused in relation to each charge. It claims that paragraph 14 of the Indictment lacks specificity and raises ambiguity as to the modes of liability since all the forms under Article 6(1) are pleaded. The Defence also argues that a number of paragraphs in the Amended Indictment fail to particularise the way in which the Accused participated in the crimes alleged, most notably in the context of the allegations of instigating and aiding and abetting.

⁷ Although considered a form of liability under Article 6(1) of the Statute, joint criminal enterprise will be treated separately for clarity in this Decision.

⁸ Prosecution Response at para. 7 and 9.

⁹ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 195; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 30; *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49.

¹⁰ *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgement (TC), 25 February 2004, para. 37, *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, para. 138.

¹¹ *Prosecutor v. Ntagerura*, Case no ICTR-99-46-T, Judgment (AC), 7 July 2006, para. 25, *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgment (TC), 25 February 2004, fn 38.

¹² *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement (TC), 15 May 2003, para. 59; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement (AC), 17 September 2003, para. 138.

¹³ *Prosecutor v. Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgement (TC), 15 May 2003, para. 59.

8. In the Chamber's view, paragraph 14 of the Amended Indictment is a general paragraph introducing all the forms of liability which are then alleged throughout the Indictment. The Chamber notes that the forms of liability on which the Prosecution intends to rely under Article 6(1) of the Statute are specified in relation to each factual allegation. This view is confirmed by the Prosecution's submission in its reply to the Defence motion. The Chamber is satisfied that the forms of liability concerning the alleged crimes committed by the Accused are sufficiently pleaded in relation to each fact.

9. The Defence submits that the allegations in paragraphs 28 and 36, which refer to the Accused's direct participation in the crimes alleged, must be struck from the Amended Indictment because they do not coherently allege the forms of criminal liability consistently with the second sentence of paragraph 14. They must also be struck because they are inconsistent with Decision of Trial Chamber I granting leave to amend the Indictment except when it is alleged that the Accused personally committed the murders.¹⁴

10. Paragraphs 28 and 36 must be read in the context of paragraphs 28 through 37 of the Indictment. These paragraphs contain specific factual allegations including modes of liability for each of these factual allegations. Similarly paragraph 14 as a whole contains all the modes of liability referred to in paragraphs 28 through 37. The allegations specify a reasonable range of dates, a precise location and the exact names of the victims involved. The Chamber is therefore satisfied that paragraphs 28 and 36 are set out with enough detail and clarity to allow the Accused to understand the charges against him and prepare his defence. The Chamber is not convinced that a reference to the commission of killing by the Accused at paragraph 36 will require more investigation than for the allegation that he ordered, instigated or aided and abetted the killing of some Tutsi girls as stated in the paragraph, and can see no inconsistency with the Decision of Trial Chamber I.

11. The Defence argues that paragraphs 5, 34, 35, 43, 64 and 65 fail to explain the way in which the Accused instigated or aided and abetted the crimes alleged, in particular it does not understand how both forms of liability could be pleaded on the same facts. It requests that the Prosecution indicate the alleged acts of the Accused that give rise to each form of participation charged, because otherwise it appears that the Prosecution does not know what theory it intends to prove on these allegations.

12. In the Chamber's view, paragraphs 5, 34, 35, 43, 64 and 65 provide sufficient detail concerning the acts by which the Accused allegedly participated in the commission of the crimes to allow the Accused to understand the charges against him. The words "ordered, instigated, or aided and abetted the crime" are the legal terms which may be applied to the Accused's participation as described under these paragraphs.

13. The Defence also complains that paragraphs 27, 29, 41, and 49 do not specifically state the means by which the Accused participated in the criminal facts alleged. These paragraphs allege certain actions taken by the Accused, and all include specific forms of liability pursuant to Article 6(1). Whether the alleged action by the Accused amounts to the criminal responsibility pleaded is a matter to be decided at a later stage in the trial. For the purposes of this Motion, the Chamber finds no defects in this regard.

(ii) Defects Related to the Category of Joint Criminal Enterprise

14. Joint criminal enterprise is considered as a form of participation in the crime coming from the word "committing" contained in Article 6(1) of the Statute. The jurisprudence established the existence of three forms of joint criminal enterprise: basic, systemic and extended. According to the jurisprudence, when pleading responsibility as a participant in a joint criminal enterprise, it is preferable that the Indictment refers to the particular form of

¹⁴ The Defence relies upon para. 21 of the Decision filed on 17 July 2006.

joint criminal enterprise envisaged. However, more than one form of joint criminal enterprise can be pleaded for the same facts, similarly to other forms of individual criminal responsibility pursuant to Article 6(1).¹⁵ The indictment must also set out the purpose of the enterprise, the identity of the co-participants, and the nature of the accused's participation in the enterprise.¹⁶

15. The Defence argues that the Amended Indictment does not specify which category of joint criminal enterprise is alleged against the Accused, but instead includes both the basic and extended categories and that a criminal act cannot fall within both forms of joint criminal enterprise at the same time. It further submits that the Amended Indictment fails to particularise which specific criminal activities refer to which category of joint criminal enterprise both within paragraphs 15, 16 and 17, and within the concise statement of facts relating to each count of the Amended Indictment.

16. As Trial Chamber I pointed out in its Decision of 14 July 2006, the Amended Indictment makes clear to the Accused that he is charged with both the basic and extended forms of joint criminal enterprise.¹⁷ Here, the Indictment must be read as a whole: paragraphs 15 to 17 of the Indictment plead without ambiguity the basic and extended forms of joint criminal enterprise. Paragraph 17 provides the names of the members of the joint criminal enterprise, and as paragraph 14 of the Indictment, these paragraphs introduce the factual allegations pleaded in the subsequent paragraphs where, in each instance, the mode of liability is specified. As a result, the Accused is sufficiently aware of the material facts, which make up the Prosecution's theory of joint criminal enterprise and can, on this basis, adequately prepare his defence.

(iii) Defects Related to the Failure to Specify Precise Dates, Locations, the Identity of Victims and Co-Perpetrators, Vagueness, and Relevance to the Charges in the Indictment

17. The specificity with which material facts must be pleaded depends on the form of participation charged against an accused.¹⁸ With respect to allegations of direct commission of criminal acts, an indictment must specify the identity of the victims, the time and place of the events, and the means by which the acts were committed.¹⁹ In light of the nature or scale of the crimes, the fallibility of witnesses' recollections and considerations tied to witness protection, the Prosecution is not expected to plead these material facts with absolute precision.²⁰ If a precise date cannot be specified, a reasonable range of dates can be provided;²¹ and if victims cannot be individually identified, then the Prosecution should refer to their category or position as a group.²² Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available.²³

¹⁵ See footnote 11.

¹⁶ *Prosecutor v. Stanisic*, Case No. IT-03-69-PT, Decision on Defence Preliminary Motions (TC), 14 November 2003; *Prosecutor v. Mejakic*, Case No. IT-02-65-PT, Decision on Dusko Knezevic's Preliminary Motion on the Form of the Indictment (TC), 4 April 2003.

¹⁷ *Nchamihigo*, Trial Chamber I Decision filed on 17 July 2006, para. 14.

¹⁸ *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgement (AC), 7 July 2006, at para. 23.

¹⁹ *Prosecutor v. Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment (TC), 15 May 2003, at para. 45.

²⁰ *Prosecutor v. Kupreskic*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, at para. 89; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, at para. 40.

²¹ *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, Decision on Objections to the Form of Amended Indictment (TC), 20 February 2001, at para. 22.

²² *Ibid.*; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Decision on the Defence Preliminary Motion on the Form of the Indictment (TC), 24 February 1999, at paras. 40, 55, 58.

²³ *Brdjanin*, Decision on Momir Objections by Momir Talic to the Form of Amended Indictment (TC), 20 February 2001, at para. 22.

18. The Defence submits that the concise statement of the facts included in the Amended Indictment is defective to the extent that some allegations are not relevant to the charges against the Accused or that the Indictment lacks details relating to certain dates, places and persons and therefore results in grave prejudice to the Accused.

19. The Defence first claims these defects with respect to paragraphs 3, 6 and 7 of the Indictment. The Chamber notes that these paragraphs provide context and background concerning the Accused, indicated by the heading of the section and the content of the paragraphs themselves. As Trial Chamber I stated in its Decision of 14 July 2006, none of these allegations could independently ground a conviction on any of the counts included in the Indictment.²⁴ The Defence's contention on this issue is therefore rejected.

20. The Defence argues that paragraphs 4, 5, 8 to 10 of the Indictment also lack details. These paragraphs are however introducing the allegations against the Accused as fully described in the concise statement of the facts related to the charges.²⁵ Read as a whole along with the other allegations in the Indictment, paragraphs 4, 5, and 8 are not defective. Paragraph 10, however, mentions a meeting held on or about 11 April 1994, which allegedly lead to the distribution of weapons. Nowhere else in the Indictment is a meeting alleged to be held on that day, although there are similarities in paragraph 10 with paragraph 20(a), where the meeting is alleged to be held on or about 14 April 1994. Due to this confusion, the Chamber finds that the dates of the meetings and distribution of weapons should be specified in paragraphs 10 and 20(a), and that clarification should be made if paragraph 20(a) is meant to elaborate on the meeting introduced in paragraph 10. If these two paragraphs are not referring to the same meeting, then more details should be given in paragraph 10 as to when the weapons were distributed and orders were given to kill the Tutsi with those weapons.

21. The Defence also argues that references to the *Interahamwe* in the Amended Indictment are imprecise in that the Prosecution does not define the nature of the *Interahamwe* and does not specifically identify its members. The Defence reasons that this information is all the more necessary as the Amended Indictment alleges that the *Interahamwe* executed a number of the crimes charged where responsibility has been attributed to the Accused. The Chamber notes that in some instances, the identities of the alleged perpetrators of the crimes, including *Interahamwe* are specified in the Indictment. There are other instances where the use of the term *Interahamwe* does not refer to an individual's name in particular. Where the Prosecution knows the names of the *Interahamwe* who committed the particular acts, they should be provided. If it is impossible to provide more specific information due to the large number of *Interahamwe* involved or other reason, this should be clearly indicated in the Indictment. The definition or meaning of "*Interahamwe*", however, is not a matter that needs to be specified in the Indictment.

22. In addition, the Defence identifies a number of paragraphs in the Amended Indictment which suffer from a lack of detail and clarity in the following ways:

(a) *Time-frame*

23. The Defence claims that paragraphs 20(a), (c), (d), 26, 27, 31, 41, and 43 do not specify with enough detail the date, time or length of time in which the criminal allegations took place. The Chamber notes that the time-frame of the Accused receiving and later distributing weapons for an attack on the Shangi parish as alleged in paragraph 20(a) is not clear. Although a range of dates is given for the military training alleged in paragraph 20(c), and the drawing of lists in 20(d) this range is rather large, and if possible, should be better specified. The language in paragraphs 26 and 27 indicates that the dates in question are

²⁴ Para. 24.

²⁵ See in particular last sentence of Paragraph 9 of the Indictment: "as described below in the concise statements of the facts relating to the charges".

unknown and in Paragraph 31 that the most specific date is given for the allegations in those paragraphs. Reading the Indictment as a whole, the Chamber can infer that the lists referred to in paragraphs 41 and 43 were made during the large time-frame specified in paragraph 20(d), but that if a more precise time-frame is known, it should be clarified.

(b) Location

24. The Defence asserts that paragraphs 21, 22, 23, 24, 25 are not clear on where the facts involved occurred. Paragraphs 21, 22, 23, 24 and 25 all mention roadblocks in Cyangugu town. Each of these paragraphs gives a satisfactory detailed factual account of alleged criminal events, without always specifying the exact roadblock. If the name of the actual roadblock is known, the Chamber finds that it should be specified.

(c) Individual Identification- Victims, Organizers and Perpetrators

25. It is contended by the Defence that paragraphs 26, 27, 30, 32, 38, 39, 40, 41, 43, 47, 64, and 65 do not sufficiently name the individual victims, organizers or perpetrators of the crimes in question. Pursuant to the jurisprudence, if individuals cannot be specified, than sufficient detail can be given on the group or the individuals. This information, however, must be according to what the Prosecution actually has in its possession. The Prosecution's response, as stated above, is that the details requested here are not required by the Indictment but regardless, have already been provided to the Defence through other informal means such as disclosure.

26. As already stated, amending the Indictment at this stage of the proceedings is the most appropriate way to ensure that the Accused understands the charges against him. It is only when the information is unavailable, or the scale too large should individuals be referred to within groups or positions. If the information is presently available, as inferred by the Prosecution's response, then it should be specified in the Indictment.

(d) Vagueness

27. The Defence claims that the Amended Indictment contains a number of vague and imprecise expressions such as "among others" (at paragraphs 16, 20(c), 37 and 43), "other" or "other members" (at paragraphs 38 to 42, 60 and 70) or "members of security council" (at paragraph 5). Paragraph 16 indicates the members of the joint criminal enterprise. The Prosecution should state all known members, but if it is unable to do so, it should be mentioned. Paragraph 20(c), 37 and 43 make specific allegations against individuals. All known identities for these individuals should be provided, or stated that it is unable to do so. Paragraphs 5, 38 to 42, and 70 refer to members of the prefecture security council, who have been defined in paragraph 9. In paragraph 60, which alleges that the *Interahamwe* and other attackers killed about 600 civilians, the Prosecution should clarify the identities of these attackers to the extent possible.

(e) Relevance

28. The reference in paragraph 31 to the theft of the vehicle by the Accused and the planning to kill Marianne Baziruwaha in paragraph 49 are alleged to be irrelevant to the actual charges in the Indictment and should be struck.

29. In relation to the allegation of vehicle theft the argument of irrelevance is refuted by Rule 88(B) of the Rules which provides that if the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. With regard to paragraph 49 the facts relating to the Marianne Baziruwaha as set out in that paragraph and in paragraphs 42 and 43 of the Indictment do not make any reference to her having been

killed. Repetition of the incident in paragraph 49 as murder as a crime against humanity is incongruous if there is no allegation that she was killed. The Prosecution should either amend the paragraph to indicate that Marianne Baziruwiha was killed or strike out the paragraph.

FOR THOSE REASONS, THE CHAMBER

I. GRANTS the Motion in part, and

II. ORDERS

1. The Prosecution to clarify the dates of the meetings, reception and distribution of weapons and the orders to kill the Tutsi mentioned in paragraphs 10 and 20(a)
2. The Prosecution to provide further details to the extent available on the names and identities of the *Interahamwe* in paragraphs 8, 10, 13, 20, 20(a), 20(e), 21, 22, 23, 24, 26, 27, 28, 29, 34, 35, 36, 37, 45, 47, 50, 52, 53, 54, 55, 57, 61, 63, and 69;
3. The Prosecution to provide more specific time-frames to the extent possible in paragraphs 20(a), 20 (e), 20(d), 41 and 43;
4. The Prosecution to provide the name of the exact roadblock, or the best detail available concerning the roadblocks mentioned in paragraphs 21, 22, 23, 24, and 25;
5. The Prosecution to provide to the extent possible the identities of persons mentioned in paragraphs 26, 27, 30, 32, 38, 39, 40, 41, 43, 47, 64, and 65;
6. The Prosecution to specify to the extent possible the identities of the members of the joint criminal enterprise in paragraph 16, and the individuals involved in the factual allegations in paragraphs 20(c), 37, 43 and 60;
7. The Prosecution to amend paragraph 49 to indicate that Marianne Baziruwiha was murdered or strike out the paragraph altogether;
8. The Amended Indictment in conformity with this decision shall be filed by 29 September 2006.

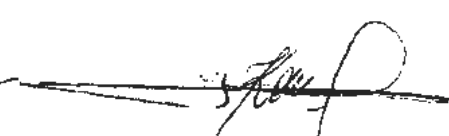
III. DENIES the remainder of the Motion.

Arusha, 27 September 2006, done in English.



Dennis C. M. Byron

Presiding Judge



Gberda Gustave Kam



[Seal of the Tribunal]



Robert Fremr

Judge