



UNITED NATIONS
NATIONS UNIES



**International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda**

TRIAL CHAMBER I

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

Registrar: Adama Dieng

Date: 3 March 2008

THE PROSECUTOR

v.

Ephrem SETAKO

Case No. ICTR-04-81-I

**DECISION ON DEFENCE MOTION CONCERNING DEFECTS IN THE
INDICTMENT**

The Prosecution

Ifeoma Ojemeni-Okali
Simba Mawere
Christiana Fomenky

The Defence

Lennox Hinds
Cainnech Lussiaà-Berdou

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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

BEING SEIZED OF the Defence's "Preliminary Motion", filed on 1 February 2008;

CONSIDERING the Prosecution Response and Further Response, filed on 7 February and 20 February 2008, as well as the Defence Reply, filed on 15 February 2008;

HEREBY DECIDES the motion.

INTRODUCTION

1. On 18 September 2007, the Chamber granted in part the Prosecution request for leave to amend the Indictment.¹ It allowed the Prosecution to better articulate its theories of criminal responsibility, remove, correct or supplement some factual allegations and add a number of new allegations. The request to add two new counts was denied. The Defence did not raise specific notice challenges in its opposition to the Prosecution's request to amend the Indictment. The Amended Indictment was filed on 23 September 2007. It charges the Accused with six counts: genocide, or alternatively complicity in genocide, murder and extermination as crimes against humanity, and two counts of serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II of 1977 (violence and pillage).²

2. In the present motion, the Defence claims that the Amended Indictment does not properly plead superior responsibility under Article 6 (3) of the Statute and lacks sufficient specificity with respect to locations, persons and dates.³ The Prosecution argues that the Indictment satisfies the necessary requirements.⁴

PRELIMINARY ISSUE

3. The motion was filed after the expiration of the thirty days period following the filing of the Amended Indictment, within which the Defence may submit preliminary motions according to Rule 50 (C) of the Rules of Procedure and Evidence. In a status conference on 14 December 2007, the Chamber allowed the Defence to file preliminary

¹ *Setako*, Decision on the Prosecution's Request to Amend the Indictment (TC), 18 September 2007 ("Decision on Amendment of Indictment").

² *Setako*, Amended Indictment, 23 September 2007. On 9 October 2007, the Chamber denied a Defence request for certification to appeal its decision of 18 September 2007. *Setako*, Decision on Defence Motion for Certification to Appeal the Decision on Amendment of the Indictment (TC), 9 October 2007.

³ Motion, paras. 30-37 (superior responsibility); paras. 38-39, 42-43, 47, 51-52 (locations); paras. 40-41, 46, 52 (identities of persons); paras. 44-45, 47, 49, 52 (dates). In setting out the applicable law on defects in the indictment, the Defence outlines pleading principles relevant to the joint criminal enterprise. Motion, paras. 18, 19. However, the Defence did not address in its Motion any particular defect in the Indictment concerning this form of criminal responsibility.

⁴ See, e.g., Response, paras. 19, 22, 23.

motions until 31 January 2008 but to indicate any good cause for the delay.⁵ The Defence has explained that Lead Counsel was replaced at the end of 2007.⁶ The Chamber considers this to be good cause, in particular given the importance of the fair trial right at stake and since deciding the motion will not delay the commencement of the trial.⁷

DELIBERATIONS

4. As the Appeals Chamber has stated, the charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in the Indictment so as to provide notice to the accused.⁸ The Appeals Chamber has held that criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including where feasible “the identity of the victim, the time and place of the events and the means by which the acts were committed.”⁹ Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the “particular acts” or “the particular course of conduct” on the part of the accused which forms the basis for the charges in question.¹⁰

5. The Appeals Chamber has explained that, if the Prosecution intends to rely on the theory of superior responsibility to hold an accused criminally responsible for a crime under Article 6 (3) of the Statute, the Indictment should plead the following: (1) that the accused is the superior of subordinates sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible; (2) the criminal conduct of those others for whom he is alleged to be responsible; (3) the conduct of the accused by which he may be found to have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates; and (4) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them.¹¹

6. An indictment lacking this precision is defective. The Appeals Chamber, however, has also acknowledged that in certain circumstances less detail may be acceptable if “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

⁵ T. 14 December 2007 p. 6.

⁶ Motion, paras. 22-28.

⁷ See, e.g., *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on the Prosecutor’s Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007 (AC), 5 March 2007, para. 15 (allowing appellant to raise notice arguments for the first time on appeal given the importance of the right).

⁸ *Mikaëli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement (AC), 21 May 2007, para. 76 (“*Muhimana* Appeal Judgement”); *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, para. 49 (“*Gacumbitsi* Appeal Judgement”).

⁹ *Muhimana* Appeal Judgement, para. 76, quoting *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Judgement (AC), 23 October 2001, para. 89 (“*Kupreškić et al.* Appeal Judgement”).

¹⁰ *The Prosecutor v. André Ntagerura et al.*, Case No. ICTR-99-46-A, Judgement (AC), 7 July 2006, para. 25 (“*Ntagerura et al.* Appeal Judgement”).

¹¹ See *Ntagerura et al.* Appeal Judgement, paras. 26, 152.

of the crimes”.¹²

Superior Responsibility

7. Paragraphs 24-27 of the Indictment charge Setako with superior responsibility under Article 6 (3) of the Statute. Paragraph 25 identifies the “subordinates” over whom Setako allegedly exercised “effective control” as “Soldiers of the FAR, local Hutu civilian population and members of the militiamen”. The Defence complains that this is too vague. In addition, it highlights the confusion surrounding whether Setako is alleged to be a superior over “communal police” given the group’s omission from this list of subordinates and its identification as perpetrators elsewhere in the Indictment. Moreover, the Defence argues that the Prosecution failed to identify with any particularity the nature of Setako’s role in military training or arming his alleged subordinates, which the Indictment asserts as a basis of his *de facto* control over them. In this same vein, the Defence contends that the Indictment’s description of Setako as an “unofficial Liaison Officer” between the Ministry of Defence and the *Interahamwe* of Kigali-ville prefecture is vague.¹³

8. In the Chamber’s view, the Indictment adequately identifies Setako’s alleged subordinates. In most cases, they are specified by broad category, such as soldiers, *Interahamwe* and *Amahindure* militiamen as well as Hutu members of the local population. These assailants are then further identified with geographic and temporal details. In the context of this case and given the nature of the attacks, the Chamber is not satisfied that the Prosecution could have provided a more specific identification. However, to the extent that it is in a position to do so, the Prosecution should provide additional identifying information. Notwithstanding, at this stage, the Defence has not demonstrated that the identification of Setako’s alleged subordinates in paragraph 25, when read in conjunction with the Indictment as a whole, is impermissibly vague.¹⁴

9. The Chamber agrees, however, that there is some ambiguity throughout the Indictment as to whether the Prosecution seeks to hold Setako responsible for the acts of “communal police” as a superior. Paragraph 25 of the Indictment, which lists his alleged subordinates, omits reference to this group of assailants. Nonetheless, other paragraphs in the Indictment refer to “communal police” in the context of the language of superior responsibility, suggesting that they are equally Setako’s subordinates.¹⁵ This is significant because paragraph 25, which falls under the heading of “Individual criminal responsibility of the Accused, as a superior, under Article 6 (3) of the Statute”, is not vague and appears to be a definitive enumeration of the categories of his subordinates. The Prosecution therefore must eliminate this ambiguity and clarify whether it seeks to

¹² *Ntagerura et al.* Appeal Judgement, para. 23, citing *Kupreškić et al.* Appeal Judgement, para. 89 (internal citations omitted). See also *Muhimana* Appeal Judgement, para. 79; *Gacumbitsi* Appeal Judgement, para. 50.

¹³ Motion, paras. 30-37.

¹⁴ See *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement (AC), 27 November 2008, paras. 71, 72, 75, affirming *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement (TC), 13 December 2005, paras. 392-393 (considering the specificity of the identity of members of a joint criminal enterprise).

¹⁵ For example, this is evident in paragraphs 6, 7, 34, 48, and 56 of the Amended Indictment.

hold Setako responsible under Article 6 (3) of the Statute for the acts of communal police.

10. Paragraph 7 of the Indictment indicates that an additional basis of Setako's *de facto* authority over his alleged subordinates involved his role providing them with weapons and military training. In the Chamber's view, the general allegation in this paragraph is not vague to the extent that the Prosecution is using it simply as an additional factor to demonstrate Setako's authority and not as a basis of conviction. In any event, the Chamber notes that paragraphs 36 to 38 refer to specific instances where Setako was involved in providing weapons and training.

11. Finally, the Chamber does not consider that the description of Setako as the "unofficial Liason Officer" between the Ministry of Defence and the *Interahamwe* in Kigali-ville prefecture is vague simply because it does not identify the specific individuals with whom the Accused allegedly interacted and the scope of the position. The organisations are reasonably identified, and the function of a liason officer is self-explanatory.

Locations, Dates and Persons

12. According to the Defence, paragraphs 42, 43 and 53 of the Indictment do not sufficiently identify victims, perpetrators or locations of the crimes.¹⁶ Paragraph 42 alleges that Setako brought two Tutsi girls to a roadblock where he ordered their killing. It mentions the month of the event, the roadblock's name and neighbourhood, the killer's first name, the designation of the pit where the bodies were buried, and the first name of the owner of the plot where the pit was located. The Chamber considers that this provides sufficient information in the context of this case concerning these alleged crimes. Paragraph 53 alleges that Setako shot dead a Tutsi woman called Rachel, referring to the day and exact location of the killing. In view of the totality of the information contained in paragraphs 42 and 53, the identification of the victims and perpetrators by first names provides sufficient notice.

13. Paragraph 43 refers to a massacre in May of about 30 Tutsi refugees by *Interahamwe* of Rugenge sector. It mentions the month, the large number of victims, the role of Setako and Major Bivamvagara as well as the identity of the killers. However, the allegation is generally formulated and does not include the exact location of the killings (for instance whether they occurred in Rugenge sector). The Prosecution must clearly identify the location of the crime or remove the allegation.

14. The Defence submits that paragraphs 29, 30, 41 and 62 of the Indictment fail to mention the specific locations of roadblocks.¹⁷ The Chamber observes that paragraphs 29 and 30 refer to roadblocks in Mukingo commune, which covers a considerable area, without further specification. Paragraph 41 states that certain killings were committed in Mukamira Camp, Ruhengeri prefecture, but the location of the roadblocks where the

¹⁶ Motion, paras. 40-43, 46. Paragraphs 42, 43 and 53 of the Amended Indictment correspond to paras. 63, 64, 81 in the previous proposed amended indictment. See *Setako*, Decision on Amendment of Indictment, para. 13. The present motion contains more precise and to some extent new arguments by the Defence concerning these three paragraphs.

¹⁷ Motion, paras. 38 and 51, Reply para. 21.

victims were captured is not stipulated. Paragraph 62 mentions roadblocks built pursuant to Setako's orders, apparently in Ruhengeri prefecture, when RPF advanced to Rushashi, but is silent as to their exact location. The Prosecution has not suggested that the sheer scale of the crimes prevent it from providing further specificity in this regard. Accordingly, the Prosecution should provide further information regarding the location of the roadblocks mentioned in paragraphs 29, 30, 41 and 62 to the extent possible.

15. The Defence submits that paragraph 38 of the Indictment is too vague because it refers to Setako's role in promoting killings throughout Ruhengeri prefecture without providing the specific locations of the crimes.¹⁸ This paragraph describes Setako's alleged orders, given to a specific group of people on or about a particular day, to kill Tutsis throughout Ruhengeri prefecture, including Butaro commune. It also alleges that Setako performed other acts to promote such killings throughout the prefecture, including expanding, training and arming the *Amahindure* militia. In the Chamber's view, however, paragraph 39 of the Indictment provides further specificity by indicating that the result of Setako's acts included an attack on a specific location, namely the Ruhengeri Court of Appeal.

16. Under Count 3 (murder as a crime against humanity), paragraph 47 refers to killings committed between January and July 1994 in Ruhengeri and Kigali-Ville prefectures without providing dates and locations of crimes.¹⁹ In the Chamber's view, this allegation, while general in nature, operates as an introduction to and must be read in context with the more specific allegations that follow in paragraphs 48 to 53. However, these paragraphs give further particulars only in relation to Ruhengeri. Therefore, the Prosecution should remove the reference to Kigali-Ville prefecture in paragraph 47. With respect to crimes in Ruhengeri prefecture, the Chamber finds paragraphs 47 to 53 sufficiently specific in terms of locations and dates but the reference to "a known adult" in paragraph 51 should be substituted by the perpetrator's name or other identifying details, unless it has been obscured for witness protection reasons.²⁰

17. The Defence also argues that paragraphs 54 and 55, which refer to crimes committed between January and July 1994 in Ruhengeri and Kigali-Ville, lack detail about dates and locations.²¹ Paragraphs 54 to 58 relate to Count 4 (extermination as a crime against humanity). When read together, these paragraphs include sufficient details regarding dates and locations of crimes in Ruhengeri. With respect to Kigali-Ville, paragraph 55 is sufficiently specific about the place of the alleged crimes whereas the time frame (between April and July) is vague. Accordingly, the Prosecution should add further information about the dates (or period) of the crimes described in that paragraph.²²

¹⁸ Motion, para. 39.

¹⁹ Motion, paras. 44-45.

²⁰ If the identity of this assailant has been obscured for witness protection concerns, then the Prosecution should specifically highlight this individual to the Defence in making its unredacted pre-trial disclosures to ensure clear and timely notice, including making specific reference to him in its Pre-trial Brief. *See The Prosecutor v. Jean Mpambara*, Case No. ICTR-2001-65-I, Decision on the Defence Preliminary Motion Challenging the Amended Indictment (TC), 30 May 2005, paras. 8-10.

²¹ Motion, paras. 47-48.

²² The Defence criticism of paragraph 54 as vague when describing certain attacks as "massive", "systematic" and "coordinated" and referring to certain targeted groups as "Tutsi", "deemed to be

18. Paragraphs 59 to 63 relate to Count 5 (violence as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II). The Chamber does not find these provisions too vague.²³ It appears that the Prosecution is attempting to cumulatively charge the specific events alleged under the crimes of genocide and crimes against humanity also as violations of common Article 3 and Additional Protocol II. Therefore, when read together with other paragraphs in the Indictment, they provide adequate information regarding crimes in Ruhengeri and Kigali-Ville prefectures.²⁴ The Prosecution, however, should clearly cross-reference to relevant preceding paragraphs.

19. The Defence submits that paragraphs 64 to 66 of the Indictment are vague with relation to dates, locations and persons.²⁵ These paragraphs relate to Count 6 (pillage as a violation of Article 3 common to the Geneva Conventions and Additional Protocol II). While these paragraphs do not provide details about the events constituting pillage, it is noteworthy that paragraphs 33 and 37, which appear under Counts 1 and 2, describe lootings with specification of perpetrators, locations and dates. It appears that the Prosecution is cumulatively charging the specific acts mentioned under Counts 1 and 2 as acts of pillage. The Prosecution, therefore, should clearly cross-reference to these preceding paragraphs or provide further details indicating dates (or period), locations, perpetrators and any other information it has regarding the allegations in paragraphs 64 to 66.

FOR THE FOREGOING REASONS, THE CHAMBER

GRANTS the motion in part, and

ORDERS the Prosecution to supplement the Amended Indictment with further particulars, regarding the following issues:

1. whether “communal policemen” are among the Accused’s subordinates, in particular, in paragraphs 6, 7, and 25;
2. locations of killings alleged in paragraph 43;
3. locations of roadblocks mentioned in paragraphs 29, 30, 41 and 62;
4. remove the reference to Kigali-Ville prefecture in paragraph 47;
5. identity of the perpetrator referred to as “a known adult” in paragraph 51;
6. dates or period of crimes in Kigali-Ville prefecture described in paragraph 55;
7. dates, locations, perpetrators, victims and other details elaborating the allegations as stated above in paragraphs 18 and 19 of this decision.

sympathetic to the Tutsi” and deemed “to support the RPF or to be politically opposed to the MRND” is not convincing.

²³ Motion, paras. 49-50.

²⁴ See also above about paragraph 62 of the Amended Indictment (location of roadblocks).

²⁵ Motion, para. 52.

ORDERS the Prosecution to file the Indictment as amended in accordance with this decision in French and English within five days of the filing of this decision.

Arusha, 3 March 2008

Erik Møse
Presiding Judge

Jai Ram Reddy
Judge

Sergei Alekseevich Egorov
Judge

[Seal of the Tribunal]