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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

OR: ENG

TRIAL CHAMBER II

Before: Judge William H. Sekule, Presiding
Judge Arlette Ramaroson
Judge Solomy Balungi Bossa

Registrar: Mr. Adama Dieng

Date: 8 April 2009

The PROSECUTOR

v.

Augustin NGIRABATWARE

Case No. ICTR-99-54-T

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**DECISION ON DEFENCE MOTION TO DISMISS BASED UPON DEFECTS IN
AMENDED INDICTMENT**

Office of the Prosecutor

Mr. Wallace Kapaya
Mr. Patrick Gabaake
Mr. Brian Wallace
Mr. Iskandar Ismail

Defence Counsel

Mr. David C. Thomas

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

SITTING as Trial Chamber II composed of Judges William H. Sekule, Presiding, Arlette Ramaroson and Solomy Balungi Bossa (the "Trial Chamber");

BEING SEIZED of the "Defence Motion to Dismiss Based Upon Defects in Amended Indictment", filed on 11 March 2009 (the "Motion");

CONSIDERING:

a) The "Prosecutor's Response to the Defence Motion to Dismiss Based Upon Defects in Amended Indictment", filed on 16 March 2009 (the "Response"); and

b) The "Defence Reply to the Prosecutor's Response to Defence Motion to Dismiss, Pursuant to Rule 72 (A)(ii), Based Upon Defects in Amended Indictment", filed on 23 March 2009 (the "Reply");

CONSIDERING the Statute of the Tribunal (the "Statute") and the Rules of Procedure and Evidence (the "Rules");

NOW DECIDES the Motion pursuant to Rule 72 (A) of the Rules, on the basis of the written briefs filed by the Parties.

INTRODUCTION

1. On 29 January 2009, the Trial Chamber granted the Prosecution's motion to amend the indictment against Ngirabatware in part and ordered the filing of an amended indictment.¹ The Prosecution filed an amended indictment on 5 February 2009.² At his further appearance on 9 February 2009, the Accused pleaded not guilty to all charges contained in the Amended Indictment.

SUBMISSIONS OF THE PARTIES

Defence Motion

2. The Defence submits that the Amended Indictment contains a number of defects warranting a preliminary motion challenging the Amended Indictment under Rule 72 (A)(ii) of the Rules.³

3. The Defence first alleges that some of the new charges brought against the Accused in the Amended Indictment are not sufficiently supported by the evidence disclosed by the Prosecution and therefore do not constitute a *prima facie* case.⁴

¹ Decision on Prosecution Motion for Leave to Amend the Indictment, 29 January 2009 ("Decision of 29 January 2009"), p. 11.

² Amended Indictment, 5 February 2009 ("Amended Indictment").

³ Motion, para. 7.

4. Secondly, the Defence alleges defects in the pleading of Count 4 of the Amended Indictment (Direct and Public Incitement to Commit Genocide), as the allegations contained in some paragraphs of the Amended Indictment do not fulfill the criteria for determining whether a speech was made in a 'public' place or gathering.⁵

5. The third alleged defect in the Amended Indictment pertains to the pleading of superior responsibility under Article 6 (3) of the Statute.⁶ The Defence submits that Paragraph 38 of the Amended Indictment is vague because it does not inform the Accused how he is alleged to have exercised effective control over subordinates, had knowledge that they were going to divert funds, and failed to prevent such acts or to punish those who performed them.⁷

6. Further, the Defence submits that defects arise from the pleading of Joint Criminal Enterprise ("JCE") in Count 6 of the Amended Indictment.⁸ The Defence claims that the Prosecution failed to provide sufficient information in respect of (i.) the identity of JCE members; (ii.) the time period over which the JCE is alleged to have existed; (iii.) the nature of the participation of the Accused in the JCE; and (iv.) the Accused's *mens rea* with regard to the JCE, including his knowledge that rape was a natural and foreseeable consequence of the execution of the JCE.⁹

7. Moreover, the Defence argues that a number of paragraphs relating to the personal involvement of the Accused lack specificity with regard to dates and locations.¹⁰ The Defence submits that the Amended Indictment fails to properly identify collaborators and/or victims and that it uses terminology that is too vague.¹¹

8. The Defence therefore moves for a dismissal of Paragraphs 12-18, 21-27, 35-47, 49-55 and 59-63 of the Amended Indictment.¹²

Prosecution's Response

9. In its Response, the Prosecution requests the Trial Chamber to dismiss the Motion in its entirety.¹³

10. As regards the lack of a *prima facie* case, the Prosecution submits that a *prima facie* case has been shown with regard to some of the paragraphs mentioned by the Defence

⁴ Motion, p. 2-3, referring to Paragraphs 12, 15, 34, 38 and 59 of the Amended Indictment.

⁵ Motion, p. 3, referring to Paragraphs 39, 41, 42, 44, 45, 49 of the Amended Indictment.

⁶ Motion, p. 3-4.

⁷ Motion, p. 4.

⁸ Motion, p. 4-7.

⁹ Motion, p. 6-7.

¹⁰ Motion, pp. 7-8, referring to Paragraphs 12-14, 15, 16, 17, 18, 21-23, 24-26, 35-36, 37, 39, 40, 41, 42-43, 44, 45-47, 50-52, 53, 54, 59, 60, 61-63 of the Amended Indictment.

¹¹ Motion, pp. 8-9, referring to Paragraphs 15, 17, 25-26, 37, 42-43, 45, 47, 51-55, 60, 61-63 of the Amended Indictment.

¹² Motion, p. 9.

¹³ Response, para. 14.

and refers to the corresponding witness statements disclosed to the Defence under Rule 66 (A)(ii) of the Rules.¹⁴

11. Concerning the second argument of the Defence, the Prosecution refers to a number of witness statements that support the allegations that the places mentioned in the Amended Indictment are 'public' places within the meaning of 'Direct and Public Incitement to Commit Genocide.'¹⁵

12. As to the alleged imprecision in the pleading of superior responsibility, the Prosecution argues that the allegations are clearly set out and are furthermore supported by witness statements.¹⁶

13. The Prosecution further submits that it has set out the criteria for criminal responsibility within the terms of JCE and has provided the Defence with enough information as to the alleged participants, duration and common criminal purpose of the JCE, as well as the alleged nature of the participation of the Accused.¹⁷

14. The Prosecution asserts that the dates and locations are sufficiently set out in the Amended Indictment for the Accused to understand the charges against him.¹⁸ It further argues that the attackers are identified by names where they are known to the victims.¹⁹ Finally, the Prosecution submits that the terminology of the Amended Indictment is not vague and that terms have to be read in the context in which they are made.²⁰

Defence's Reply

15. First, the Defence submits that the Prosecution has not adequately dealt with the Defence's first argument.²¹ The Defence asserts that the Prosecution does not mention Paragraph 38 in its Response at all. It further submits that the witnesses, whom the Prosecution refers to in its Response in support of the allegations in Paragraph 15, do not support the Prosecution's contention.²²

16. As to its second argument,²³ the Defence submits that the Prosecution's Response changes the description of the locations from those contained in the Amended Indictment.²⁴ The Defence further claims that, contrary to the Prosecution's assertions, roadblocks cannot be accessed by the public at large.²⁵ It also contends that the

¹⁴ Response, para. 7, referring to Paragraphs 12, 15 and 59 of the Amended Indictment.

¹⁵ Response, para. 8, referring to Paragraphs 39, 41, 42, 44, 45 of the Amended Indictment.

¹⁶ Response, para. 9, referring to Paragraph 38 of the Amended Indictment.

¹⁷ Response, para. 11, referring to Paragraphs 61-63.

¹⁸ Response, para. 12, referring to Paragraphs 12-14, 15-18, 21-23, 24-26, 35-36, 39-47, 50-54, 59-63 of the Amended Indictment.

¹⁹ Response, para. 13, referring to Paragraphs 25-26, 37, 42-43, 45, 47, 51-55, 60, 61-63 of the Amended Indictment.

²⁰ Response, para. 13, referring to Paragraphs 15, 17 of the Amended Indictment.

²¹ See *supra* para. 5.

²² Reply, para. 6.

²³ See *supra* para. 6.

²⁴ Reply, para. 7(b).

²⁵ Reply, para. 7(c).

Prosecution cannot refer to the testimony of witnesses at trial to prove that a location is public, since the public nature of the location is an element of the crime which needs to be set forth in the indictment and cannot await the presentation of evidence at trial. The Defence reiterates that the witness statements referred to in the Prosecution's Response in support of the assertion that the location was public in nature do not actually support this assertion.²⁶

17. Further, the Defence submits that the Prosecution's Response ignored the Defence's third argument,²⁷ and that by not referring to any factual basis set forth in the Amended Indictment or its supporting materials it failed to support its allegations.²⁸ The Defence submits that Paragraph 38 of the Amended Indictment remains defective.²⁹

18. Regarding its fourth argument,³⁰ the Defence submits that the Prosecution fails to set out the alleged nature and participation of the Accused in the JCE, how the JCE contributed to the common purpose, and how rapes were a foreseeable consequence to the Accused.³¹ In addition, the Defence re-asserts that the Prosecution does not present any facts demonstrating the foreseeability of rapes to the Accused, and that it fails to identify any of the *Interahamwe* members who allegedly were also members of the JCE.³²

19. As far as its last argument is concerned,³³ the Defence argues that the Prosecution has not addressed it properly, and that the lack of specificity concerning dates and locations, as well as the identity of alleged collaborators and/or victims, remains.³⁴

DELIBERATIONS

Applicable Law

20. Article 17 (4) of the Statute and Rule 47 (C) of the Rules enjoin the Prosecution to set out a concise statement of the facts of the case and of the crimes pleaded in the indictment. This obligation must be read in light of Articles 20 (2) and 20 (4)(a) and (b) of the Statute to ensure the minimum guarantees of the rights of the accused. The Prosecution is therefore required to state the material facts underpinning the charges in the indictment in a prompt and detailed manner, with sufficient particularity to clearly inform an accused of the charges against him so that he may prepare his defence, but not the evidence by which such facts are to be proven. If the Prosecution charges personal, physical commission of criminal acts, the indictment should set forth the identity of the

²⁶ Reply, para. 7(d).

²⁷ See *supra* para. 7.

²⁸ Reply, paras. 8(a)-(b).

²⁹ Reply, paras. 8(c).

³⁰ See *supra* para. 8.

³¹ Reply, para. 9(b).

³² Reply, paras. 9(c)-(d).

³³ See *supra* para. 9.

³⁴ Reply, paras. 10-11.

victims, the time and place of the events and the means by which the acts were committed.³⁵

21. 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. 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. However, the Prosecution is expected to know its case before it goes to trial, and it is not acceptable for material aspects of the main allegations in the indictment to be omitted with the aim of molding the case against the accused in the course of the trial depending on how evidence unfolds. An indictment that does not set out the material facts with enough detail in this respect is defective.³⁶ Such defect may be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges.³⁷ Such information could be included in the material provided by the Prosecution in support of the indictment. However, there are limits to the principle that a defective indictment may be cured by other sources. In this regard, the Appeals Chamber emphasised that "new material facts" should not lead to a "radical transformation" of the Prosecution's case.³⁸

22. The materiality of such facts as the identity of the victim, the place and date of the events for which the accused is alleged to be responsible, and the description of the events themselves, necessarily depends upon the alleged proximity of the accused to those events, that is, upon the type of responsibility alleged by the Prosecution. The precise details to be pleaded as material facts are the acts of the accused himself, not the acts of those persons for whose acts he is alleged to be responsible.³⁹

23. The Chamber will now address the arguments raised in the Motion.

³⁵ *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88; *The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004, para. 25; *Laurent Semanza v. The Prosecutor*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, para. 85; *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-R72, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 9; *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-R50, Decision on Defence Motion on Defects in the Form of the Indictment, 27 September 2006, para. 3.

³⁶ *George Anderson Nderubumwe Rutaganda v. The Prosecutor*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, para. 304; *The Prosecutor v. Siméon Nchamihigo*, Case No. ICTR-2001-63-R50, Decision on Defence Motion no Defects in the Form of the Indictment, 27 September 2006, para. 3.

³⁷ *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, para. 100; *Mikaëli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, para. 76, 195, 217; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006, para. 20.

³⁸ *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 September 2006, para. 30.

³⁹ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 210; *Prosecutor v. Zdravko Tolimir*, Case No. IT-05-88/2-PT, Decision on Preliminary Motions on the Indictment Pursuant to Rule 72 of the Rules, 14 December 2007, para. 45.

• Is a Prima Facie Case Established for Facts Pleaded in Paragraphs 12, 15, 34, 38 and 59 of the Amended Indictment?

24. The Chamber observes that the alleged lack of *prima facie* case in support of Paragraphs 12, 15, 34, 38 and 59 was adjudicated by the Chamber in its Decision of 29 January 2009. In this Decision, the Chamber accepted these paragraphs in the Amended Indictment on the ground that they met the requirements of Rules 47 (E) and 50 (A)(ii).⁴⁰ Therefore, the Defence request on this point is denied.

• Are the Facts Pleaded in Paragraphs 39, 41, 42, 44, 45 and 49 Sufficient to Constitute Direct and Public Incitement to Commit Genocide?

25. The Chamber recalls that the *actus reus* for the crime of direct and public incitement to commit genocide is established when an accused directly and publicly provoked the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, through the public display of placards or posters, or through any other means of audiovisual communication.⁴¹ To be public, the incitement must "call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media".⁴²

26. Having reviewed the supporting material, the Trial Chamber considers that the locations in which the events alleged in Paragraphs 39, 41 and 49 of the Amended Indictment took place, appear to be public places within the meaning of 'Direct and public incitement to commit genocide.' Paragraph 39 refers to an alleged speech held at an MRND meeting at Umuganda stadium. Considering this location and the presence in person of Witness ANAJ, who will testify about it, the Chamber considers that this meeting may have been open to the public. Paragraphs 41 and 49 refer to an alleged speech held at an alleged roadblock on the Cyanika-Gisa tarred road. The Chamber considers that the roadblock may have been set up on a public road, thus making it accessible to anyone, and therefore considers that this location could amount to a public place.

27. Paragraphs 42, 44 and 45 of the Amended Indictment refer to meetings that allegedly took place at the area of residence of the Accused's parents. Having reviewed Witness ANAG's statements as being the sole witness in support of the facts related in these three paragraphs, the Chamber does not consider that there has been an apparent defect in the pleading of direct and public incitement to commit genocide. The Trial

⁴⁰ Decision of 29 January 2009, para. 29.

⁴¹ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, para. 559; see also *The Prosecutor v. Eliézer Niyitekega* Case No. ICTR-96-14-T, Judgement and Sentence, 16 May 2003, para. 431; *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, Judgement and Sentence, paras. 850-855; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006, para. 501.

⁴² *The Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 22; *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, paras. 557-558.

Chamber observes that the actual nature of the location where the speech is alleged to have taken place will be assessed and determined at a later stage. The Defence argument is thus dismissed.

• Is the Accused's Superior Responsibility Sufficiently Pleaded Pursuant to Article 6 (3) of the Statute?

28. The Chamber recalls that to hold a superior responsible for the acts of his subordinates, three elements must be established: (i.) the existence of a superior-subordinate relationship between the superior and the perpetrator of the crime; (ii.) the superior knew or had reason to know that the criminal act was about to be or had been committed by his subordinates; and (iii.) the superior's obligation to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.⁴³

29. The existence of a superior-subordinate relationship depends on the superior's "effective control" over the person(s) committing the offences.⁴⁴ While a superior does not necessarily need to know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6 (3) of the Statute,⁴⁵ effective control means that said superior must have the "material ability to prevent or punish the commission of the offences".⁴⁶ This requirement is not satisfied by a showing of general influence on the part of the accused.⁴⁷

30. In the instant case, the Defence argues that Paragraph 38 of the Amended Indictment is vague as the Accused is not informed about how he is alleged to have exercised effective control over "employees in the Ministry of Planning", had knowledge that those persons were going to divert funds, and failed to prevent such acts or to punish those who did. The Chamber observes that in his alleged position as "Minister of Planning" during the events, the Accused may have had effective control over the remaining staff of his ministry. The Chamber thus considers that the Prosecution appropriately pleaded the material facts underpinning the charges in Paragraph 38 of the Amended Indictment, and therefore rejects the Defence argument on the alleged defect.

31. The Chamber notes the Defence submissions that Paragraphs 21 and 27 of the Amended Indictment refer to "*de facto* control" of the Accused over certain individuals

⁴³ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 457, referring to *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement (AC), 24 May 2000, para. 72; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 143.

⁴⁴ *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 197; *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, Judgement and Sentence, 12 September 2006, para. 489.

⁴⁵ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-A, Judgement, 9 May 2007, para. 287; *Tharcisse Muvunyi v. The Prosecutor*, ICTR-2000-55A-A, Judgement, 29 August 2008, para. 55.

⁴⁶ *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 256; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, para. 457; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement, 3 July 2008, para. 20.

⁴⁷ *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 266; *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgement, 15 May 2003, paras. 402, 415; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-T, Judgement and Sentence, 18 December 2008, para. 2012.

whereas the Accused is not charged under Article 6 (3) of the Statute for Count 3.⁴⁸ The Chamber observes that the Accused's responsibility is alleged under both Articles 6 (1) and 6 (3) for Counts 2 and 3 of the Amended Indictment. Indeed, paragraphs 15 to 37 of the Amended Indictment describe the facts in support of the Accused's responsibility under Article 6(1) while paragraph 38 describes his responsibility under Article 6(3). The Chamber however does not find how the use of "*de facto* control" for facts underpinning charges under Article 6 (1) may be prejudicial to the Accused while preparing his defence. Consequently, the Chamber denies the Defence request on this issue.

• Is the Extended Form of Joint Criminal Enterprise Sufficiently Pleaded in Relation to Count 6?

32. According to the jurisprudence, the Prosecution must plead the purpose and period of the enterprise, the identity of the participants⁴⁹ and the nature of the participation of the accused in that enterprise.⁵⁰

33. The Chamber notes the Defence submissions as to the alleged defects with regard to Paragraphs 61, 62 and 63 of the Amended Indictment in support of Count 6.

34. The Chamber recalls that this issue was already adjudicated in its Decision of 29 January 2009, and that the Chamber is satisfied that the Prosecution has met the requirements to specify the relevant aspects of JCE for Count 6 in Paragraphs 61, 62 and 63 of the Amended Indictment.⁵¹ The Chamber observes that Count 6 clearly indicates that the Accused is charged with the "extended" form of JCE, along with the required criteria.

• Alleged Lack of Precision as to the Dates and Places of Commission of the Crimes, the Identity of Collaborators and/or Victims, Use of Vague Terminology

35. As regards the determination of dates and places of the commission of the crimes and the identity of victims, the Chamber recalls the *Kupreškić* Decision⁵² and considers

⁴⁸ Motion, p. 4.

⁴⁹ The formulation "such actions being taken either directly or through subordinates" is specific enough, see *The Prosecutor v. Brdanin*, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007, paras. 366, 367.

⁵⁰ *The Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal against Trial Chamber III Decision of 8 October 2003 denying Leave to File an Amended Indictment, 19 December 2003, paras. 26, 27.

⁵¹ Decision of 29 January 2009, paras. 32-34.

⁵² *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 88-89 which read: "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."

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."⁵³ With regard to the identity of the accused's collaborators in the crimes charged, the Chamber agrees 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."⁵⁴

36. In light of the foregoing jurisprudence, the Chamber finds that the use of such expressions as "*Interahamwe* militia" and "attackers"⁵⁵ in the Amended Indictment is sufficient to describe the persons who acted concomitantly with him during the period referred to in the Indictment. However, with regard to Paragraphs 37 and 60 of the Amended Indictment, the Chamber notes that Witness ANAI's statements provide specific information regarding the identity of some of the perpetrators. The Chamber considers that the Prosecution should therefore be in a position to identify by name or pseudonym those who are alleged to have participated in the crimes charged.⁵⁶ Accordingly, the Defence request on this point is partially granted.

37. With regard to the allegation that Paragraphs 37 and 60 of the Amended Indictment should identify some of the victims, the Chamber notes that these paragraphs include reference to the identity of two of the victims. However, the Chamber considers that the general reference to information "referred to herein above" appears vague. The Chamber directs the Prosecution to specify the paragraphs of the Amended Indictment the Prosecution is referring to when using this formulation.

38. The Defence cites thirty-four paragraphs of the Amended Indictment which allegedly fail to provide a specific date for alleged events.⁵⁷ The Trial Chamber has considered these paragraphs in their context and considers that they are sufficiently detailed to meet the requirements of Article 18 (4) of the Statute.

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."

⁵³ *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 17; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 61. *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001, para. 89.

⁵⁴ *Prosecutor v. Milorad Krnojelac*, Case No. IT-95-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 46; *Le Procureur v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Décision sur la Requête en Exception Préjudicielle pour Vices de Forme de l'Acte d'Accusation, 5 September 2006, para. 33.

⁵⁵ See Paragraphs 25-26, 42-43, 45, 47, 51-55, 61-63 of the Amended Indictment.

⁵⁶ Witness ANAI, statements of 3-8 June, 5-6 October 2004, and 9-10 September 2002.

⁵⁷ See Paragraphs 12-18, 21-26, 35-37, 39-47, 50-54, 59-63 of the Amended Indictment.

39. Additionally, the Defence requested additional information about locations provided in five paragraphs of the Amended Indictment. The Chamber considers that the request for additional information in relation to four of these paragraphs is baseless as the location is easily identifiable from the wording and context of each paragraph as a whole.⁵⁸ Also, with regard to Paragraph 15, the Trial Chamber considers that the Prosecution has adequately placed the reference to the location into the general context of this paragraph.

40. Lastly, the Chamber has considered the Defence's allegation that Paragraphs 15 and 17 of the Amended Indictment are too imprecise. The Chamber considers that these paragraphs must also be read in the context of the rest of the Amended Indictment, and concludes that they are not 'too imprecise', as alleged by the Defence.

41. Therefore, the Chamber partially grants the Defence Motion and orders the Prosecution to amend Paragraphs 37 and 60 of the Amended Indictment and to provide more details as to the identity of the alleged perpetrators.

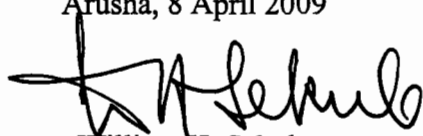
FOR THE ABOVE REASONS, THE TRIBUNAL

GRANTS partially the Motion by ordering the Prosecution to amend Paragraphs 37 and 60 of the Amended Indictment, by providing more details as to the identity of the alleged perpetrators; and by specifying the paragraphs of the Amended Indictment the Prosecution is referring to when using the formulation "referred to herein above" in these paragraphs.

DENIES the Motion in all other respects; and

ORDERS the Prosecution to file a revised Amended Indictment in English and French by 15 April 2009.

Arusha, 8 April 2009



William H. Sekule

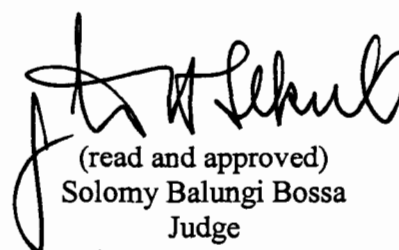
Presiding Judge



Arlette Ramarason



[Seal of the Tribunal]



(read and approved)
Solomy Balungi Bossa
Judge
(absent at the time of
signature)

⁵⁸ See Paragraphs 37, 61-63 of the Amended Indictment.