



UNITED NATIONS
NATIONS UNIES

ICTR-05-88-PT
28-4-2009
1150 - 1138
International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

1150
2009

OR: ENG

TRIAL CHAMBER III

Before Judges: Khalida Rachid Khan, presiding
Lee Gacuiga Muthoga
Aydin Sefa Akay

Registrar: Mr. Adama Dieng

Date: 28 April 2009

JUDICIAL NOTICE
RECEIVED

2009 APR 28 P 5:05
[Signature]

THE PROSECUTOR

v.

DOMINIQUE NTAWUKULILYAYO

Case No. ICTR-05-82-PT

**DECISION ON DEFENCE PRELIMINARY MOTION ALLEGING DEFECTS IN
THE INDICTMENT**

*Articles 19 and 20 of the Statute and
Rules 72 (A), (F) and 47 of the Rules of Procedure and Evidence*

Office of the Prosecutor:

Charles Adeogun-Phillips
Ibukunolu Alao Babajide
Thembile Segoete

Counsel for the Defence:

Maroufa Diabira
Dorothee Le Fraper du Hellen

[Signature]

INTRODUCTION

1. On 13 June 2005, the amended Indictment (“Indictment”) was confirmed against Dominique Ntawukulilyayo (“the Accused”).¹ The Accused is charged with three counts: genocide; or in the alternative complicity in genocide; and direct and public incitement to commit genocide.²
2. On 20 March 2009, the Defence filed a preliminary motion alleging defects in the Indictment pursuant to Rule 72 (A) of the Rules of Procedure and Evidence (“Rules”).³ The Defence claims that the Indictment is not sufficiently precise to allow the Accused to understand the nature and extent of the charges against him.
3. On 27 March 2009, the Prosecution filed its Response to the Defence Motion.⁴ The Prosecution submits that the Defence has filed its Motion out of time and that, in any event, the Indictment is pleaded with sufficient particularity to give the Accused objective notice of the crimes charged. On 6 April 2009, the Defence filed its Reply to the Prosecution Response.⁵

DISCUSSION

i) Preliminary Matters

a. Has the Defence Motion been filed outside the prescribed time limit?

4. Rule 72 (A) of the Rules permits the Defence to file a preliminary motion alleging defects in the form of the indictment within thirty days of the disclosure of the supporting materials which accompanied the indictment.⁶ Rule 72 (F) provides that failure to comply

¹ *The Prosecutor v. Dominique Ntawukulilyayo.*, Case No. ICTR-05-82-PT, Confirmation of Indictment and Other Related Orders, 13 June 2005.

² The Indictment charges the Accused with Genocide pursuant to Articles 2 (3) (a), 6 (1) and 6 (3) of the Statute; or in the alternative, Complicity in Genocide pursuant to Articles 2 (3) (e), 6 (1) and 6 (3) of the Statute; and Direct and Public Incitement to Commit Genocide, pursuant to Articles 2 (3) (c) and 6 (1) of the Statute.

³ *Ntawukulilyayo.*, Exceptions préjudicielles de la Défense fondées sur les vices de forme de l’acte d’accusation, filed 20 March 2009, stamped by CMS at 5.43pm that day and circulated/served on 23 March 2009, thereby the Chamber considers that it was served on 23 March 2009 (“Motion”).

⁴ *Ntawukulilyayo.*, Prosecutor’s Reply to the Defence Motion Titled Exceptions Préjudicielles de la Defense Fondees sur le Vices de Forme de L’Acte de L’Accusation, 27 March 2009 (“Prosecution Response”).

⁵ *Ntawukulilyayo.*, Réplique de la Défense à la réponse du Procureur à la requête “Exceptions préjudicielles de la Défense fondées sur les vices de forme de l’acte d’accusation”, 6 April 2009 (“Defence Reply”).

⁶ Rule 72 (A) provides: “Preliminary motions, being motions which: (i) challenge jurisdiction; (ii) allege defects in the form of the Indictment; (iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); (iv) or raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C) shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 66 (A) (i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. The Trial Chamber may rule on such motions based solely on the briefs of the parties, unless it is decided to hear the motion in open court.”



1148

with this time limit shall constitute a waiver of this right, although the Trial Chamber may grant relief upon showing good cause.⁷

5. The Prosecution submits that the Defence Motion is out of time and therefore should be dismissed in its entirety.⁸

6. The Chamber recalls its Decision of 27 February 2009 in which it found that the Prosecution was not in breach of its disclosure obligations under Rule 66 (A) (i) on 10 June 2008.⁹ Accordingly, the thirty day time limit for the filing of preliminary motions in this case began to run on 10 June 2008. Since the Defence filed its Motion on 23 March 2009,¹⁰ it clearly failed to comply with the time limit set down by the Rules, constituting a waiver of the Defence's right to file a Preliminary Motion.

7. Notwithstanding this, the Chamber notes that until the issuance of its 27 February 2009 Decision, there was considerable uncertainty concerning whether the Prosecution had in fact fulfilled its obligation under Rule 66 (A) (i), and if so, when. This uncertainty may have been caused, in part, by the Chamber's order of 16 December 2008 that the Prosecution file hard copies of the Rule 66 (A) (i) supporting materials with the Registry and that the Registry transmit these to the Defence within the following two weeks.¹¹ The Chamber considers that the confusion concerning the date on which Rule 66 (A) (i) materials were actually disclosed amounts to "good cause" pursuant to Rule 72 (F). Accordingly, the Chamber grants the Defence relief from the waiver and will consider the Defence Motion despite it having been filed out of time.

b. Should the Defence Motion be heard in open Court?

8. The Defence requests that, in the interests of justice, the Chamber hears this Motion at a public hearing as permitted by Rule 72 (A).¹² However, as the Chamber considers that the written submissions are sufficient for it to decide the matter, that this promotes judicial economy, and that the Defence has failed to advance any reason why it should be heard in open Court, it denies this request.

(ii) Alleged Defects in the Form of the Indictment

9. Article 17 (4) of the Statute and Rule 47 (C) of the Rules require the Prosecution to set out in the indictment a concise statement of the facts of the case and the crime(s) with which the accused is charged.¹³ This obligation must be interpreted in conjunction with the

⁷ Rule 72 (F) provides: "Failure to comply with the time limits prescribed in this Rule shall constitute a waiver of the rights. The Trial Chamber may, however, grant relief from the waiver upon showing good cause."

⁸ Prosecution Response, paras. 3-16.

⁹ *Ntawukulilyayo*, Decision on Defence 'Requete en urgence de la defense concernant les manquements du procurer a ses obligations de communiquer les pieces et ses effets sur le calendrier du proces', 27 February 2009 ("27 February 2009 Decision").

¹⁰ *See supra*, n. 3.

¹¹ This Order was made by the Chamber during the pre-trial conference on 16 December 2008, *see Ntawukulilyayo*, T.16 December 2008, p.10.

¹² Motion, paras. 22-24; Defence Reply, para. 11.

¹³ Article 17 (4) provides: "Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged



Accused's right to a fair and public hearing, pursuant to Article 20 (2) of the Statute, as well as Articles 20 (4) (a) and (b) which provide that in the determination of any charge against him or her the accused is entitled to a fair hearing, 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.¹⁴

10. These requirements have been elaborated upon by the Appeals Chamber which has consistently held that "charges against an accused and the material facts supporting those charges must be pleaded with sufficient precision in an indictment so as to provide notice to the accused".¹⁵ The Prosecution is expected to know its case before proceeding to trial and cannot mould the case against the accused in the course of the trial depending on how the evidence unfolds.¹⁶ An indictment which does not set out the material facts with sufficient detail is defective; however, under certain circumstances the defect may be cured if the Prosecution provides the accused with timely, clear, and consistent information detailing the factual basis underpinning the charge.¹⁷ The Appeals Chamber has held that a Pre-Trial Brief in certain circumstances can provide such information.¹⁸

11. The Defence submits that the form of the Indictment is defective to the extent that it: (i) fails to specify certain dates and places with sufficient precision; (ii) is insufficiently precise regarding the identity of the alleged co-perpetrators and victims of the joint criminal enterprise; (iii) is insufficiently precise in respect of the modes of liability pleaded under

under the Statute." Rule 47 (C) provides: "The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged."

¹⁴ Article 20 (2) states: In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute; Article 20 (4) states: In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her; (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing.

¹⁵ *The Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Judgement, 29 August 2008, ("Muvunyi Judgement (AC)"), para. 18 (citing *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, ("Seromba Judgement (AC)") paras. 27, 100); *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, ("Simba Judgement (AC)") para. 63; *Mikaeli Muhimana v. The Prosecutor*, Case No. ICTR-95-1B-A, Judgement, 21 May 2007, ("Muhimana Judgement (AC)") paras. 76, 167, 195; *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, ("Gacumbitsi Judgement (AC)") para. 49; *Emmanuel Ndingabahizi v. The Prosecutor*, Case No. ICTR-01-71-A, Judgement, 16 January 2007, ("Ndingabahizi Judgement (AC)") para. 16).

¹⁶ *Muvunyi Judgement (AC)*, para. 18 (citing *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe*, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("Ntagerura et al., Judgement (AC)"), para. 27. See also, *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić and Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("Kvočka et al., Judgement (AC)"), para. 30; *Eliézer Niyitegeka v. The Prosecutor*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004 ("Niyitegeka Judgement (AC)"), para. 194; *Prosecutor v. Zoran Kupreskić, Mirjan Kupreskić, Vlatko Kupreskić, Drago Josipović, Vladimir Šantić*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("Kupreskić et al., Judgement (AC)"), para. 92).

¹⁷ *Muvunyi Judgement (AC)*, para. 20 (citing *Seromba Judgement (AC)*, para. 100; *Simba Judgement (AC)*, para. 64; *Muhimana Judgement (AC)*, paras. 76, 195, 217; *Gacumbitsi Judgement (AC)*, para. 49. See also *Ntagerura et al. Judgement (AC)*, paras. 28, 65).

¹⁸ *Muhimana Judgement (AC)*, para. 82; *Gacumbitsi Judgement (AC)*, paras. 57, 58; *The Prosecutor v. Élizaphan Ntakirutimana and Gérard Ntakirutimana*, Case Nos. ICTR-96-10-A and ICTR-96-17-A, Judgement, 13 December 2004 ("Ntakirutimana, Judgement (AC)"), para. 48; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Judgement (AC), 3 May 2006 ("Naletilić and Martinović Judgement (AC)"), para. 45.

1146

Article 6 (1); (iv) fails to clearly identify the individuals over whom it alleges the Accused had effective control pursuant to Article 6 (3); and (v) fails to specify the means used by the Accused to aid and abet the commission of crimes pleaded. It requests that the Chamber issue an order requiring the Prosecution to provide the additional information requested. It further requests that the Prosecution provide this additional information in French for the benefit of the Accused.

12. The Prosecution opposes the Motion and claims that the Indictment "is pleaded with sufficient particularity to give the accused objective notice of the crimes charged". It states that "the nature of the crimes charged are such that any further particularity cannot be offered, for instance the names of dead victims, specific dates are impossible".¹⁹ It further submits that any [defects *sic*] which it denies exist, have been subsequently cured by the Pre-Trial Brief.²⁰

13. The Chamber recalls that a defect in an indictment can be cured by the provision of timely, clear and consistent information detailing the factual basis underpinning the charges and that in certain circumstances this can be done by the Pre-Trial Brief as the Prosecution highlights.²¹ However, as this case is in its pre-trial phase, the Chamber considers that should it find that there are defects in the Indictment, it is more appropriate to order the Prosecution to amend the Indictment to ensure that any ambiguity concerning the charges against the Accused be removed from the primary charging instrument before the trial commences.

14. In addition, the Chamber notes that it has only considered the specific requests for clarification made by the Defence in the body of its Motion, rather than its very broad Prayer which the Chamber considers is insufficiently detailed and supported by submissions.

a. Lack of specificity of dates and places

15. As stated above, the material facts supporting the charges against the accused must be pleaded in an indictment with sufficient precision so as to provide notice. Whether certain 'facts' are 'material' depends on the nature of the Prosecution's case.²² For example, the Appeals Chamber has noted, "where the Prosecution alleges that an accused personally committed the criminal acts, the material facts, such as the identity of the victim, the time and place of the events and the means by which the acts were committed, have to be pleaded in detail".²³ However, "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.'"²⁴ The Chamber also recalls that while specificity regarding dates is preferable, if a precise date cannot be specified, a reasonable range of dates may be provided.²⁵

¹⁹ Prosecution Response, para. 23.

²⁰ Prosecution Response, para. 34.

²¹ See, *Muhimana* Judgement (AC), para. 82; *Gacumbitsi* Judgement (AC), paras. 57, 58; *Ntakirutimana* Judgement (AC), para. 48; *Naletilić and Martinović* Judgement (AC), para. 45.

²² *Ntakirutimana*, Judgement (AC), para. 25 (citing *Kupreškić et al.*, Judgement (AC), paras. 88-89).

²³ *Kupreškić et al.*, Judgement (AC), para. 89.

²⁴ *Kupreškić et al.*, Judgement (AC), para. 89.

²⁵ *Prosecutor v. Nizeyimana and Hategikimana*, Case No. ICTR-00-55-I, 25 September 2007, para. 33 (citing *Prosecutor v. Nchamihigo*, Case No. ICTR-2001-63-I, Decision on Defence Motion on Defects in the Form of



1145

I) Date range of the Indictment: mid 1993 to 17 July 1994

16. The Defence claims that the current range of dates for the period covered by the Indictment being "at least during the period from mid 1993 to 17 July 1994" is too broad and creates uncertainty about the exact time period. In addition, it states that the Tribunal is not competent to consider facts prior to 1 January 1994.²⁶ The Defence also submits that the dates of eight meetings listed in paragraphs 14 and 25-31 inclusive of the Indictment are too vague and requests that they be clarified.²⁷ It is further submitted that the Prosecution has failed to comply with the requirement to precisely describe the location of two meetings in which the Accused allegedly participated detailed in paragraphs 14 and 25 of the Indictment and submits that the Prosecution should be ordered to provide information on their location.²⁸

17. The Chamber notes that only paragraphs 5 and 23 of the Indictment refer to the period from 'mid -1993 to 17 July 1994'. These are both general chapeau paragraphs setting out the Accused's liability under Article 6 (1) of the Statute for the counts charged. The charges themselves and the material facts supporting those charges are set out in subsequent paragraphs. Therefore, the Chamber does not consider that the Indictment is defective in this respect.

18. Moreover, while the Chamber is mindful that it has jurisdiction only in respect of crimes committed between 1 January and 31 December 1994,²⁹ it recalls that the provisions of the Statute relating to the Tribunal's temporal jurisdiction do not preclude the Chamber from admitting and considering evidence concerning events that occurred prior to 1994 where, for example, the purpose of such evidence is to (i) clarify a given context; (ii) establish by inference the elements of criminal conduct occurring in 1994; or (iii) demonstrate a deliberate pattern of conduct.³⁰

II) Dates of meetings in paragraphs 14, 25-26 and 28-31 of Indictment

19. The Chamber considers that the dates of meetings listed in paragraph 14, being 'On or about 20th April 1994'; paragraph 25, being 'On or about 19th April 1994'; paragraph 26, being 'On or about 25 May 1994'; and paragraph 31, being 'On or about 21 June 1994' are sufficiently precise. The Chamber observes, however, that the dates provided in paragraphs 28, 29 and 30 span a longer time frame, specifically: 'Towards the end of May 1994';³¹ 'At about the end of May or early June 1994';³² and 'Between 1 May and 17 July 1994'.³³ The Chamber considers that it cannot consider these dates in isolation and has to take into account the other material facts pled in these paragraphs. The Chamber notes that paragraphs 28, 29

the Indictment, 27 September 2006, para. 17, *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).

²⁶ Motion, para. 30.

²⁷ Motion, para. 31.

²⁸ Motion, paras. 33-34.

²⁹ Articles 1 and 7 of the Statute. See *Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007 ("*Nahimana et al.*, Judgement (AC)"), para. 313.

³⁰ *Nahimana et al.*, Judgement (AC), para. 315.

³¹ Indictment, para. 28.

³² Indictment, para. 29.

³³ Indictment, para. 30.



and 30 mention the precise location of the alleged meetings being in front of the deputy *bourgmestre*'s house, *Muyaga commune*,³⁴ and the Gisagara centre.³⁵ Paragraphs 28, 29 and 30 also refer to the exact nature of the Accused's participation at the meetings and their content. Paragraph 28 alleges that the Accused addressed the local population and urged them to search for and kill all the Tutsis before the Rwandan Patriotic Front reached Muyaga. Paragraph 29 alleges that the Accused called the meeting, that those present were told the consequences if they kept Tutsi women as their wives or any Tutsi alive, and that the Accused was silent. Paragraph 30 alleges that that the Accused attended and was silent at the meeting where the attendees were ordered to kill any young Tutsi girls and women who were still alive. Paragraph 30 also lists the identity of some of the other participants at the meeting such as Callixte Kalimanzira. Notwithstanding the detailed pleading of these other material facts, the Chamber considers that the date range specified in paragraphs 28, 29 and particularly paragraph 30 is insufficiently precise. Accordingly, the Chamber requires the Prosecution, to the extent that it is able, to provide greater specificity regarding the date of these meetings, and in particular the meeting referred to in paragraph 30 of the Indictment.

III) Date of meeting in paragraph 27 of Indictment

20. Paragraph 27 refers to an address made by the Accused on an unknown date within the period between 'on or about 21 April and 31 May 1994' to the local population in Gikoro. The Chamber considers that in light of the paucity of the other material facts, such as the failure to specify the exact location of the meeting, the date range specified is vague. Accordingly, the Chamber requires the Prosecution, to the extent that it is able, to provide greater specificity regarding the date of this meeting, or alternatively, provide other information, for example, its exact location and time and/or the identity of the participants.

IV) Location of meetings in paragraphs 14 and 25 of Indictment

21. The Chamber notes the Defence concern that paragraphs 14 and 25 of the Indictment do not state the location of meetings referred to. In respect of paragraph 14, while the Indictment specifies the date of the meeting with sufficient precision,³⁶ names some of the participants and gives detailed information regarding its content, the failure to give any detail at all about the location of the meeting renders this paragraph vague. Accordingly, the Chamber requires the Prosecution, to the extent that it is able, to clearly identify the location of the meeting.

22. In respect of paragraph 25, the Chamber observes that while the date of the meeting is pleaded in sufficient detail,³⁷ as is the fact that it was the swearing in of the new *préfet* for Butare, Sylvain Nsabimana, and that Interim President Theodore Sindikubwabo attended and addressed the officials present, its location is only referred to in general terms. Paragraph 25 must be considered in light of the chapeau paragraph 24 which states that, as detailed in paragraphs 25-31, the Accused organised, attended and participated in various meetings throughout Butare *préfecture* and in particular at the Gisagara sous *préfecture* between 6

³⁴ Indictment, para. 28.

³⁵ Indictment, paras. 29 and 30.

³⁶ See para. 19 above.

³⁷ See para. 19 above.



April 1994 and 31 July 1994. However, the Chamber considers that this reference to the location of the meeting being in Butare *préfecture* is too vague and the Prosecution should, to the extent that it is able, provide greater specificity regarding its exact location.

b. Joint Criminal Enterprise

23. The Chamber recalls the Appeals Chamber jurisprudence that when it intends to rely on joint criminal enterprise responsibility (“JCE”), the Prosecution must specifically plead this mode of liability in the indictment.³⁸ Although JCE is a means of “committing” under Article 6 (1) of the Statute, it is insufficient for the Prosecution to merely make broad reference to that Article.³⁹ The Prosecution must also plead the purpose of the enterprise, the identity of the participants, the nature of the accused’s participation in the enterprise and the period of the enterprise. Furthermore, in order for an accused charged with JCE to fully understand which acts he is allegedly responsible for, the indictment should clearly indicate which form of JCE is being alleged.⁴⁰

24. The Defence submits that the Indictment is not sufficiently precise regarding the identity of the alleged co-perpetrators of the JCE pleaded. First, it claims that the list of co-perpetrators contained in paragraphs 5, 8 and 23 of the Indictment is too vague and it is not possible for the Defence to determine if the Prosecution alleges that other officers were involved. Second, it claims that references to individuals in paragraphs 15 and 29 of the Indictment by reference to their participation in the JCE specified in paragraphs 5 and 23 of the Indictment is too vague. Third, the Defence submits that the Prosecution should be ordered to specify the names of the co-perpetrators that took part in the events on Kabuye hill referred to in paragraph 10, and if unknown, it should specify from where in Butare those military personnel and gendarmes came.⁴¹

25. The Chamber recalls that the Prosecution must plead the identity of the participants of the JCE. It observes that in the chapeau paragraphs 5 and 23 (to which paragraphs 8, 10, 15 and 29 all cross refer) the Prosecution has identified the alleged participants of the JCE either by reference to a group, such as soldiers, more specifically by their full name or under the broad categorisation “other unknown participants”. In paragraph 10, the Prosecution has identified the members of the JCE by group, being “soldiers, gendarmes, communal police and civilians”. The Chamber considers that the identification of those engaged in a JCE in paragraphs 5, 8, 10, 15, 23 and 29 either by reference to a group, or by their full name, or where relevant by cross reference to paragraphs 5 or 23, is sufficiently precise. However, it does not consider that the reference to “other unknown participants” in paragraphs 5 and 23 adequately identifies some of the alleged participants and accordingly, directs the Prosecution to remove the phrase “other unknown participants” in paragraphs 5 and 23 as it is impermissibly vague.

³⁸ *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006 (“*Simić*, Judgement (AC)”), para. 22; *Ntagerura et al.*, Judgement (AC), para. 24; *Kvočka et al.*, Judgement (AC), para. 42.

³⁹ *Simić*, Judgement (AC), para. 22; *The Prosecutor v. Aloys Simba*, Case No ICTR-01-76-T, Judgement and Sentence, 13 December 2005, (*Simba*, Judgement (TC)), para. 389; *Ntagerura et al.*, Judgement (AC), para. 24; *Kvočka et al.*, Judgement (AC), para. 42.

⁴⁰ *Simić* Judgement (AC), para. 22; *Ntagerura et al.* Judgement (AC), para. 24; *Kvočka et al.* Judgement (AC), para. 28.

⁴¹ Motion, para. 36.



26. The Defence further submits that the concept of aiding and abetting is inconsistent with JCE, such that they cannot be pleaded together. The Defence states that whereas aiding and abetting is a form of criminal responsibility similar to complicity (accomplice liability), participation in a JCE is a form of direct participation in a crime by virtue of which an accused person is a principal perpetrator. To this end, the Defence submits, the Indictment is incoherent insofar as it simultaneously pleads aiding and abetting and JCE. The Defence does not make this complaint with specific reference to any paragraphs in the Indictment.⁴² However, paragraphs 5-15 of the Indictment (inclusive) relate to the Accused's alleged individual criminal responsibility for the crimes of genocide and, alternatively, complicity in genocide, including by means of his participation in a JCE. Furthermore, paragraphs 23-31 of the Indictment (inclusive) relate to the Accused's alleged individual criminal responsibility for the crime of direct and public incitement to commit genocide, including by means of his participation in a JCE. The Chamber has therefore considered the Accused's complaint with specific reference to these paragraphs.

27. The Chamber recalls the Appeals Chamber jurisprudence which concludes that the modes of responsibility under Article 6 (1) of the Statute are not mutually exclusive and that it is possible to charge more than one mode in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct.⁴³ Accordingly, the Chamber finds that the pleading of aiding and abetting and JCE in paragraphs 5-15 and 23-31 of the Indictment is not defective, and denies this aspect of the Defence Motion.

c. Individual Criminal Responsibility

28. The Chamber recalls the Appeals Chamber jurisprudence which states that that while it is possible to charge more than one mode of responsibility under Article 6 (1) of the Statute in relation to a crime if this is necessary in order to reflect the totality of the accused's conduct,⁴⁴ the Prosecution should only plead those modes of responsibility on which it intends to rely.⁴⁵

29. The Defence requests the Chamber to order the Prosecution to detail the specific modes of liability under Article 6 (1) of the Statute on which it intends to rely on the basis of specific factual allegations.⁴⁶ The Chamber observes that while the Prosecution has listed all the modes of liability under Article 6 (1) of the Statute together with JCE in paragraphs 5 and 23, it has failed to specifically plead the material facts necessary to support all these modes of responsibility in the subsequent paragraphs. The Chamber, therefore, finds that in pleading modes of responsibility for which no corresponding material facts are pleaded, the Indictment is defective. Accordingly, it directs the Prosecution to remove those modes of liability listed in paragraphs 5 and 23 of the Indictment for which no material facts are pleaded.⁴⁷

⁴² Motion, para. 37.

⁴³ *Nahimana et al.*, Judgement (AC), para. 483.

⁴⁴ *Nahimana et al.*, Judgement (AC), para. 483.

⁴⁵ *Kvočka et al.*, Judgement (AC), para. 41.

⁴⁶ Motion, paras. 40, 41.

⁴⁷ See *Kvočka et al.*, Judgement (AC), para. 41.

d. Superior Responsibility

30. 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.⁴⁸

31. A superior need not necessarily know the exact identity of his or her subordinates who perpetrate crimes in order to incur liability under Article 6 (3) of the Statute.⁴⁹ Under certain circumstances, it may be sufficient to identify subordinates as coming from a particular camp that is under the authority of the accused.⁵⁰ Physical perpetrators of the crimes can be identified by category in relation to a particular crime site.⁵¹

32. The Appeals Chamber has previously stated that “the facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue”.⁵² Moreover, in certain circumstances, 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 of the commission of the crimes.⁵³

33. The Defence submits that the Prosecution must identify the individuals over whom he alleges that the Accused had effective control and to the extent that they can not be individually identified, the Prosecution must, at a minimum, refer to their class or their position in the group. It submits that the level of detail required varies depending on the number of subordinates under the control of the accused. As a result, the Defence seeks an order that the Prosecution clarify the identities and positions of certain alleged subordinates of the Accused referred to in paragraphs 2 and 16 of the Indictment.⁵⁴ These subordinates are: “armed civilians”,⁵⁵ “other known participants such as”,⁵⁶ and “civilian militias; local

⁴⁸ *Muvunyi* Judgement (AC), para. 19; *Nahimana et al.* Judgement (AC), para. 323; *Ntagerura et al.* Judgement, (AC) paras. 26, 152. See also *Naletilić and Martinović* Judgement (AC), para. 67; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić*, Judgement (AC)”), para. 218.

⁴⁹ *Muvunyi* Judgement (AC), para. 55; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007, para. 287.

⁵⁰ *Muvunyi* Judgement (AC), para. 56; *Ntagerura et al.* Judgement (AC), paras. 140, 141, 153.

⁵¹ See, e.g., *Simba* Judgement (AC), paras. 71-72 (concerning identification of other members of a joint criminal enterprise), quoting *Simba*, Judgement (TC), paras. 393-393.

⁵² *Ntagerura et al.* Judgement (AC), para. 26 fn. 82, quoting *Blaškić* Judgement (AC), para. 218. See also *Muvunyi* Judgement (AC), para. 58.

⁵³ *Muvunyi* Judgement (AC), para. 58; *Muhimana* Judgement (AC), para. 79; *Gacumbitsi* Judgement (AC), para. 50; *Kupreškić et al.* Judgement (AC), para. 89.

⁵⁴ Motion, paras. 42-45.

⁵⁵ Indictment, para. 2.

⁵⁶ Indictment, para. 16.



administrative officials”.⁵⁷ In addition, it seeks clarification of the alleged subordinates referred to in paragraph 17 of the Indictment.⁵⁸

I) Identity of subordinates

34. Paragraph 2 of the Indictment which refers to “armed civilians in the *sous prefecture*” is an introductory paragraph providing the background of the Accused. The allegations contained within it are not part of the charges against the Accused and therefore do not need to be pleaded with more specificity. The Defence contention on this point is therefore rejected.

35. Paragraph 16 of the Indictment, which refers to “other known participants such as”, and “civilian militias; local administrative officials”, is a chapeau paragraph setting out the Accused’s general liability under Article 6 (3) of the Statute for the counts charged. The charges themselves and the material facts supporting those charges including sufficiently detailed identification of the Accused’s alleged subordinates (save for paragraph 17) are set out in the subsequent paragraphs. The Chamber therefore rejects the Defence submission in this regard. Moreover, the Chamber notes that the Prosecution has listed the categories of “civilian militias; local administrative officials” in this chapeau paragraph when it has not referred to them in any of the subsequent paragraphs.

36. The Chamber agrees with the Defence that the Prosecution should further particularise the generic reference to “subordinates” in paragraph 17, as it has done in paragraphs 18-22 in relation to subordinates, to provide adequate notice to the Accused.

II) Identity of Tutsi refugees

37. In addition, the Defence requests that the Chamber order the Prosecution to clarify who was chased up to Kabuye hill as detailed in paragraphs 7 and 18 of the Indictment and the identity of the refugees listed in paragraph 6 of the Indictment.⁵⁹ The Chamber considers that, in light of the scale of the alleged crimes that the Accused is charged with in relation to Kabuye hill, it is satisfied that the identification of the victims as ‘Tutsi refugees’ is sufficiently precise.⁶⁰

III) Clarification of paragraphs 10 and 11 of Indictment

38. The Defence also requests that the Prosecution clarify the pleading in paragraph 10 of the Indictment, specifically the mode of liability and how the Accused allegedly transported soldiers, gendarmes and ammunition to Kabuye hill. It further requests clarification of the use of the word “committed” in relation to an attack on Kabuye hill that is referred to in paragraph 11 of the Indictment.⁶¹ In respect of paragraph 10, the Chamber notes that the Prosecution has clearly specified the modes of liability of commission and aiding and abetting. Moreover, the Chamber is satisfied that the Prosecution has pleaded how the

⁵⁷ Indictment, para. 16.

⁵⁸ Motion, para. 45.

⁵⁹ Motion, para. 45.

⁶⁰ See *Kupreškić et al.*, Judgement (AC), para. 89.

⁶¹ Motion, para. 47.



Accused committed and aided and abetted the criminal acts in sufficient detail. Specifically, the Indictment alleges that by transporting soldiers, gendarmes and ammunition to Kabuye hill, the Accused committed and aided and abetted the killing of the Tutsi there. The Chamber further observes that while the Prosecution has not specified how the Accused transported soldiers, gendarmes and ammunition to Kabuye hill, it is satisfied that it has sufficiently set out the material facts regarding the crimes charged to give adequate notice to the Accused.

39. In respect of paragraph 11, the Chamber is satisfied that the Prosecution has pleaded the modes of liability with sufficient precision. It notes that the Indictment clearly alleges that the Accused committed and aided and abetted the crimes alleged by transporting soldiers and Callixte Kalimanzira to Kabuye hill. Accordingly the Chamber denies the Defence request in this regard.

e. Aiding and Abetting

40. The Chamber recalls that where it is alleged that the accused 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.⁶² Paragraph 15 of the Indictment refers to the killing of Tutsis at roadblocks in Gisagara *sous préfecture*. The Chamber agrees with the Defence that the Indictment is silent on the issue of how the Accused aided and abetted this killing and finds the Indictment unacceptably vague in this respect.⁶³ Accordingly, the Chamber requires the Prosecution, to the extent that it is able, to provide greater detail regarding the manner in which the Accused aided and abetted this killing.

41. Paragraph 25 of the Indictment refers to the participation of the Accused in a meeting at which he aided and abetted in the killing of Tutsi by agreeing with the speech of President Sindikubwabo. According to the Defence, the Prosecution should specify how the Accused would have agreed with the speech.⁶⁴ The Chamber considers that it is sufficient for the purpose of giving notice to the Accused that it specified that the Accused aided and abetted in the killing of Tutsi by agreeing with the president's speech. The Defence contention in this respect is therefore rejected.

f. Other problems with the Indictment

42. The Chamber, *proprio moto*, has observed that the Indictment has incorrectly pleaded the Accused's liability under Articles 6 (1) and (3). In Paragraph 5 of the Indictment the Prosecution has listed all the modes of liability under Article 6 (1) including JCE upon which it intends to rely. The Indictment further states that "The particulars that give rise to this individual criminal responsibility are set forth in paragraphs 6 through 22." However, while paragraphs 6-15 concern the Accused's alleged individual criminal liability pursuant to Article 6 (1), it is clear that paragraphs 16-22 concern the Accused's liability pursuant to

⁶² *Ntagerura et al.* Judgement (AC), para. 25.
⁶³ Motion, para. 50.
⁶⁴ Motion, para. 49.

Article 6 (3). Therefore, the reference in paragraph 5 to paragraphs 16-22 does not make sense and the Chamber directs the Prosecution to correct this reference.

FOR THE ABOVE REASONS, THE CHAMBER

GRANTS the Defence Motion to amend the Indictment in part; and

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

1. the date of the meeting alleged in paragraph 27, or alternatively its exact location and time and/or the identity of the participants;
2. the date of the meetings alleged in paragraphs 28, 29 and 30;
3. the location of the meetings alleged in paragraphs 14 and 25;
4. the identity of the Accused's alleged "subordinates" referred to in paragraph 17;
5. the manner in which the Accused aided and abetted the killing of Tutsis at roadblocks in Gisagara *sous préfecture* alleged at paragraph 15 of the Indictment.


ORDERS the Prosecution to remove the reference to "other unknown participants" in paragraph 5 and 23 of the Indictment.

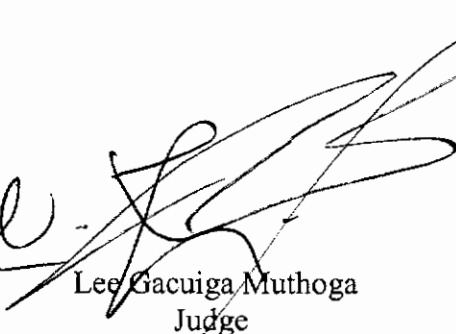
ORDERS the Prosecution to remove those modes of liability listed in paragraphs 5 and 23 of the Indictment for which it pleads no material facts.


ORDERS the Prosecution to correct the mistaken reference in paragraph 5 of the Indictment to paragraphs 16-22.

ORDERS the Prosecution to file the Indictment as amended in accordance with this Decision in French and English by Friday 1 May 2009.

Arusha, 28 April 2009


Khalida Rachid Khan
Presiding Judge


Lee Gacuiga Muthoga
Judge


Aydin Sefa Akay
Judge

[Seal of the Tribunal]

