



UNITED NATIONS
NATIONS UNIES

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

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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Vagn Joensen
Aydin Sefa Akay

Registrar: Adama Dieng

Date: 30 April 2010

ICTR-01-68-PT
30th April 2010
(1618 - 1613)

THE PROSECUTOR

v.

Grégoire NDAHIMANA

CASE NO. ICTR-2001-68-PT

JUDICIAL AUTHORITY
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**DECISION ON NDAHIMANA'S MOTION ON DEFECTS
IN THE AMENDED INDICTMENT**

Rule 72 of the Rules of Procedure and Evidence

Office of the Prosecutor:
Holo Makwaia
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[Signature]

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1. On 5 March 2010, Grégoire Ndahimana filed a motion alleging defects in the Amended Indictment.¹ The Prosecution opposes the Motion.²

2. In the Motion, Grégoire Ndahimana alleges that there are defects in the pleading of joint criminal enterprise ("JCE"), individual responsibility, superior responsibility, genocide, complicity in genocide and extermination as a crime against humanity in the Amended Indictment.

Alleged Defects in the Pleading of Joint Criminal Enterprise

3. Grégoire Ndahimana contends that the pleading of the alleged joint criminal enterprise is defective because four elements are not pled: i) the form and *mens rea*; ii) the nature of the Accused's participation; iii) identity of alleged members; and iv) the time period.

4. The Chamber finds that the form and *mens rea* for the alleged JCE are properly pled. From paragraphs 11 and 36 of the Amended Indictment, it is clear that the form of JCE is the first or basic category. The *mens rea* for this type requires that all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention to perpetrate the alleged crime.³ The Amended Indictment states that, the Accused, along with others who are listed, allegedly wilfully and knowingly participated in a JCE whose common purpose was the commission of genocide.

5. The Chamber finds that the nature of Grégoire Ndahimana's participation in the alleged JCE is sufficiently pled. Certain paragraphs discuss alleged meetings with other alleged members of the JCE⁴ as well as orders given⁵. Not every paragraph which mentions the words "joint criminal enterprise" must mention the nature of Ndahimana's alleged participation. Some paragraphs provide context or information regarding the conduct of the alleged members.

6. The Chamber finds that the identity of alleged members of the JCE is also properly pled. The Amended Indictment pleads the names of persons or categories of persons involved

¹ Defence Motion on Defects in the Amended Indictment pursuant to Rule 72, filed on 5 March 2010 ("Motion").

² Prosecutor's Response to Defence Motion on Defects in the Amended Indictment pursuant to Rule 72 dated 5 March 2010, filed on 9 March 2010 ("Response").

³ *Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, Judgement (AC), 7 July 2006, ("Gacumbitsi") para. 158. See also *Prosecutor v. Elizaphan Ntakirutimana et al.*, Case No. ICTR-96-10-A, Judgement (AC), 13 December 2004, ("Ntakirutimana") para. 467.

⁴ See Amended Indictment, paras. 15-16, 19-20.

⁵ See Amended Indictment, paras. 14.

in the alleged JCE. The identity of the alleged JCE participants can include categories of persons where those persons cannot be individually identified.⁶

7. The Chamber additionally notes that the time period of the alleged JCE has been properly pled and is stated as 6 April 1994 to 30 April 1994.⁷ Therefore, the Chamber finds no defects in the pleading of JCE in the Amended Indictment.

Alleged Defects in the Pleading of Individual Responsibility

8. Grégoire Ndahimana alleges that with the exception of “ordering”, there are no specific allegations of criminal conduct pursuant to Article 6(1) in the Amended Indictment. The Chamber notes that paragraphs 10 and 35 set out the method of commission of Article 6(1) the Prosecutor is relying upon. Further, except for those paragraphs which discuss context or background, each paragraph alleges Ndahimana’s participation in a meeting⁸ or the carrying out of an act which supports the counts⁹.

9. Grégoire Ndahimana alleges that the Prosecution cannot state that he supervised alleged assailants as part of the pleading of Article 6(1).¹⁰ The Chamber recalls that the Appeals Chamber has held that “supervising” forms part of “committing”.¹¹ Therefore, the Prosecution can plead that Ndahimana “supervised”. The Chamber finds that there are no defects in the pleading of Article 6(1) in the Amended Indictment.

Alleged Defects in the Pleading of Superior Responsibility

10. Grégoire Ndahimana argues that the pleading of superior responsibility is defective as no material facts are pled which shows that he had knowledge, had reason to know, or failed to prevent or punish his alleged subordinates by virtue of his conduct as alleged in the Amended Indictment.¹²

11. The Chamber finds that superior responsibility has been pled sufficiently. The Chamber recalls that the Amended Indictment should be read as a whole.¹³ The Amended

⁶ *Prosecutor v. Blagoje Simić et al.*, IT-95-9-T, Judgement (TC), 17 October 2003, (“*Simić*”) para. 145. See also *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Decision on Form of Second Amended Indictment, 11 May 2000, para. 16.

⁷ Amended Indictment, paras. 11 and 36.

⁸ See Amended Indictment, paras. 15, 16, 22, 24 and 30.

⁹ See Amended Indictment, paras. 17, 18, 21, 23, 27 and 29.

¹⁰ Motion, para. 62. See also Amended Indictment, para. 26.

¹¹ *Gacumbitsi*, para. 60, *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement (AC), para. 161.

¹² Motion, paras. 64-68.

¹³ *Seromba*, Judgement (AC), para. 27.

Indictment alleges that Grégoire Ndahimana was *bourgmestre* of Kivumu commune¹⁴ and that by virtue of his alleged position had authority over those listed in paragraphs 12 and 37 of the Amended Indictment. Further, a number of paragraphs set out the direct material conduct of the Accused by which he is alleged to have known or had reason to know of the acts of his subordinates but failed to prevent or punish them.¹⁵

12. Grégoire Ndahimana alleges that Articles 6(1) and 6(3) cannot be pled together. The Chamber finds that as the material factual allegations contained in paragraphs 13 through 33 are sufficient to support each form of liability and provide Ndahimana with sufficient information to investigate the case against him, they can be pled cumulatively.

Alleged Defects in the Pleading of Genocide

13. Grégoire Ndahimana contends that there are three defects in the pleading of genocide in the Amended Indictment: i) the *actus reus* and *mens rea* are not sufficiently pled; ii) some paragraphs are too vague; and iii) no criminal conduct is alleged in some paragraphs.

14. The Chamber finds that the count of genocide is pled correctly. The Amended Indictment correctly pleads the *actus reus* and *mens rea* for genocide. Paragraph 8 of the Amended Indictment specifies that the alleged criminal acts which form the *actus reus* are outlined in paragraphs 13 through 33 of the Amended Indictment. The same paragraph specifies the alleged *mens rea* as the intent to destroy, in whole or in part, a racial or ethnic group.¹⁶

15. Grégoire Ndahimana argues that certain paragraphs are impermissibly vague because the identities of alleged victims and co-perpetrators are not sufficiently detailed. Paragraph 13 is sufficient to identify the alleged victim where further details are not known by the Prosecution.¹⁷ Paragraph 21 identifies the alleged subordinates involved as Fulgence Kayishema and Télesphore Ndungutse and is not defective. The identities of co-perpetrators are sufficiently pled. The Chamber notes that the Amended Indictment specifies named persons or refers to “other members of the joint criminal enterprise” whose identities are detailed in paragraphs 11 and 36 of the Amended Indictment. However, with respect to the expression “and others” used throughout the Amended Indictment,¹⁸ the Chamber finds that

¹⁴ Amended Indictment, para. 2.

¹⁵ See, e.g., Amended Indictment, paras. 15-19, 21-24.

¹⁶ See *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Judgement (AC), 28 November 2007, para. 492.

¹⁷ *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-14-A, Judgement (AC), 9 July 2004, para. 240.

¹⁸ See Amended Indictment, paras. 15, 17-26 and 29-32.

the Prosecution must either provide sufficient identifying information for Ndahimana to conduct his investigation or add the words “whose identity is unknown” to “and others”.

16. Grégoire Ndahimana alleges that paragraph 15 of the Amended Indictment is impermissibly vague with respect to the location and date of the allegation. The Chamber notes that paragraph 15 mentions the Presbytery and the CODECOKI as the locations in Nyange Parish and is sufficient. Further, paragraphs 16-33 of the Amended Indictment provide details regarding the specific dates from the range of “several dates” stated in paragraph 15. Further, Ndahimana argues that since there are no factual allegations to support the full date range of 6 April to 30 April 1994 of the Amended Indictment¹⁹ this renders it impermissibly vague. The Chamber notes that the date ranges are only discussed in the introductory paragraphs. Further, the material factual allegations provide sufficient details as to each alleged charge to enable Ndahimana to prepare his defence. Therefore, the Chamber finds that the Amended Indictment is not impermissibly vague with respect to locations and dates.

17. Grégoire Ndahimana contends that there is no criminal conduct alleged in paragraphs 32 and 33 of the Amended Indictment and that therefore, these paragraphs should be struck. The Chamber finds that these paragraphs are material as they contain alleged facts related to Ndahimana and his alleged criminal conduct.

Alleged Defects in the Pleading of Complicity in Genocide

18. Grégoire Ndahimana alleges that as complicity in genocide is a form of commission, it cannot be prosecuted through a JCE, another form of commission. Further, Ndahimana argues that the required *actus reus* and *mens rea* of complicity in genocide have not been pled. The Prosecution did not address this issue in their Response. The Chamber notes that the Appeals Chamber has affirmed convictions for complicity in genocide as a crime in itself.²⁰ Therefore, it is not accurate that complicity in genocide is solely a form of commission.

19. The Chamber finds that the *actus reus* and *mens rea* for complicity in genocide have been sufficiently pled. The Chamber recalls that the *actus reus* for complicity is defined as providing “practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”²¹ The Amended Indictment alleges that Grégoire

¹⁹ Amended Indictment, paras. 8, 9, 11, 12, 36 and 37.

²⁰ *Prosecutor v. Laurent Semanza*, Judgement (AC), 20 May 2005.

²¹ *Prosecutor v. Vincent Rutaganira*, Case No. ICTR-95-1C-T, Judgement (TC), March 14, 2005, para. 63.

Ndahimana provided such assistance, encouragement, or moral support.²² The required *mens rea* of knowing participation is outlined in paragraph 9 of the Amended Indictment.²³

Alleged Defects in the Pleading of Extermination as a Crime Against Humanity

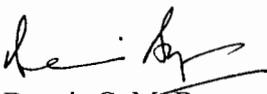
20. Grégoire Ndahimana alleges that the Amended Indictment does not sufficiently plead Extermination as a Crime Against Humanity because this count relies upon paragraphs 13 through 33 of the Amended Indictment which relate to genocide and complicity in genocide.

21. The Chamber finds that Extermination as a Crime Against Humanity has been sufficiently pled. The Chamber recalls that Extermination as a Crime Against Humanity requires proof that the Accused participated in “widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, and that the accused intended by his acts or omissions this result.”²⁴ The material facts pled in paragraphs 13 through 33 of the Amended Indictment discuss the factual elements required for the *actus reus*. Further, the *mens rea* of the crime is set-out in paragraph 34. Therefore, the Amended Indictment is not defective with respect to the pleading of Extermination as a Crime Against Humanity.

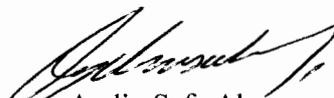
FOR THESE REASONS, THE CHAMBER

- I. **GRANTS** the Defence's Motion in part.
- II. **ORDERS** the Prosecution to provide more specificity as to the identity of “others” in paragraphs 15, 17-26 and 29-32 or add the words “whose identity is unknown” to “and others”.
- III. **DENIES** the Defence's Motion in all other respects.

Arusha, 30 April 2010, done in English.


Dennis C.M. Byron
Presiding Judge


Vagn Joensen
Judge


Aydin Sefa Akay
Judge

[Seal of the Tribunal]



²² See, e.g., Amended Indictment, paras. 17, 18, 19, 21, 23, 24 and 27.

²³ See *Ntakirutimana*, para. 499.

²⁴ *Ibid.* at para. 522.